

the Department. Deborah Spain, Kristin R. Schulze, William Muller, Chad T. Fluid, Mike Kilmer and Mike Powell appeared by telephone and testified on behalf of Muller. Following the hearing, the case was deemed submitted for decision.

In this matter, Muller appeals the findings of the Wage and Hour Unit regarding payment of prevailing wages at the several job sites in the Kalispell area. As a result of its investigation of Nielson's claim, the Wage and Hour Unit issued a determination and redetermination finding that Muller had failed to pay the prevailing wage to Nielson at the Kalispell Fire Station, Kalispell Middle School and Flathead Community College jobs. Each determination ordered payment of additional wages, penalty, and forfeiture of \$25.00 per day for each day that the violations occurred.

Having considered the evidence and exhibits presented at the hearing and the parties arguments, the hearing officer makes the following findings of fact, conclusions of law, and order.

II. ISSUES

1. Did Muller fail to pay prevailing wages to Nielson?
2. If Muller failed to pay the prevailing wage to Nielson, what percentage of statutorily prescribed penalty should be imposed?
3. If Muller failed to pay the prevailing wage to Nielson, must it pay the statutorily required \$25.00 per day forfeiture?

III. FINDINGS OF FACT:

1. Nielson worked full-time for Muller from approximately January 27, 2006 to October 12, 2006. He was previously employed by Muller at various times from 2002 through 2005.
2. Nielson worked on three prevailing wage jobs from January 27, 2006 to August 31, 2006: The Kalispell Middle School Additions project; the Flathead Valley Community College Occupational Trades Building project; and the New Kalispell Fire Station project. All three were constructed pursuant to a "public works contract" as defined in Mont. Code Ann. §18-2-401(11), and are subject to the standard prevailing rate of wages" as defined in Mont. Code Ann. §18-2-401(13).
3. Nielson worked only as a hod carrier during the time period for which he claims he was not paid the prevailing wage.
4. Neither Nielson nor Muller or his employees knew, with any degree of certainty, when the prevailing wage jobs at issue began or ended.

5. Nielson was not paid the prevailing wage at the Kalispell Middle School, the Kalispell Fire Station or the Flathead Valley Community College projects.
6. Muller submitted a check to the department in the amount of \$471.44 made payable to Nielson on April 13, 2007. This payment was made for work that was performed at the Flathead Valley Community College and represented \$720.34 in gross income. Muller also deducted \$88.80 in overtime pay that was miscalculated. Muller, however, improperly included the \$88.80 in the gross wages resulting in the improper withholding of taxes from that payment.
7. Nielson is owed unpaid wages in the amount of \$3,118.55 and a forfeiture in the amount of \$2,575.00 based on 103 days that the wages were unpaid at the statutory rate of \$25.00 per day.
8. Muller owes a penalty of \$311.85 representing ten percent (10%) of the unpaid wages and audit costs of \$68.13.

IV. OPINION¹

A. Muller Owes Additional Wages To Nielson

The parties' disputes in this matter center on (1) what jobs Nielson worked on during the claim period, (2) the imposition of the statutorily prescribed penalty and (3) the imposition of the statutorily prescribed \$25.00 per day forfeiture. There is no dispute about the amounts that Muller actually paid Nielson.

Pursuant to Mont. Code Ann. § 18-2-403(4)(b), for all public works contracts for non-construction projects the contractor must pay employees the prevailing wage rates, which include fringe benefits for health, welfare and pension contributions. Employers must also pay the prevailing wages on public works contracts or be subject to penalties and fees as provided by the law. Mont. Code Ann. § 18-2-407. The employer is obliged to classify each employee who performs labor on a public works project according to the applicable prevailing rate of wages established by the commissioner and to pay each such employee not less than the standard prevailing wage. Admin. R. Mont. 24.16.9006.

The burden of proof regarding hours worked is on the employer, not the employee. *Garsjo v. Department of Labor and Industry* (1977), 172 Mont. 182, 562 P.2d 473. If the employer fails to record the employee's hours, reference is then made to the employee's records. However, the employee is not to be penalized for failing to keep precise time records.

¹Statements of fact in this discussion are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

Where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes, a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act. In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.

Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687 (1946).

Nielson through his testimony and that of his witnesses established that he worked at the Kalispell Fire Station, Kalispell Middle School and Flathead Community College jobs during the claim period. Muller's only record that establishes the hours worked by Nielson at any job site during the claim period is a spreadsheet developed for purposes of the hearing (Respondent's Exhibit A). While testimony at hearing asserted that it was a true and accurate representation of the data that was stored in the employer's bookkeeping program, the absence of the supporting data that went into the computer program and the conflicting testimony about how the data was collected and entered make this document unreliable. The actual time sheets that were prepared at the time the work was performed and which should have been retained pursuant to Admin. R. Mont. 24.17.301 were destroyed by Ms. Spain.

Without these documents, Exhibit A is not reliable evidence. Spain and Schulze described similar, but clearly different methods of obtaining the data that would be put into Quickbooks. Spain's admitted limited knowledge of the workings of Quickbooks and the fact that Schulze performed a significant portion of the bookkeeping duties during the claim period, make the data going into the program suspect. The improper manner of withholding taxes on the April 13, 2007 back payment amplifies this conclusion. Doc. 22. Schulze described getting a worksheet summary from Muller while Spain testified that she would get actual time sheets for each employee from Muller, Pluid or other project foreman. Such inconsistencies add to the unreliability of the report identified as Exhibit A. Again, although the bookkeepers testified to how the data was collected, without the actual time sheets that testimony lacks substantial persuasion.

Muller places significant weight on Exhibit D, a purported "certified payroll" submitted by Muller to its contractor Martel Construction. However, all this shows is that Nielson worked at the Kalispell Fire Station for one week in 2005 that is not part of his claim. Moreover, the document is not certified by anyone and appears to be missing additional pages.

Muller's witnesses' testimony was also insufficient to overcome Nielson's prima facie showing. All of the witnesses testified that they saw Nielson at non-public works job sites. However, their testimony frequently related to time periods outside the claim period. The emphasis on these irrelevant time periods undermines any testimony they may have provided with respect to Nielson's location during the claim period. Furthermore, the credibility of Mike Powell, who appeared to be a key witness for Muller given his job as foreman on several of the job sites in question, was significantly undermined when in response to one of Mr. Nevin's questions he consulted with Bill Muller for the answer and in another later instance consulted Muller in response to one of the hearing officer's questions. Powell also gave inconsistent answers regarding who was recording time at the Oswood site. Additionally, not one of Muller's witnesses, including William Muller himself, could testify as to the date any job started or finished. Under these circumstances, Nielson has proven that he is owed the wages as determined by the department in its redetermination.

B. Muller Owes a Penalty.

Mont. Code Ann. § 18-2-407 provides that a contractor to a public works contract who pays employees at less than the prevailing wage as established under the public works contract "shall forfeit to the department a penalty at a rate of **up to** 20% of the delinquent wages plus fringe benefits . . ." (emphasis added).

Admin. R. Mont. 24.17.851 establishes criteria to determine penalty and cost imposition in cases where a contractor fails to pay the prevailing wage. The regulation utilizes the following criteria:

- (a) the actions of the contractor in response to previous violations;
- (b) prior violations;
- (c) the opportunity and degree of difficulty to comply;
- (d) the magnitude and seriousness of the violation;
- (e) whether the contractor knew or should have known of the violation.

In addition, Admin. R. Mont. 24.17.851(3) permits consideration of the amount of the underpayment of wages in arriving at the penalty to be imposed.

With respect to the 20% penalty, the Department argues that the hearing officer should pay deference to the Department's practice of imposing a 20% penalty in a prevailing wage case. The hearing officer, however, has only such power as is granted by applicable statutes and regulations and is bound to follow the directives contained in each. *Auto Parts of Bozeman v. Employment Relations Division*, 2001 MT 72, ¶ 38, 305 Mont. 40, 50, 23 P.3d 193, 200. Mont. Code Ann. § 18-2-407, while requiring that a penalty be imposed, does not require that in all instances the penalty must equal 20%. Rather, the statute directs that a penalty of **up to** 20% of the delinquent wages must be imposed. Admin. R. Mont. 24.17.851 provides direction for the balancing process to determine the appropriate amount of penalty to be imposed. Accordingly,

the hearing officer will engage in the balancing process articulated in Admin. R. Mont. 24.17.851 to determine the proper amount of the penalty to be imposed in this case.

In mitigation, the employer has no prior violations of any statutes or rules. Based on these factors, the hearing officer concludes that a 10% penalty equaling \$381.55 is appropriate in this case.

C. Muller Must Pay The Statutorily Prescribed \$25.00 per day Forfeiture.

Mont. Code Ann. § 18-2-407 also provides that a contractor, subcontractor, or employer who fails to pay prevailing wages shall forfeit to the employee the amount of wages owed plus \$25.00 a day for each day that the employee was underpaid. The hearing officer finds that Nielson was underpaid for 103 days and thus Muller owes a total forfeiture of \$2,575.00.

V. CONCLUSIONS OF LAW

1. Muller failed to pay prevailing wages to Nielson at the three prevailing wage job sites he worked at during the claim period as required by Mont. Code. Ann. § 18-2-407.

2. Muller owes Nielson additional wages of \$3,118.55.

3. Pursuant to Mont. Code. Ann. § 18-2-407 and Admin. R. Mont. 24.17.851, Muller owes a penalty in the amount of \$311.85.

4. Pursuant to Mont. Code. Ann. § 18-2-407, Muller owes \$25.00 per day forfeiture to Nielson in the amount of \$2,575.00.

5. Pursuant to Mont. Code. Ann. § 18-2-407, Muller must pay audit costs in the amount of \$60.48.

VI. ORDER

1. Masonry By Muller is hereby ORDERED to tender a cashier's check or money order in the amount of \$6,065.88, representing \$3,118.55 in unpaid wages, \$311.85 in penalty, \$2,575.00 in forfeiture, and \$60.48 in audit costs, made payable to the Employment Relations Division, and mailed to the Employment Relations Division, P.O. Box 6518, Helena, Montana 59624-6518, no later than 30 days after service of this decision. Appropriate federal and state taxes should be deducted from the unpaid wages portion only. An itemized statement of those deductions must be included with the payment.

2. Masonry By Muller will not receive credit for the payment made because of the withholding issues involved in that payment. Instead, the Employment Relations Division shall refund Muller's payment of \$471.44 and Muller shall make payment in full as described above.

DATED this 15th day of January, 2008.

DEPARTMENT OF LABOR AND INDUSTRY

By: /s/ DAVID A. SCRIMM
David A. Scrimm, Hearing Officer
Hearings Bureau

NOTICE: You are entitled to judicial review of this final agency decision in accordance with Mont. Code Ann. § 18-2-407(2), by filing a petition for judicial review in an appropriate district court within 30 days of service of the decision. See also Mont. Code Ann. § 2-4-702.

If there is no appeal filed and no payment is made pursuant to this Order, the Commissioner of the Department of Labor and Industry will apply to the District Court for a judgment to enforce this Order pursuant to Mont. Code Ann. § 39-3-212. Such an application is not a review of the validity of this Order.