

overtime wages for a total amount owing in the amount of \$2,355.61. A subsequent redetermination made the same findings.

3. On April 24, 2007, Lucas requested a contested case hearing. After mediation of the dispute proved unsuccessful, the matter was transferred to the hearings bureau on May 3, 2007.

4. On May 22, 2007, the hearing officer held a scheduling conference during which the parties agreed to a in-person hearing in Great Falls on August 22, 2007; a telephonic pre-hearing conference on August 15, 2007 at 3:00 p.m. and an August 10, 2007 deadline for filing requests for relief, final contentions, lists of exhibits and witnesses, requests for subpoenas; and stipulated facts. The telephonic prehearing conference was subsequently rescheduled for August 17, 2007.

5. At the time of the pre-hearing conference, neither party had complied with the filing deadlines listed above. At the conference it was agreed that due to Jumper's inability to travel outside Yellowstone county due to his confinement to a pre-release center there, the hearing would be held telephonically instead of in-person, and that the parties must identify and submit the telephone numbers for their witnesses by Monday, August 20, 2007 at 5:00 p.m.

6. Respondent identified four witnesses for hearing, but did not have a telephone number for one of them, Natalie White. Claimant provided no list of witnesses or exhibits.

7. Jumper is owed unpaid wages in the amount of \$1,813.00 in regular wages and \$174.62 in overtime wages. Jumper is owed a 55% penalty on the regular wages in an amount of \$997.15 and a 110% penalty on the overtime wages in the amount of \$192.08.

III. DISCUSSION¹

A. *The Employer Owes Wages to Jumper.*

The appellant challenges the claimant's contention that he is owed additional wages. The substantial evidence in this matter demonstrates that Jumper is due both additional overtime and regular wages as well as 110% penalty on the overtime and 55% penalty on the regular wages as required by the applicable rules.

Montana law requires employers to pay wages when due, and in no event later than 15 days following termination of employment. Mont. Code Ann. §§ 39-3-204 and 39-3-205. Montana law also requires employers to pay an overtime premium of 1½ times the regular hourly rate when employees work more than 40 hours in a work week. Mont. Code Ann. § 39-3-405.

An employee seeking unpaid wages has the initial burden of proving work performed without proper compensation. *Anderson v. Mt. Clemens Pottery Co.* (1946), 328 U.S. 680; *Garsjo v. Department of Labor and Industry* (1977), 172 Mont. 182, 562 P.2d 473. To meet this burden, the employee must produce evidence to "show the extent and amount of work as a matter of just and reasonable inference." *Id.* at 189, 562 P.2d at 476-77, **citing** *Anderson*, 328 U.S. at 687, **and** *Purcell v. Keegan* (1960), 359 Mich. 571, 103 N.W. 2d 494, 497; *see also*, *Marias Health Care Srv. v. Turenne*, 2001 MT 127, ¶¶13, 14, 305 Mont. 419, 422, 28 P.3d 494, 495 (holding that lower court properly concluded that the plaintiff's wage claim failed because she failed to meet her burden of proof to show that she was not compensated in accordance with her employment contract).

Once an employee has shown as a matter of just and reasonable inference that he or she is owed wages, "the burden shifts to the employer to come forward with evidence of the precise amount of the work performed or with evidence to negate the reasonableness of the inference to be drawn from the evidence of the employee, and if the employer fails to produce such evidence, it is the duty of the court to enter judgment for the employee, even though the amount be only a reasonable approximation.' * * *." *Garsjo*, 172 Mont. at 189, 562 P.2d at 477, **quoting** *Purcell v. Keegan*, *supra*, 359 Mich. at 576, 103 N.W. 2d at 497.

Jumper's testimony and that of other witnesses called at hearing is sufficient to meet his burden to show that he was not paid for the overtime and regular hours of work that he is claiming. Jumper's records prove he worked the time claimed. Lucas attempted to show that at least some of the hours claimed were not actually worked and that Jumper was somehow responsible for the loss of the contract that Lucas had with several Great Falls grocery stores. However, Lucas' witnesses' testimony, especially that of Gene Lucas was not credible as it merely attempted to bring in hearsay testimony about what other people said, saw or did. Judith

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

Lucas admitted that the records were essentially accurate and that Lucas owed Jumper unpaid wages. The fact that she may not have the funds available at this time does not change the fact that Jumper worked the claimed hours and remains unpaid for that time. Jumper's credibility was bolstered by the fact that Judith Lucas admitted that Jumper was forced to quit by the Great Falls Pre-release center because Lucas was not paying him his wages. Lucas credibility regarding the quality of his work was supported by Gene Lucas' testimony and by the fact that Albertson's hired Jumper to clean its stores after it cancelled its contract with Lucas. Lucas presented no specific and substantive evidence to rebut any of the hours claimed by Jumper. Thus the hearing officer finds that Jumper has proven by a preponderance of the evidence that he is owed the additional overtime and regular wages as stated in Finding of Fact 7.

B. Penalty Is Due on the Unpaid Wages.

Montana law assesses a penalty when an employer fails to pay wages when they are due. Mont. Code Ann. §39-3-206. For cases involving overtime claims, a penalty of 110% must be imposed in the absence of certain circumstances, none of which are applicable to this case. Admin. R. Mont. 24.16.7561. For claims involving compensation other than minimum wage and overtime compensation, a penalty of 55% must be imposed in the absence of certain circumstances, none of which apply to this case. Admin. R. Mont. 24.16.7566. Where a claim involves a failure to pay both overtime and regular wages, the penalties to be assessed must be calculated by applying the appropriate penalty to each component of the claim. Admin. R. Mont. 24.16.7569.

Applying these three regulations, Lucas also owes penalty in the amount of \$997.15 (55% of \$1,813.00) for the unpaid regular wages due to Jumper. Lucas also owes penalty in the amount of \$192.08 (110% of \$174.62) for the unpaid overtime wages due to Jumper. Lucas thus owes total penalty of \$1,189.23.

V. CONCLUSIONS OF LAW

1. The State of Montana and the Commissioner of the Department of Labor and Industry have jurisdiction over this complaint under Mont. Code Ann. § 39-3-201 et seq. *State v. Holman Aviation* (1978), 176 Mont. 31, 575 P.2d 925.

2. Lucas owes Jumper unpaid wages in the amount of \$1,813.00 in regular wages and \$174.62 in overtime wages. Jumper is additionally owed a 55% penalty on the regular wages in an amount of \$997.15 and a 110% penalty on the overtime wages in the amount of \$192.08. The total amount owed is \$3,176.85

VI. ORDER

Judith Lucas d/b/a Lucas & Sons Floor Maintenance is hereby ORDERED to tender a cashier's check or money order in the amount of \$3,176.85, representing \$1,987.62 in wages (less appropriate withholding of taxes from those wages) and \$1,189.23 in penalty, made payable to John W. Jumper 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.

DATED this 6th day of September, 2007.

DEPARTMENT OF LABOR AND INDUSTRY

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

NOTICE: You are entitled to judicial review of this final agency decision in accordance with Mont. Code Ann. § 39-3-216(4), 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.