

**STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
HEARINGS BUREAU**

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| <b>IN THE MATTER OF THE PREVAILING</b>   | ) | <b>Case Nos. 106-2002 &amp; 1524-2003</b> |
| <b>WAGE AUDIT INVOLVING THE</b>          | ) |   |
| <b>DEPARTMENT OF LABOR AND INDUSTRY</b>  | ) |   |
| <b>ex. rel. SUSAN E. REGENDAHL,</b>      | ) |   |
| <b>PENNY JOLLY, GERALD HERKIMER, and</b> | ) |   |
| <b>GEOFF O'HAIRE,</b>                    | ) |   |
| <b>Claimant,</b>                         | ) | <b>FINDINGS OF FACT;</b>                  |
|  | ) | <b>CONCLUSIONS OF LAW;</b>                |
| <b>vs.</b>                               | ) | <b>AND ORDER</b>                          |
|  | ) |   |
| <b>ROCKY MOUNTAIN SERVICES COMPANY ,</b> | ) |   |
| <b>LLC., in Blackfoot, Idaho,</b>        | ) |   |
| <b>Respondent.</b>                       | ) |   |

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**I. INTRODUCTION**

In these consolidated matters, Rocky Mountain Services, Inc. (RMS), appeals the findings of the Wage and Hour Unit regarding prevailing wage audits for RMS employees at the Grey Cliffs' Rest Area located along Interstate 90 near Grey Cliffs, Montana. The Wage and Hour Unit conducted two audits, one for the time period from April 15 to July 15, 2001, and a second from July 22, 2001 to March 15, 2002. As a result of each audit, the Wage and Hour Unit issued a determination and redetermination finding that RMS had failed to pay the prevailing wage to its employees at the Grey Cliff rest areas. Each determination ordered payment of additional wages, penalty, and forfeiture of \$25.00 per day for each day that the violations occurred.

The determinations issued as a result of the audits were consolidated for contested case hearing before Hearing Examiner Gregory L. Hanchett. Julia Swingley, agency legal counsel, represented the Department of Labor and Industry. David Parmenter, attorney at law, appeared *pro hac vice* on behalf of RMS. Susan Regendahl, Geoffrey O'Haire, Gerald Herkimer, Penny Jolly and Tanya McCormick appeared by telephone and testified

under oath on behalf of the Department. Kris Kelly, Les Pallett, Jeff Greenwall, and Bob Judson appeared by telephone and testified on behalf of RMS. The parties submitted a combined exhibit binder (containing Exhibits 1 through 11, Exhibits A through Z, and Exhibits AA and BB) and stipulated to the admission of the binder. After the completion of the hearing, the parties were permitted to provide closing briefs. Having considered the evidence and exhibits presented at the hearing and the parties arguments presented both orally at the hearing and in written briefs, the hearing examiner makes the following findings of fact, conclusions of law, and order.

## **II. ISSUES**

1. Did RMS fail to pay prevailing wages to Regendahl, O'Haire, Jolly, Herkimer ?
2. If RMS failed to pay prevailing wage to these employees, what percentage of statutorily prescribed penalty should be imposed?
3. If RMS failed to pay a prevailing wage to these employees, must it pay the statutorily required \$25.00 per day forfeiture?

## **III. FINDINGS OF FACT:**

1. RMS entered into a contract with the Montana Department of Transportation (MDOT) to service and maintain the Grey Cliffs' rest areas. The contract began on April 15, 2001 and ended on March 18, 2002, when MDOT canceled the contract for a failure to meet prevailing wage requirements imposed by Montana law. The rest areas are located on the north and south side of Interstate 90 near Grey Cliffs, Montana. There are rest rooms, picnic tables and lawn areas located at each of the rest areas.
2. The contract with MDOT required RMS to pay prevailing hourly wages to employees. The actual hourly wage depended on the particular position filled by an employee and was set by the State of Montana.
3. At issue in this case are three types of job classifications, one a grounds keeping position, one a janitorial position, and one a janitorial services supervisor position. Under the prevailing wage requirements (Exhibit D), the groundskeeper position commands a \$12.81 hourly wage (which includes pension and vacation benefits). A janitor position

commands a \$9.02 hourly wage (which includes pension and vacation benefits). A janitorial services supervisor position commands a \$10.64 hourly wage (which includes pension and vacation benefits).

4. Work at each of the rest areas was controlled by a general work schedule created by Kris Kelly, owner of RMS (Exhibit B-8). The work schedule had two components, a summertime schedule, when the rest areas experienced a great deal of use, and a wintertime schedule, where reduced traffic on the Interstate resulted in far less use. Under both schedules, there was a caretaker as well as one or two other employees scheduled to work. The work schedule for the summertime required the employees to engage in "lawn care" (mowing, weed eating, and edging) for at least three hours each day.

5. During the summertime schedule, the caretaker was scheduled to work Sunday through Thursday from 6:00 a.m. to 3:00 p.m. with a one hour lunch break. Employee #2 was scheduled to work Tuesday through Saturday from 9:00 a.m. to 6:00 p.m. with a one hour lunch break. Employee # 3 was scheduled to work Sunday, Monday, Friday and Saturday from 6:00 a.m. to 3:00 p.m. with a one hour lunch break. There was also provision for a fourth employee (Exhibit C-1).

6. During the wintertime schedule, the caretaker was scheduled to work Sunday through Thursday from 8:00 a.m. to 5:00 p.m. with a one hour lunch break. Employee #2 was scheduled to work Friday and Saturday from 8:00 a.m. to 5:00 p.m. with a one hour lunch break (Exhibit C-2).

7. When RMS began its contract on April 15, 2001, Kris Kelly employed his brother, Pat Kelly, to work as the caretaker. Kris Kelly also hired Susan Regendahl, Gerald Herkimer and Geoffrey O'Haire for the other positions. In September 2001, after consulting with Kris Kelly, Regendahl hired Penny Jolly to work at the rest areas.

8. Beginning on April 15, 2001, and continuing until June 1, 2001, Regendahl worked Sunday through Thursday, 8 hours per day. She spent 2 hours each day completing grounds keeping duties and six hours each day completing janitorial duties. On June 1, 2001, Kris Kelly discharged Pat Kelly. Regendahl then assumed the position of caretaker and continued to work her Sunday through Thursday schedule, 8 hours each day, with 2 hours spent in grounds keeping and 6 hours spent in janitorial and supervising duties. She continued working these hours until the

termination of the Grey Cliffs' contract on March 15, 2002. Regendahl worked a total of 35 days between April 15 and June 1, 2001. After assuming the caretaker position, she worked a total of 204 days. For her work between April 15 and March 15, 2002, her compensation at the appropriate prevailing wage rates should have been a total of \$20,986.14. She earned \$1,839.60 ( $\$8.76 \times 210$ ) for her janitorial work and \$896.70 ( $\$12.81 \times 70$  hours) for her grounds keeping work between April 15 and June 1, 2001. She earned \$13,023.36 ( $\$10.64 \times 1,224$  hours) for her supervisory janitorial work and \$5,226.48 ( $\$12.81 \times 408$  hours) for her continuing grounds keeping work between June 2, 2001 and March 15, 2002. She was paid \$17,174.08 during the entire tenure of her job with RMS. RMS underpaid Regendahl by \$3,812.06.

9. After Regendahl took over as caretaker, she assumed additional duties above and beyond her cleaning tasks and grounds keeping responsibilities. Regendahl trained Jolly when Jolly was hired. Each week, Regendahl would keep in contact with Kelly via e-mail on a daily basis regarding issues at the rest stop. Regendahl submitted monthly reports to Kris Kelly about the rest areas. Regendahl submitted hourly time reports from the employees to Kelly by facsimile at the end of each pay period. Regendahl also had authority to utilize petty cash to purchase items for the rest area that were needed. Regendahl would decide how to fix and/maintain the equipment at the rest area needed to maintain the facility. Whenever any of the other employees would need to report an absence or something else, they would report to Regendahl. If an employee needed time off, Regendahl would rework the schedule to accommodate the time off. Regendahl also met with an MDOT representative each month to complete a monthly performance review report. When Jolly and Herkimer were laid off for the winter season, Regendahl informed them of their last day of work. Kelly himself only visited the rest area four times during the period between April, 2001 and March, 2002.

10. Herkimer worked 8 hours per day, two days per week, Sunday and Monday, from April 21 until September 15, 2001, for a total of 44 days worked in this position. His work day consisted of 2 hours of work completing grounds keeping and 6 hours of work completing janitorial duties. During his tenure in the position, he spent a total of 88 hours doing lawn maintenance (44 days  $\times$  2 hours each day of lawn maintenance) and 264 hours of janitorial work (44 days  $\times$  6 hours each day). At prevailing wage rates, he earned a total of \$3,439.92, representing \$2,312.64 ( $\$8.76 \times 264$  hours) for his janitorial work and \$1,127.28 ( $\$12.81 \times 88$  hours) for his grounds keeping. RMS paid

him \$3,319.36 during the entire tenure of his position. RMS underpaid Herkimer by \$120.56.

11. Between his first day of work and approximately September 15, 2001, O'Haire usually worked five days each week. After September 15, 2001, O'Haire worked two days each week. During his entire employment with RMS, O'Haire worked a total 141 days spending 2 hours completing lawn maintenance and six hours doing janitorial work. He worked 1 additional day completing lawn maintenance only for a period of two hours. At prevailing wage rates, he earned a total of \$11,049.00, representing \$7,410.96 ( $\$8.76 \times 846$  hours over 141 days of work) for his janitorial work and \$3,638.04 ( $\$12.81 \times 284$  hours over 142 days) for his grounds keeping. RMS paid him \$10,156.52 during the entire tenure of his job with RMS. RMS underpaid O'Haire by \$892.48.

12. Penny Jolly worked for RMS from June through September 15, 2001, when she was laid off for the winter. She worked on Sundays and Mondays, spending 2 hours each day on grounds keeping and 6 hours each day on janitorial work. She worked for a total of 30 days. At prevailing wage rates, she earned a total of \$2,345.40, representing \$1,576.80 ( $\$8.76 \times 180$  hours) for her janitorial work and \$768.60 ( $\$12.81 \times 60$  hours) for her grounds keeping work. RMS paid her \$2,255.00 during the entire tenure of her job with RMS. RMS underpaid Jolly by \$90.40.

13. The only pay stub information produced by RMS (Exhibits I and BB) shows that RMS never paid an hourly wage to Regendahl, Herkimer, O'Haire and Jolly that equaled or exceeded the required minimum prevailing wage. The pay stub information shows that these employees were always paid less than the prevailing wage.

14. The schedule utilized at the rest stops was the schedule preset by Kris Kelly. All employees followed this work schedule. Neither Kris Kelly nor any member of RMS maintained records showing the actual number of hours worked by each of the employees at the two rest areas.

15. During the wintertime, Regendahl and O'Haire would spend as much time clearing walk ways of snow and otherwise maintaining the grounds of the rest areas as they would mowing and trimming the grass during the summer.

16. In July 2001, the Wage and Hour Unit of the Department of Labor and Industry began an audit of the RMS employment at

Grey Cliffs after receiving information that indicated the employees were not being paid in conformity with prevailing wage statutes and regulations. Tonya McCormick, compliance specialist, completed the investigation for the Wage and Hour Unit. McCormick audited two time periods, the first beginning on April 21 and going through July 21, 2001, and the second beginning on July 22, 2001 and going through March 15, 2002, the day that all employees of RMS were released from employment due to MDOT's cancellation of the contract.

17. McCormick had difficulty getting Kris Kelly's input on the problems of the underpayment to the four employees. McCormick was unable to complete her audit of the April 21 to July 21, 2001 time frame until March 1, 2002. Part of the problem in completing the audits is attributable to the fact that Kelly did not provide information requested by McCormick despite promising to do so. For example, during the first audit, McCormick sent a letter to RMS on July 18, 2001, indicating that the Wage and Hour Unit would be conducting an audit and requesting certified copies of payroll records for April 15 through July 21, 2001. The information was to include records of the hours worked each day. RMS did not provide records of the hours each employee worked each day (apparently because it did not keep such records). RMS responded in a July 30, 2001 letter with check stubs and a copy of the employee list and job descriptions. The information was insufficient to complete the audit so on September 18, 2001, McCormick followed up with another letter requesting additional information. Though asked to respond by September 28, 2001, RMS failed to do so. McCormick sent a third letter to RMS on October 2, 2001, requesting additional information no later than October 16, 2001. RMS failed to respond to either letter. Two subsequent telephone calls were also placed to RMS, one on January 14, 2002 and the next on February 21, 2002, both without success. RMS never returned the telephone calls. On March 1, 2002, McCormick issued the audit for the April 15 to July 22, 2001 period.

18. RMS engaged in a similar pattern of ignoring Wage and Hour inquires during the audit conducted on the period of July 22, 2001 to March 15, 2002. The Wage and Hour Unit undertook the audit for this period on February 25, 2003. McCormick sent out a letter to RMS on that date seeking information regarding payment of wages for the second audit period. RMS never responded to this request and on April 2, 2003, McCormick issued her determination for the second time period.

19. The Department imposed audit costs of \$84.20 for the audit period of April 15 through July 21, 2001, and \$119.31 for the audit period of July 22, 2001 to March 15, 2002. These costs represent the work put into the audits by McCormick.

#### **IV. OPINION**

##### *A. RMS Owes Additional Wages To Regendahl, O'Haire, Herkimer, and Jolly*

The parties' disputes in this matter center on (1) the number of hours the employees spent doing janitorial work versus grounds keeping work, (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 RMS actually paid the employees.

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. Mont. Code Ann. § 18-2-407 requires employers to pay the prevailing wages on public works contracts or be subject to penalties and fees as provided by the law. Admin. R. Mont. 24.16.9006 provides that 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.<sup>(1)</sup>

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.

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).

The employer failed to keep records of the daily and weekly hours worked by each employee on each actual calendar date. The testimony of the employees, taken in conjunction with the schedule developed and implemented by the employer, provides a reasonable basis from which to determine the hours each employee spent on the various tasks at the rest areas and the number of days each employee worked. In addition, the evidence (as shown above in Finding of Fact #9) provides substantial support for the conclusion that Regendahl acted as a supervisor of the other employees with respect to the janitorial services. Regendahl should have been compensated as a supervisor with respect to that facet of her work between June 1, 2001 and March 15, 2002.

The employer contends that both the hours the employees claimed to have worked and the classification of those hours are suspect. The substantial evidence presented at the hearing does not support the employer's argument. The testimony of Regendahl, Herkimer O'Haire, and Jolly is consistent regarding the amount of time worked doing the various jobs. The employer presented no eye-witness testimony on the issue nor did it present any substantial testimony to rebut the testimony of these employees. Perhaps most telling is the additional fact that the Department's determination of the summertime breakdown between grounds keeping and janitorial work was based on the schedule **developed by the employer**. Based on testimony of the employees, the hearing examiner finds substantial evidence to support the hours and type of work claimed to have been worked in the Department's case. Because of this finding, the hearing examiner finds that Regendahl is owed additional wages of \$3,812.06, Herkimer is owed additional wages of \$120.56, O'Haire is owed additional wages of \$892.48, and Jolly is owed additional wages of \$90.40.

B. *RMS 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).<sup>(2)</sup>

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 examiner, 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.<sup>(3)</sup> Accordingly, the hearing examiner 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. Furthermore, the discrepancy in amounts due versus amount paid is due in large part to the employer's misunderstanding of the percentages of work (janitorial versus

grounds keeping) which the employees were undertaking. The employer ran his contract from out of state and only showed up at the contract site two or three times during the eleven month period that RMS held the contract for the Grey Cliffs' Rest Area. While he is to blame for not keeping closer tabs on the actual work, there is no evidence to suggest that he intentionally underpaid his employees. This is particularly true with respect to Regendahl's pay as a supervisor. The employer's other contracts (such as with the Arizona Department of Transportation) required him to act as the supervisor of each contract site. Employing the model presented by the other contracts, the employer erroneously, but not unreasonably, concluded that he and not Regendahl was the supervisor of the Grey Cliffs' Rest Area.

Moreover, it appears that the employer actually underpaid the employees by approximately 13%.<sup>(4)</sup> Based on these factors, the hearing examiner concludes that a 13% penalty equaling \$639.00 is appropriate in this case.

*C. RMS 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 employer, citing a California Supreme Court decision<sup>(5)</sup>, argues that the \$25.00 per day forfeiture should not be imposed in this matter. The employer has failed to show, however, how this hearing examiner can ignore the clear statutory language that requires imposition of the \$25.00 per day forfeiture in cases of underpayment. Agency powers in Montana are limited to specific and definite guidance from the legislature. *State ex rel. Dehrer v. Lewis and Clark County*, (1993), 257 Mont. 445, 451, 849 P.2d 1045, 1051. Unlike the portion of the statute relating to the 20% penalty, Mont. Code Ann. § 18-2-407 provides no leeway in the imposition of the \$25.00 per day forfeiture. The forfeiture is required.

Moreover, the California Supreme Court decision is distinguishable on at least three grounds. First, in holding that the contractor would not be required to pay a penalty, the California court invoked its *equitable* powers to reach the determination. Unlike a court, this hearing examiner has no equity powers. Second, the California contractor entered into the

contract in good faith, based on the public agency's agent's representation that the contract was a private contract not subject to prevailing wage laws. In other words, contrary to the facts of the case at bar, the contractor had no notice that he was in reality entering into a public works contract that would require implementation of prevailing wage laws. Here, the employer entered into its agreement with the state with the full knowledge that the contract required compliance with prevailing wage requirements. Third, the facts in this case show that the employer itself had "unclean hands" with respect to the length of time involved in the audits. As demonstrated by the testimony of Tonya McCormick, the employer was uncooperative in returning phone calls and providing information so that the auditor could complete her work. It took several communications, both by letter and by telephone, to get any responses out of the employer. The employer never provided any records to show the actual hours worked by the employees, despite repeated efforts on the part of McCormick to get the employer to produce such documentation. Thus, while this hearing examiner has no equitable powers to fashion the remedy sought by the employer, even if he did, he could not find that equity would demand the elimination of the \$25.00 per day forfeiture. The forfeiture amounts of \$5,975.00 for Regendahl (representing 239 days of underpayment), \$3,550.00 for O'Haire (representing 142 days of underpayment), \$1,100.00 for Herkimer (representing 44 days of underpayment), and \$750.00 for Jolly (representing 30 days of underpayment), for a total forfeiture of \$11,375.00, are appropriate under the circumstances of this case and must be imposed.

## **V. CONCLUSIONS OF LAW**

1. RMS improperly classified the work of Regendahl, O'Haire, Herkimer and Jolly. RMS should have compensated Regendahl, O'Haire, Herkimer and Jolly in part as grounds keepers as well as janitorial employees. In addition, RMS failed to properly compensate Regendahl as a supervisor.

2. Because RMS failed to properly classify the work of Regendahl, O'Haire, Herkimer and Jolly, and because RMS failed to properly categorize Regendahl as a supervisor, RMS failed to pay prevailing wages to Regendahl, O'Haire, Herkimer and Jolly as required by Mont. Code. Ann. § 18-2-407.

3. RMS owes Regendahl total additional wages of \$3,812.06. RMS owes O'Haire total additional wages of \$892.48. RMS owes

Herkimer total additional wages of \$120.56. RMS owes Jolly total additional wages of \$90.40.

4. Pursuant to Mont. Code. Ann. § 18-2-407 and Admin. R. Mont. 24.17.851, RMS owes a penalty in the amount of \$639.00.

5. Pursuant to Mont. Code. Ann. § 18-2-407, RMS owes \$25.00 per day forfeiture to Regendahl in the amount of \$5,975.00. RMS owes \$25.00 per day forfeiture to O'Haire in the amount of \$3,550.00. RMS owes \$25.00 per day forfeiture to Herkimer in the amount of \$1,100.00. RMS owes \$25.00 per day forfeiture to Jolly in the amount of \$750.00. 6. Pursuant to Mont. Code. Ann. § 18-2-407, RMS must pay audit costs in the amount of \$203.61.

## **VI. ORDER**

Rocky Mountain Services, Inc., is hereby ORDERED to tender a cashier's check or money order in the amount of \$17,133.11, representing \$4,915.50 in unpaid wages, \$639.00 in penalty, \$11,375.00 in forfeiture to the affected employees, and \$203.61 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.

DATED this 29th day of March, 2004.

DEPARTMENT OF LABOR & INDUSTRY  
HEARINGS BUREAU  
By: /s/ GREGORY L. HANCHETT  
GREGORY L. HANCHETT  
Hearing Officer

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.

1. Effective September 13, 2002, the administrative regulations pertaining to minimum wages on public contracts were transferred to Title 24, Chapter 17 of the Administrative Rules of Montana. This particular provision was renumbered as Admin. R. Mont. 24.17.147.

2. Mont. Code Ann. § 18-2-407 has been twice amended since the contract at issue in this case was in force. Those amendments do not pertain to the issues to be decided in this case.

3. Admin. R. Mont. 24.17.851 did not come into effect until September 13, 2002, after the time of the contract material to this matter. There is no case or prior administrative rule precluding utilization of the factors enumerated in that regulation in order to determine the amount of penalty due under Mont. Code Ann. § 18-2-407.

4. The amount of the underpayment (approximately \$4,915.00) divided by the total amount that should have been paid to the employees (approximately \$37,820.00).

5. *Lusardi Construction Co. v. Aubry*, 1 Cal. 4th 976; 824 P.2d 643 (1992).