

STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM )	Case No. 2036-2012
OF MATHIAS H. TALLIS, )	
)	
Claimant, )	
)	
vs. )	<b>FINAL AGENCY DECISION</b>
)	
NANNINI BROTHERS, INC., a Montana )	
corporation d/b/a ALDER KOA, )	
)	
Respondent. )	

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**I. INTRODUCTION**

On May 15, 2012, Mathias H. Tallis filed a claim with the Department of Labor and Industry contending that Nannini Brothers, Inc., d/b/a Alder KOA, owed him \$1,300.00 in unpaid wages for the time period from March 22, 2012 through May 8, 2012.

On June 4, 2012, the Department's Wage and Hour Unit issued a determination finding Alder KOA owed Tallis \$1,300.00 in unpaid wages, plus a penalty of 110% based upon its failure to respond to the Department's request for information regarding Tallis' claim.

On June 15, 2012, Attorney Stephanie Gehres Kruer filed a timely request for redetermination on behalf of Alder KOA. Kruer indicated neither she nor her client had received Tallis' claim for benefits. Kruer also indicated Alder KOA denied Tallis was ever an employee and argued Tallis was not owed any unpaid wages.

On August 15, 2012, the Wage and Hour Unit issued a redetermination finding Tallis had been an employee of Alder KOA and was owed for 104 hours of work performed at an hourly rate of \$7.65 for a total of \$780.30. Alder KOA filed a timely appeal.

Following mediation efforts, the Wage and Hour Unit transferred the case to the Department's Hearings Bureau on November 27, 2012. On November 30, 2012, the Hearings Bureau issued a Notice of Hearing. Following a scheduling conference on December 13, 2012, the matter was set for hearing on March 27, 2013. The hearing date was later continued to April 12, 2013, at the request of Alder KOA. Tallis did not oppose the requested continuance. On March 8, 2013, the hearing officer conducted a final pre-hearing conference with Tallis and Kruer both present.

Hearing Officer Caroline A. Holien conducted the hearing on April 12, 2013. Mathias H. Tallis was present and appeared without counsel. Attorney Stephanie Gehres Kruer represented the respondent. Tallis, Edward Nannini, Owner, Michael Stuart, Senior Business Development Consultant with KOA, and Edward Baade, a/k/a "Gunny," a seasonal employee of Alder KOA, presented sworn testimony.

Exhibits 12 through 18, 59, and 60 from the administrative record compiled by the Wage and Hour Unit, as well as Respondent's Exhibits A through T were admitted. The Respondent's motion to exclude its own Exhibit C was denied.

Based upon the evidence and argument presented at hearing, the hearing officer makes the following findings of fact, conclusions of law, and final agency decision.

## **II. ISSUE**

Whether Nannini Brothers, Inc., a Montana corporation d/b/a Alder KOA, owes wages for work performed, as alleged in the complaint filed by Mathias H. Tallis, and owes penalties or liquidated damages, as provided by law.

## **III. FINDINGS OF FACT**

1. Nannini Brothers, Inc. has owned and operated Alder Kampgrounds of America (Alder KOA) since 1999. Alder KOA typically hires one employee to work in the office and one employee to perform outside maintenance. Alder KOA also hires teenagers who live in the area to work on various projects throughout the season.

2. Alder KOA's busy season typically runs from Memorial Day through Labor Day. Alder KOA also operates during hunting season and at other times throughout the year depending upon customer demand. Alder KOA offers camping sites, as well as cabins, and operates an on-site convenience store.

3. In October 2011, Owner Edward Nannini spoke with Wendy Tallis about the possibility of her working in the office during the 2012 camping season. Wendy Tallis and her husband, Mathias Tallis, had been frequent guests at Alder KOA for several years and were on friendly terms with Nannini. In February 2012, Wendy Tallis and Nannini orally agreed Wendy Tallis would work in the office during the 2012 camping season with a monthly salary of \$2,000.00 and she and Mathias Tallis would be allowed to stay in their RV at the campgrounds. Nannini also discussed with Mathias Tallis the possibility that he would also work for Alder KOA.

4. There was no written employment agreement between Nannini and either Wendy Tallis or Mathias Tallis. Nannini assumed Mathias Tallis would accompany Wendy Tallis to the campground. Nannini was aware that Mathias Tallis was performing work on behalf of the employer. Nannini never directed Mathias Tallis to stop performing work on behalf of the employer.

5. Both Wendy Tallis and Mathias Tallis were allowed to take items from the on-site store, which included pop, cigarettes, and other snacks. Respondent's Exhibit P and Q. There was no agreement that wages would be withheld from either person's wages to cover the amount the employer claims is owed.

6. On or about February 5, 2012, Nannini requested Mathias Tallis and Wendy Tallis to prepare the campground for the upcoming season. During this period, Nannini requested Wendy Tallis and Mathias Tallis attend an owners meeting on behalf of Alder KOA scheduled for March 28, 2012. Wendy Tallis and Mathias Tallis attended the meeting, which lasted for approximately nine hours. The meeting covered topics such as how to effectively market KOA Campgrounds, insurance and liability issues, issues with ADA, how to profitably run a KOA store, as well as human resources issues. The topics covered at the meeting were related to the work both Wendy Tallis and Mathias Tallis performed for Alder KOA. Nannini was aware Mathias Tallis attended the owners meeting. Alder KOA paid for the Tallises' hotel stay, as well as other expenses. Respondent's Exhibit M.

Wendy Tallis and Mathias Tallis spent seven hours driving to and from Billings for the manager's meeting held on March 28, 2012. Mathias Tallis spent a total of 23 hours of work time attending the owners meeting, which included drive time to and from the meeting, as well as the meeting itself. Respondent's Exhibit T.

7. Beginning on or about March 22, 2012 through May 8, 2012, Mathias Tallis assisted Wendy Tallis in preparing the campground for the season. Wendy Tallis recorded the hours they both worked by marking "x2" beside the hours she had

worked that day. Respondent's Exhibit T. Mathias Tallis performed a total of 40 hours of work for the employer. Mathias Tallis performed work on behalf of the employer the following days:

March 22, 2012	5 hours
March 23, 2012	2 hours
April 3, 2012	5 hours
April 4, 2012	5 hours
April 25, 2012	6 hours
April 26, 2012	6 hours
April 27, 2012	4 hours
April 29, 2012	4 hours
May 8, 2012	3 hours

TOTAL: 40 hours

8. From April 15, 2012 through April 19, 2012, Mathias Tallis and Wendy Tallis attended KOA University (KOA U) at the Crowne Plaza Hotel in Billings, Montana. Nannini was aware Mathias Tallis would be accompanying his wife to KOA U. Nannini was informed by a KOA representative during the program that Mathias Tallis was attending KOA U along with Wendy Tallis. Nannini also received a copy of a certificate indicating Mathias Tallis and Wendy Tallis had successfully completed KOA U on behalf of Alder KOA. Respondent's Exhibit T. Alder KOA paid for the Tallises' hotel stay and reimbursed them for expenses related to the trip. Respondent's Exhibit L. Alder KOA also paid the Tallises' tuition for the program. Respondent's Exhibit J.

Mathias Tallis attended KOA U as follows:

April 15, 2012	8 hours
April 16, 2012	9 hours
April 17, 2012	9 hours
April 18, 2012	9 hours
April 19, 2012	6 hours

TOTAL: 41 hours

Mathias Tallis also spent seven hours driving each way from his home to Billings on April 14, 2012 and April 20, 2012. Respondent's Exhibit T. Mathias Tallis spent a total of 55 hours of work time attending KOA U on behalf of the

employer, which included drive time to and from KOA U, as well as time spent at the program itself.

9. On or about April 20, 2012, Nannini arrived at the Alder KOA for the season. Wendy Tallis returned to the campground on April 23, 2012. Mathias Tallis returned to the campground on April 25, 2012. Mathias Tallis continued performing work for the Alder KOA while Nannini was on site. Nannini never advised Mathias Tallis to stop performing work on behalf of the employer.

10. The working relationship between Nannini and the Tallises began to deteriorate soon after Nannini arrived at the campground. On or about May 11, 2012, Wendy Tallis and Mathias Tallis decided to separate from their employment with Alder KOA. Ed “Gunny” Baade arrived at the campground on or about May 22, 2012 and worked for the remainder of the season.

11. Mathias Tallis performed 118 hours of work for Alder KOA during the period beginning March 22, 2012 through May 8, 2012. Tallis is owed \$902.70 in unpaid wages for work performed during that period (118 hours x \$7.65 = \$902.70).

12. There is no proof in this case that the special circumstances decided in Admin. R. Mont. 24.16.7556 exist such that the maximum penalty permitted by Admin. R. Mont. 24.16.7561 (110%) must be imposed. Under the facts adduced at hearing, imposition of 55% penalty under Admin. R. Mont. 24.16.7561 is appropriate.

13. Penalty on the unpaid overtime amount equates to \$496.49 ( $\$902.70 \times .55 = \$496.49$ ).

#### IV. DISCUSSION<sup>1</sup>

##### A. *The Relationship Between Mathias Tallis and Alder KOA*

The primary dispute appears to be whether there was an employment relationship between Mathias Tallis and Alder KOA.

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<sup>1</sup> 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.

Montana Code Annotated § 39-2-101 defines employment as:

The contract of employment is a contract by which one who is called the employer, engages another, who is called the employee, to do something for the benefit of the employer or a third person.

“Employ” means to permit or suffer to work. Mont. Code. Ann. § 39-3-201(3).

“Employee” includes any person who works for another for hire, except that term does not include a person who is an independent contractor. Mont. Code Ann.

§ 39-3-201(4). “Employer” includes any individual, partnership, association, corporation, business trust, legal representative, or organized group of persons acting directly or indirectly in the interest of an employer in relation to an employee but does not include the United States. Mont. Code Ann. § 39-3-201(5).

Work not requested but suffered or permitted is work time. Admin. R. Mont. 24.16.1005(1). In all such cases, it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. Admin. R. Mont. 24.16.1005(3).

Mathias Tallis testified he and Owner Edward Nannini had discussed the possibility of him performing work for Alder KOA while Wendy Tallis worked as the office manager. Mathias Tallis testified he understood he would be performing general maintenance and overseeing construction projects around the campground. Mathias Tallis conceded there was no formal, written agreement outlining the terms of his employment. Mathias Tallis testified he assumed Nannini would “take care” of him due to their long term relationship. Mathias Tallis testified that both he and Wendy Tallis completed the necessary tax forms when they arrived at the campgrounds in March 2012.

Nannini strenuously denied ever talking with Mathias Tallis about his working for Alder KOA. Nannini testified he assumed Mathias Tallis would join Wendy Tallis at the campground. Nannini indicated he was aware Tallis was “hanging around” with his wife while she worked at the campground. Nannini also indicated he was aware Mathias Tallis had done some work for Alder KOA, such as painting a sign and painting lines at the RV dumping station. Nannini denied Mathias Tallis had ever completed any tax paperwork or that there was any documentation that Mathias Tallis was an employee of Alder KOA.

Mathias Tallis testified in detail about the kind of work he performed from March 22, 2012 through May 8, 2012. Nannini acknowledged that he was not a constant presence at the campgrounds prior to April 20, 2012 and that he relied upon Wendy Tallis to perform much of the work necessary to prepare the campgrounds for the season. It makes little sense that he was not aware Mathias Tallis was performing work on behalf of the employer given Mathias Tallis' testimony that both he and Wendy Tallis spoke with Nannini about the work that had been performed and what work needed to be performed to get the campground ready for the season. Further, Nannini's testimony that he assumed Mathias Tallis could not work given his disability status is not persuasive given that it was only his assumption and nothing he ever confirmed with either Wendy Tallis or Mathias Tallis. The employer's witness, Edward "Gunny" Baade, testified he did not see any evidence of work having been performed by Mathias Tallis when he arrived at the campground on or about May 22, 2012. Baade conceded he was not present at the campgrounds at any time in March or April 2012. Mathias Tallis' testimony that he performed work on behalf of the employer is deemed more credible than the evidence presented by the employer. Mathias Tallis is found to have been an employee of Alder KOA.

*B. Number of Hours Mathias Tallis Performed Work for Alder KOA*

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 the 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.

Mathias Tallis submitted a record of time he claimed to have worked from March 22, 2012 through May 8, 2012. Mathias Tallis testified Wendy Tallis kept track of the hours they worked together by marking “x2” next to the hours she worked. Mathias Tallis testified he had a total of 40 hours of work time from March 22, 2012 through May 8, 2012. See Finding of Fact 6.

Both Nannini and Baade testified that neither of them saw any evidence that Mathias Tallis had performed the work he claimed to have performed when they arrived at the campground. Baade testified he was required to perform many of the same maintenance duties he had performed during past seasons when he arrived in May 2012. Both Nannini and Baade conceded they were not at the campground on a regular basis in either March or April 2012. Nannini did acknowledge speaking with Mathias Tallis about his having painted a sign for the campground and painting lines at the RV dumping station. The evidence also suggests Nannini was present at the campgrounds while Mathias Tallis continued performing work on behalf of the employer in late April 2012, as well as early May 2012.

Mathias Tallis offered detailed testimony about the work he performed during each of the days he claimed to have worked. The employer offered little evidence to disprove Mathias Tallis’ testimony other than Nannini’s denials that Mathias Tallis was ever an employee of Alder KOA. Mathias Tallis’ detailed testimony is deemed more credible than the evidence presented by the employer regarding the number of hours he worked for the employer at the campground. Mathias Tallis’ testimony that he had 40 hours of work time from March 22, 2012 through May 8, 2012 is deemed credible.

### *C. Hours Mathias Tallis Spent at Training on Behalf of Alder KOA*

Administrative Rules of Montan 24.16.1009(1) states:

Attendance at lectures, meetings, training programs and similar activities need not be counted as working time if the following four criteria are met:

- (a) Attendance is outside of the employee’s regular working hours;
  - (b) Attendance is in fact voluntary;
  - (c) The course, lecture, or meeting is not directly related to the employee’s job;
- and
- (d) The employee does not perform any productive work during such attendance.

Mathias Tallis testified Nannini asked him to attend the March 28, 2012 owners meeting along with Wendy Tallis. Mathias Tallis admitted he had no evidence to show he was required to attend the meeting but went after being asked to do so by Nannini. Nannini denied ever asking or directing Mathias Tallis to go to the owners meeting. The employer submitted a copy of the fax cover sheet Nannini's wife used when she faxed the meeting agenda to the campground. Nannini's wife marked only Wendy Tallis' name on the fax cover sheet.

Mathias Tallis testified he attended the KOA U program on behalf of Alder KOA from April 15, 2012 through April 19, 2012 after receiving permission from Nannini to attend the program. Nannini testified he thought Mathias Tallis was merely accompanying his wife and not an active participant in the program. Nannini acknowledged that KOA staff informed him early in the week that Mathias Tallis was actually attending the programs. Nannini also acknowledged being aware that KOA U had issued a certificate indicating that both Mathias Tallis and Wendy Tallis had successfully completed the program. Michael Stuart, Senior Business Development Consultant with KOA, confirmed Mathias Tallis had attended the program. Stuart could not confirm whether the receipt showing Alder KOA paid KOA U \$596.64 for tuition covered both Wendy Tallis and Mathias Tallis.

Nannini's testimony regarding Mathias Tallis' attendance at both the owners meeting and KOA U makes little sense. Nannini denied having knowledge of Mathias Tallis attending either program but he could explain the amount of money he paid to cover the Tallises' traveling expenses to and from the programs. Nannini also acknowledged that he was aware Mathias Tallis intended to accompany Wendy Tallis to both programs. It is more likely that Mathias Tallis attended both programs at the behest of Nannini given that Nannini was not a constant presence at the campground prior to April 22, 2012 and he did not plan to attend either program. Mathias Tallis' testimony that he attended both programs at the behest of the employer is more credible than the evidence presented by the employer.

The employer submitted programs and agendas for the meetings that comported with Mathias Tallis' testimony regarding the number of hours he spent at the manager's meeting on March 28, 2012 and the hours he spent at KOA U from April 15, 2012 through April 19, 2012. Therefore, Mathias Tallis' testimony regarding the number of hours he spent at each program, including drive time to and from the programs, is determined to be credible.

The evidence shows Mathias Tallis had 23 hours of work time, which included driving to and from, as well as attending, the owners meeting on March 28, 2012.

See Finding of Fact 5. The evidence also shows Mathias Tallis had 55 hours of work time, which included driving to and from, as well as attending, KOA U from April 14, 2012 through April 20, 2012. See Finding of Fact 7.

Mathias Tallis has shown as a matter of reasonable and just inference that he performed a total of 118 hours of work for the employer at the Alder KOA campground from March 22, 2012 through May 8, 2012. The employer has not offered sufficient evidence to negate the reasonableness of that inference.

#### D. *Wages Owed to Mathias Tallis*

Montana Code Annotated § 39-3-404(1) states that “. . . An employer shall pay to each employee a wage of not less than the applicable minimum wage as determined by the commissioner in accordance with 39-3-409.” In this case, the parties did not have an agreement regarding Tallis’ wages. Therefore, it is determined that Tallis is owed an hourly wage of no greater than the applicable minimum wage of \$7.65. It is therefore determined that Mathias Tallis is owed \$902.70 for 118 hours of work performed between March 22, 2012 and May 8, 2012.

The employer argued Wendy Tallis and Mathias Tallis owed Alder KOA for \$69.29 of goods consumed from the employer’s on-site store. Attorney General Opinion No. 25, Volume 11, dated March 25, 1953, states:

An employer cannot withhold the wages or any portion thereof due and owing to an employee as wages earned, and apply such wages to an account which the employer has with the employee unless the account existing between the employer and employee is for board, room, or other incidentals which the employer has agreed may be deducted as a condition of the employment.

The employer submitted copies of receipts and handwritten tabulations showing both Wendy Tallis and Mathias Tallis took items from the on-site store. Respondent’s Exhibits P and Q. The employer submitted no evidence showing there was an agreement between the parties that monies would be withheld from the wages owed to either Mathias Tallis or Wendy Tallis to cover any items taken from the on-site store. Therefore, the amount the employer claims is owed cannot be used to offset any portion of the unpaid wages found to be owed to Mathias Tallis.

E. *Penalty On Amounts Owed*

Montana law assesses a penalty when an employer fails to pay wages when they are due. Mont. Code Ann. § 39-3-206. Imposition of the penalty is mandatory. *Id.* For claims not involving minimum wage or overtime, a 55% penalty must be imposed. Admin. R. Mont. 24.16.7566.

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. Nannini Brothers, Inc. owes Mathias Tallis \$902.70 in unpaid wages for the period of March 22, 2012 through May 8, 2012 (118 hours x \$7.65).

3. A 55% penalty amounting to \$496.49 is due on the unpaid overtime wages if it is paid within the time period specified in the order below (\$902.70 x .55). Admin. R. Mont. 24.16.7561.

VI. **ORDER**

Nannini Brothers, Inc. is hereby ORDERED to tender a cashier's check or money order in the amount of \$1,399.19, representing \$902.70 in wages and \$496.49 in penalty, made payable to Mathias Tallis, and mailed to the **Employment Relations Division, P.O. Box 201503, Helena, Montana 59620-1503**, no later than 30 days after service of this decision. Nannini Brothers, Inc. may deduct applicable withholding from the wage portion, but not the penalty portion, of the amount due.

DATED this 3rd day of May, 2013.

DEPARTMENT OF LABOR & INDUSTRY  
HEARINGS BUREAU

By: /s/ CAROLINE A. HOLIEN  
CAROLINE A. HOLIEN  
Hearing Officer

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 the date of mailing of the hearing officer's 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.