

II. ISSUE

Is Dille due additional wages for accrued vacation time and penalty as prescribed by law?

III. FINDINGS OF FACT

1. McManus Construction hired Dille in 2005. Dille worked as construction site foreman for McManus.

2. Beginning on January 1, 2007, McManus paid Dille on a salary basis. As a salaried employee, Dille was entitled to both paid vacation and sick leave benefits.

3. McManus Construction's vacation policy reads as follows:

"We provide vacation and sick leave for salaried employees. Taking vacation requires a minimum of 2 weeks notice. The vacation allocations are as follows:

<u>Years of Employment</u>	<u>Vacation</u>
Year 1	5 days paid vacation
Year 2	10 days paid vacation

In addition, salaried employees will have 5 sick days. Salaried employees may request additional time off which may be granted without pay at the discretion of Pat McManus."

4. The language of the vacation benefit policy could be construed to require a salaried employee to have completed two full years of work before qualifying or being able to use 10 days of vacation. The parties, however, did not treat the accrual and use of the vacation benefit in that manner. In practice, when Dille asked for vacation time off in his second year of employment (2008), his vacation time was treated as though he was accruing up to ten days during that year and could use his accrued days during that year of service. There is nothing in the policy that indicates that a salaried employee was entitled to and could use ten full days of vacation immediately upon the beginning of his second full year of employment.

5. In light of the practice of the parties, it is clear that vacation would be paid out on a pro rated basis over the year of employment. In this case, Dille worked 7 out of 12 months during 2008. Had he worked the full year, he could have taken up to 10 days of vacation during 2008. Since he worked only 7 months, he is entitled to 7/12 of the entire ten days, or a total of 5.8 days ($7/12 \times 10 = 5.8$ days). As Dille's salary every 10 days was \$2,307.70, he was entitled to \$1,346.16 ($7/12 \times \$2,307.70 = \$1,346.16$) in vacation pay.

6. McManus paid Dille on a weekly basis. The last three pay stubs that McManus gave to Dille (dated 7/17/08, 7/24/08 and 7/31/2008) clearly show that the accrued vacation days

year to date was a total of 8 hours. Based on this evidence, which the hearing officer finds to be the most credible evidence in this case, the hearing officer finds that McManus paid Dille for only 8 hours of vacation during 2008 for a total of \$161.31. He is thus due an additional \$1,184.85 in unpaid vacation pay (\$1,346.16-\$166.31=\$1,184.85).

7. Penalty on the unpaid amount of vacation pay is \$651.67.

IV. DISCUSSION¹

A. *McManus Owes Dille Additional Wages.*

Montana law requires employers to pay wages when due in conformity with the employment agreement and no later than 15 days following termination of employment. Mont. Code Ann. §§ 39-3-204 and 39-3-205. Except to set a minimum wage, the law does not set the amount of wages to be paid. That determination is left to the agreement between the parties. Vacation pay which has been earned and is due and owing must be considered in the same category as wages and is collectible in the same manner and under the same statutes as are wages.

23 Op. Att’y Gen. 151, 153. See also, *Langager v. Crazy Creek Products, Inc.*, , 1998 MT 44, ¶24, 287 Mont. 445, ¶24, 954 P. 2d 1169, ¶24.

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.

Once an employee has shown as a matter of just and reasonable inference that he 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. 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*, *supra*, 359 Mich. at 576, 103 N.W. 2d at 497.

Dille’s testimony in itself meets his initial burden to show that he was not paid all vacation time he was due. Dille, who was in the best position of all who testified to know

¹Statements 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.

whether or not he took vacation during 2008, testified that he took no vacation during 2008. Dille's testimony in conjunction with the documentary evidence of his last three pay stubs which show that he only used 8 hours of vacation for the entire year convincingly demonstrates that he has met his burden of proof.

To counter Dille's testimony, McManus presented documentation- a computer printout and pay stubs- indicating that Dille took vacation time. The employer's documentation itself, however, introduces doubt into the employer's case about the reliability of his documentation. Most notably, Dille's last three pay stubs from July, 2008 plainly show that he used only 8 hours of vacation during 2008. The employer also introduced three other pay stubs (one from January 2008, one from March, 2008 and one from April, 2008) purporting to show that Dille took additional vacation days during 2008. The inconsistency in the employer's documentation (the January, March and April, 2008 pay stubs showing more than 8 hours of vacation used as compared to Dille's last three pay stubs from July, 2008 which show that he used only 8 hours of vacation), when weighed against the force of Dille's testimony, causes the hearing officer to reject the documentary evidence purporting to show that Dille in fact took 55 hours of vacation during 2008.

It is clear, however, from the testimony that it was never the intention of the parties that Dille would be considered to have accrued a right to ten days of vacation as of the first day of his second year of employment. Rather, it was the intention of the parties that Dille would accrue the vacation proportionally as he continued to work throughout the second year of employment. Because of this, the hearing officer has found that Dille accrued 5.8 days of vacation time by the time he was discharged. As he was only paid for one day of that time, he is due 4.8 days worth (\$1,184.85) of unpaid vacation time.

B. *McManus Owes Penalty*

Montana law assesses a penalty when an employer fails to pay wages when they are due. Mont. Code Ann. §39-3-206. 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. Applying this regulation, McManus owes Dille \$651.67 in penalty on his unpaid vacation wages.

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. McManus Owes Dille \$1,184.85 in unpaid wages and \$651.67 in penalty for a total due of \$1,836.52.

VI. ORDER

McManus Construction, Inc, is hereby ORDERED to tender a cashier's check or money order in the amount of \$1,836.52, representing \$1,184.85 in wages and \$651.67 in penalty, made payable to Chris M. Dille 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. McManus, Inc., may deduct applicable withholding from the wage portion but not the penalty portion of the amounts due.

DATED this 12th day of June, 2009

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. § 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.

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.

Dille.FOF.ghp