

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM)	Case No. 2643-2005
OF GORDON A. SCOTT,)	
)	
Claimant,)	FINDINGS OF FACT;
)	CONCLUSIONS OF LAW;
vs.)	AND ORDER
)	
ALL RIGHT CLEANING SYSTEM, INC., a)	
Montana Corporation,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

Gordon Scott filed a wage claim seeking \$117.55 in unpaid wages from All Right Cleaning System, Inc. The Department of Labor and Industry Wage and Hour Unit found that no additional wages were due and dismissed the case. Scott filed an untimely appeal of the decision.

Hearing Examiner Gregory L. Hanchett held a contested case hearing in this matter on December 1, 2005. Scott appeared and represented himself. The employer's representative waived the employer's presence on behalf of the employer and indicated that the employer did not wish to participate in the hearing. Scott presented testimony. Wage and Hour Unit Documents 1 through 17 were admitted into the record at Scott's request. Based on the evidence adduced at the hearing, the following findings of fact, conclusions of law, and recommended decision are made.

II. ISSUES

A. Is there good cause to excuse the untimely filing of the appeal in this matter?

B. If so, is Scott due additional wages as alleged in his complaint and penalty as provided by law?

III. FINDINGS OF FACT

A. *Facts pertinent to the issue of the untimely filing of the appeal.*

1. Scott timely and diligently pursued his claim for unpaid wages by filing a complaint with the Wage and Hour Unit on June 30, 2005.

2. On July 19, 2005, the Wage and Hour Unit issued a decision denying the claim on the basis that Scott had failed to provide documentation that he had in fact been employed by All Right. That notice of appeal specifically advised Scott that he must file either an appeal or request for redetermination no later than August 8, 2005.

3. Scott received the dismissal and intended to act on it in a timely fashion in order to preserve his rights. He inadvertently miscalendared the appeal date as August 12, 2005 instead of August 8, 2005. He filed a request for redetermination on August 12, 2005, supplying additional documentation to substantiate both the fact that he worked for All Right and the dates of that work.

B. *Facts pertinent to the merits of the claim.*

1. Scott agreed to work for All Right at a cleaning job site located at the Shopko in Kalispell, Montana. The parties agreed that Scott would be paid \$7.00 per hour. Mark Campbell served as Scott's immediate supervisor.

2. Scott reported for work at the Shopko site on May 17, 2005. He clocked in at 9:50 p.m. and clocked out at 5:30 a.m., having spent the time cleaning floors.

3. Scott reported for work again on May 18, 2005 and worked from 9:50 p.m. until 5:30 a.m., again cleaning floors.

4. On May 19, 2005, Scott reported for work on yet a third night and worked from 9:45 p.m. until 1:00 a.m. At that point, he decided he could no longer do the work and he quit his employment with All Right.

5. Scott was not paid for his work. He made several inquiries of Campbell as to the whereabouts of his check. Campbell repeatedly informed him that he would be receiving his check shortly.

6. Eventually, Scott inquired directly to the All Cleaning about his pay. He received no response and in July, 2005, filed this claim.

7. Scott worked 7 hours and 30 minutes each day on May 17 and 18, 2005, and a total of 3 hours and 15 minutes on May 19, 2005. At \$7.00 per hour, he earned at least the \$117.55 he seeks in unpaid wages.

IV. DISCUSSION¹

A. Good Cause Exists to Excuse the Untimely Filing of the Appeal.

The applicable administrative rules provide that a request for redetermination or an appeal of a dismissal must be filed within 15 days of the date the determination is mailed. Admin. R. Mont. 24.16.7534; Admin. R. Mont. 24.16.7541. The rules provide a basis to request relief due to an untimely mailing of a decision. The rules do not directly address a situation where a determination is timely received but the appellant, through mere inadvertence, fails to file an appeal in a timely manner.

The Montana Rules of Civil Appellate Procedure contain a provision for excusing an untimely filing of an appeal filed within 30 days after the appeal deadline has expired where a party shows good cause for the late filing. Rule 5 (a) (1), M.R.App. P. While the rule is not directly applicable to wage and hour cases, the case law interpreting this rule provides guidance to the situation that exists in Scott's case. That case law has specifically held that the factors which may be considered in determining whether good cause exists for permitting the filing of a late appeal include "the danger of prejudice, the length of delay and its potential impact on judicial proceedings, the reason for the delay and whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Northwest Truck and Trailer Sales v. Dvorak* (1994), 265 Mont. 327, 334, 877 P.2d 31.

Applying the above factors, it is evident that good cause exists in this matter for permitting the late appeal. The risk of prejudice to Scott is considerable since he has produced documentation that clearly shows that he worked for All Right but was not paid. There is no prejudice to All Right since the employer has expressly abandoned its right to appear and defend in this matter by choosing not to participate in the hearing. The length of the delay is not substantial, a scant 4 days. The reason for the delay was Scott's inadvertence, a simple miscalculation of the due

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.

date for the appeal. It was not due to a lack of desire to pursue his rights in a timely manner. Finally, there is no evidence to show that Scott was not sincere in his desire to appeal his rights timely. Under these circumstances, good cause exists to permit this late appeal. *Northwest Truck and Trailer Sales, supra*.

B. *Scott Is Owed Additional Wages.*

Montana law requires that employers pay wages when due, in accordance with the employment agreement, pursuant to Mont. Code Ann. § 39-3-204. 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. “Wages” are any money due an employee by the employer. Mont. Code Ann. § 39-3-201(6).

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 Srvc. 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 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. It is of no consequence that the employee cannot show with exacting precision the number of hours worked. To require such evidence from an employee would “place a premium on an employer’s failure to keep proper records in conformity with statutory duty,” seriously undermining the strength of the wage protection statutes. *Garsjo* at 189, 562 P.2d at 476, *citing Anderson*, 328 U. S. at 687. This, courts will not do.

Scott has met his burden of proof in this matter to show that he is due additional wages as a matter of just and reasonable inference. He has shown documentation that proves that he signed in and out of the All Right job site on the dates and at the times he alleges. All Right, by choosing not to participate in the

hearing, has done nothing to rebut Scott's evidence. Scott has thus persuaded the finder of fact that All Right Cleaning owes him wages of \$117.50.

C. 55% Penalty Is Due.

Scott makes no claim that this case involves minimum wage or an overtime pay violation. For claims other than minimum wage claims, a penalty equal to 55% of the wages due is mandated by regulation. Admin. R. Mont. 24.16.7566. 55% of the wages due in this matter equates to \$64.63 ($\$117.50 \times .55 = \64.63).

V. CONCLUSIONS OF LAW

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

2. All Right Cleaning owes Gordon A. Scott \$117.50 in additional wages and penalty in the amount of \$64.63.

VI. ORDER

All Right Cleaning Systems, Inc., is hereby ORDERED to tender a cashier's check or money order in the amount of \$182.13, representing \$117.50 in unpaid wages and \$64.63 in penalty, made payable to Gordon A. Scott, 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. All Right Cleaning Systems may withhold appropriate deductions for income taxes and social security on the wage portion but not the penalty portion.

DATED this 15th day of December, 2005.

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.