

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM OF STEVEN D. WALDOR,)	Case No. 292-2009
)	
Claimant,)	FINDINGS OF FACT;
)	CONCLUSIONS OF LAW;
vs.)	AND DECISION
)	AND ORDER GRANTING
STEBNER REAL ESTATE, INC.,)	MOTION TO WITHDRAW
a Washington Corporation registered in)	
Montana, and COPPER MOUNTAIN REAL)	
ESTATE, INC., a Washington Corporation)	
not registered in Montana,)	
)	
Respondents.)	

* * * * *

I. INTRODUCTION

In this matter, Respondents Stebner Real Estate, Inc., and Copper Mountain Real Estate, Inc., (respondents) appeal from a Wage and Hour Unit Determination which found the respondents owed Steven D. Waldor additional wages and penalty. Hearing Officer Gregory L. Hanchett held a contested case hearing in this matter on March 5, 2009. The parties stipulated to holding the hearing by telephone. Waldor represented himself. Ted Hess-Homier, attorney at law, represented the respondents. Waldor, Susie Newman and Mark Newman all testified under oath. The parties stipulated to the admission of ERD documents 1 through 62. Based on the evidence presented at hearing, the hearing officer makes the following findings of fact and conclusions of law.

II. ISSUE

Is Waldor due additional wages as claimed in his complaint and penalties as provided by law?

III. FINDINGS OF FACT:

1. Stebner Real Estate hired Waldor to work at \$10.00 per hour as a handyman at its residential apartment complexes located in Missoula, Montana. Under the terms of his employment agreement, Waldor was to report to work at 8:00 a.m. and remain at work until 5:00 p.m. Each day that he reported to work, he would first report to work at one of the complexes in order to receive his daily instructions on work that was to be completed that day. He would then travel to the complex or complexes where he was assigned and completed his work.

2. Waldor had issues with alcohol throughout the time he worked for Stebner.

3. During the last week of his employment, Waldor was assigned to complete various tasks at two of Stebner's complexes. He turned in time sheets for this week. Documents 50 through 56.

4. The time sheets that Waldor turned into Stebner show that he completed the following hours of work on the following days during his last week of work:

October 25, 2007	8 hours
October 26, 2007	8 hours
October 29, 2007	8 hours
October 30, 2007	8 hours
October 31, 2007	8 hours
November 1, 2007	8 hours
November 2, 2007	8 hours

5. The time sheets indicate specifically each job that Waldor completed and the location where he completed it. Waldor worked the hours he claimed to have worked in the time sheets.

6. At hearing, Waldor presented evidence that he had not been paid for 48 hours of work between October 25, 2007 and November 2, 2007. The hearing officer finds that as a matter of fact Waldor was not paid for 48 hours of work during this time period. At \$10.00 per hour, Waldor is owed \$480.00 in unpaid wages ($\$10.00 \text{ per hour} \times 48 \text{ hours} = \480.00).

7. On November 2, 2007, Waldor was discharged from his employment for drinking liquor on the job.

8. Because he was occasionally under the influence of alcohol while on the job, Waldor's work was in some instances not workmanlike. However, even though his work was poor, it is clear that he worked the hours that he claimed to have worked and was not paid for 48 of those hours.

9. Penalty on the amount owed is \$528.00 (\$480.00 x 110%=\$528.00).

IV. DISCUSSION¹

A. *Stebner Owes Waldor Additional Wages*

Waldor bears the burden of persuading the fact finder that he is due additional wages which have not been paid to him. *Berry v. KRTV Communications* (1993), 262 Mont. 415, 426, 865 P.2d 1104, 1112. See also, *Marias Health Care Services 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 the plaintiff 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 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 v. Department of Labor and Industry* (1977), 172 Mont. 182, 562 P.2d 473, 477. To meet his initial 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 v. Mt. Clemens Pottery Co.* (1946), 328 U.S. 680, and *Purcell v. Keegan* (1960), 359 Mich. 571, 103 N.W. 2d 494, 497.

Waldor has met his burden in this case through the time sheets that he submitted. Waldor's testimony is credible. His testimony that he was not impaired by alcohol (except for the last day when he was fired) is credible. And on the last day when he was drinking on the job in the apartment he was nonetheless doing work even though his impaired condition resulted in his completing substandard work.

In support of their case, the respondents have presented the testimony of on-site property managers. The property managers simply were not in a position to know at all times what Waldor did. There is no evidence that they were in a position to observe him at anytime except just minutes before he was fired on his last day of work. Their testimony relies completely on inference. When compared to Waldor's credible testimony, the testimony of the respondents' witnesses is not persuasive. Waldor has therefore persuaded the hearing officer by a preponderance of the evidence he was not paid for 48 hours of the work he completed.

At the time for hearing, counsel for the respondents (whom the employer had only employed a few days before the hearing) broached for the first time before this tribunal the issue

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.

of whether or not Waldor's claim was timely filed. The hearing officer invited the respondents to brief the issue of the timeliness of Waldor's claim and invited the parties if they so desired to testify regarding the facts that surrounded the alleged untimely filing of the claim. The only testimony proffered by the parties was Waldor's indication that his first opportunity to file his complaint was in 2007 after he was released from prison. There was no testimony presented by the respondents on the timeliness of the complaint. In addition, the respondents effectively precluded their attorney from filing a post hearing brief as directed by this tribunal because the respondents, shortly after the hearing, fired their attorney.²

The determination at the Wage and Hour Unit was that the respondents had waived the issue of untimeliness by failing to raise it in their initial response to Waldor's complaint. While the hearing officer does not agree with the analysis of the Wage and Hour Unit, he has no basis upon which to find that Waldor's claim was untimely. That is because the respondents provided no evidence regarding the timeliness of the filing of the complaint and rejected the hearing officer's invitation to brief the issue. It is the respondents' burden to timely plead at some point in the proceeding and to prove the affirmative defense that a wage claim was not timely filed. *Marias Health Care Services, supra*, ¶9. The respondents, despite being given ample opportunity to do so, did not avail themselves of the opportunity to prove the affirmative defense of the untimeliness of the complaint. The respondents did not even attempt to plead the defense until the time of the hearing, obviously catching the pro se claimant off guard and precluding Waldor from presenting any meaningful response to the defense. Under these circumstances, Waldor's claim cannot be precluded on the basis of untimeliness.³

B. *Stebner Owes Penalty on the Unpaid Hourly Wages.*

The administrative rules applicable to wage and hour cases require imposition of a penalty when wages are found to be due and unpaid. When an employer has previously violated the Montana Wage and Hour Act, the employer must pay a 110% penalty. Admin. R. Mont. 24.16.7566. The respondents have never disputed that they had previously violated the Montana Wage and Hour Act as found by the Wage and Hour Unit. Therefore, the respondents owe Waldor a 110% penalty in the amount noted in Finding of Fact Number 9.

V. ORDER

² On March 10, 2009, just two days before respondents' counsel was to provide notification to this tribunal as to whether or not he would be filing a post hearing brief on the issue of timeliness of Waldor's claim, respondents' counsel filed a motion to withdraw as counsel because his clients had fired him. Respondents have not disputed counsel's assertion though given ample opportunity to do so.

³The fault for respondents' untimely assertion regarding Waldor's claim lies with the respondents, not respondents' counsel. Despite being advised almost two months before the hearing the need to retain counsel (see this hearing officer's scheduling notice dated January 6, 2009), the respondents failed to do so until February 24, 2009, just 8 days before hearing. By this time, there was no way that counsel could reasonably have been expected to have timely raised the issue of the timeliness of Waldor's claim.

Stebner Real Estate, Inc., is hereby ORDERED to tender a cashier's check or money order in the amount of \$1,008.00, representing \$480.00 in unpaid wages and \$528.00 in penalty, made payable to Steven Waldor, 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. Stebner Real Estate, Inc., may deduct applicable withholding from the wage portion but not the penalty portion of the amounts due.

It is further ordered that Mr. Hess-Homier's motion to withdraw is granted. For this reason, a copy of this decision is being forwarded to both Mr. Hess-Homier and the Respondents.

DATED this 20th day of March, 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.