

STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
HEARINGS BUREAU

IN THE MATTER CONCERNING THE	)	Case No. 5-2013
PREVAILING WAGE CLAIM INVOLVING	)	
THE DEPARTMENT OF LABOR AND	)	
INDUSTRY AND BRENT P. JELLE,	)	
	)	
Claimant,	)	<b>FINAL AGENCY DECISION</b>
vs.	)	
	)	
ROBERT H. ROBBENNOLT, JR.	)	
d/b/a SCISSOR HANDS LAWN SERVICE,	)	
	)	
Respondent.	)	

\* \* \* \* \*

**I. INTRODUCTION**

Claimant Brent Jelle appealed the finding of the Wage and Hour Unit regarding the prevailing wage audit of Robert Robbenolt d/b/a Scissor Hands Lawn Service. As a result of the audit, the Wage and Hour Unit issued a determination finding that Robbenolt had failed to pay the prevailing wage for eight days during 2010 and 2011. The determination ordered payment of additional wages, penalty, and forfeiture of \$25.00 per day for each day that the violations occurred.

Hearing Officer Gregory L. Hanchett held a contested case hearing in this matter on September 13, 2013 in Billings, Montana. Jelle represented himself. William Gilbert, attorney at law, appeared on behalf of Robbenolt. Joe Nevin, agency legal counsel, appeared on behalf of the Department of Labor and Industry. Jelle, Randy Siemers, Wage and Hour Investigator, Kevin Bathlama, and Robbenolt all testified under oath. ERD Documents 1- 208, Claimant's Documents B, C, E, and H, and Respondent's Documents 51, 52, and 53 were admitted into the record. Based on the evidence and argument adduced at hearing, the hearing officer makes the following findings of fact, conclusions of law, and final agency decision.

## II. ISSUES

1. Is Jelle's claim regarding overtime wages which he apparently seeks under the Montana Wage and Hour Act (Title 39, Chapter 3) barred by the statute of limitations?

2. Is Jelle due additional prevailing wages under Title 18, Chapter 2, Part 4 as he claims in his complaint?

## III. FINDINGS OF FACT

1. Robbenolt employed Jelle prior to August 2010 to help Robbenolt in various remodeling projects that Robbenolt was undertaking. Beginning in August 2010, Robbenolt, d/b/a Scissor Hands Lawn Service, employed Jelle as a landscaping and grounds keeping worker on various residential projects (non-prevailing wage projects) and two prevailing wage projects subject to prevailing wage contracts. Robbenolt paid Jelle by check when Jelle worked for him as a landscaping and grounds keeping worker. Jelle's last day worked during the 2011 work season was November 4, 2011.

2. Robbenolt purchased a bike, spraying equipment, and marijuana production materials from Jelle in July 2010. Robbenolt paid for these purchases by check.

3. The prevailing wage contracts were located at the Montana State University-Billings College of Technology (COT) and the Montana State University-Billings main campus (MSU-B). During 2010, the prevailing wage contract provided that Scissor Hands Lawn Service would provide services to MSU-B to provide lawn maintenance and watering between March and November 2010. For 2011, the contract indicated that Scissor Hands would provide the same services as mentioned above between March 2011 and November 2011. ERD Documents 202, 204.

4. The parties do not dispute that for the year 2010 the prevailing base wage and fringe benefit for a non-construction services landscaping and grounds keeping worker position in the Billings area (District 8) was \$16.25 per hour. Also, the parties do not dispute that for that position in District 8 in 2011 the prevailing base wage and fringe benefit was \$16.95 per hour. *See also*, ERD Documents 155 through 158.

5. It takes two people approximately 10 hours (a total of 20 man hours) to complete all the work necessary on a weekly basis to fulfill both contracts at MSU-B and at COT. With a few exceptions (a few weekdays during 2010 and 2011), Jelle worked at the two prevailing wage contract locations on Saturdays and/or Sundays only. During the rest of the week, he worked on the non-prevailing wage projects. Jelle was paid \$12.00 per hour on non-prevailing wage jobs.

6. The employer maintained written ledgers for Jelle's work (Documents 122 and 123) and time cards for his prevailing wage work (Documents 51 to 82). While not a model of record keeping, those records for the most part substantiate the employer's claim regarding the number of hours that Jelle worked on the prevailing wage contracts.

7. The Komen "Impact One" document shows that between October 25, 2011 and November 4, 2011, Jelle worked 20 hours on the prevailing wage contracts over three days but received only \$12.00 per hour. He should have received \$16.95 per hour for those hours. This document, along with the department spread sheets (Documents 149-152), show that Jelle is due \$289.26 in unpaid prevailing wages.

8. The employer improperly banked non-prevailing overtime hours that Jelle earned. The last week for which Jelle accumulated non-prevailing wage overtime hours for which he was not paid was August 14 through 20, 2011.

9. Jelle filed his complaint with the Wage and Hour Unit on July 2, 2012. In that complaint, he alleged that during 2010 and 2011, he was not paid properly for overtime work on non-prevailing wage contracts and that he was not paid in accordance with prevailing wage requirements on the two prevailing wage contracts. Jelle did not file his wage claim until after his employment with Robbenolt had ended.

10. On November 29, 2012, the Wage and Hour Unit issued its determination finding that Jelle was owed \$289.26 in unpaid prevailing wages, \$200.00 in per diem penalty for eight days for which Jelle was not paid the prevailing wage, \$57.84 representing 20% penalty on the amount of prevailing wages found to be due and owing, and \$564.49 in audit costs. On December 12, 2012, the respondent paid the entire sum found to be due and owing less appropriate tax withholding on the wage portion only.

11. Twenty percent of the unpaid prevailing wages equates to \$57.84 ( $\$289.26 \times .2 = \$57.84$ ).

12. Eight days of underpayment of prevailing wage at \$25.00 per day equates to \$200.00 total per diem penalty (8 days x \$25.00 = \$200.00).

13. The department properly assessed audit costs in the amount of \$564.49.

#### **IV. DISCUSSION**

Jelle's claim appears to contain both a non-prevailing wage component and a prevailing wage component. Jelle contends that he is due additional non-prevailing wage overtime pay under Title 39 because his employer improperly banked overtime hours and then paid those hours as regular hours during those weeks where Jelle worked less than 40 hours. Jelle complaint, Document 179.

Jelle also contends that he is due several thousand dollars in unpaid prevailing wages. With respect to that claim, the parties do not dispute that the MSU-B and COT contracts were subject to prevailing wage rates at the hourly amounts discussed in the findings of fact. Their dispute effectively centers on the number of hours which Jelle worked on those contracts during 2010 and 2011. Jelle contends that during 2010 and 2011, Robbenolt paid him only \$12.00 per hour for each hour he worked on a prevailing wage contract. He contends that during 2010 he worked on the prevailing wage contracts for a total of 517.26 hours. He argues that during 2011, he worked on the prevailing wage projects for a total of 619.86 hours. He arrives at the number of hours he worked by taking the total dollar amounts that he was paid in each year, dividing that number by 12 (the hourly dollar amount he contends he was paid for all work during 2010 and 2011) to determine his total hours worked, and then divides that number by two to arrive at the number of hours he spent working on the prevailing wage projects (figuring that he spent one half of his time each week working on the prevailing wage contracts and one half of his time working on the non-prevailing wage (residential) projects). See Jelle's final contentions, filed August 23, 2013, claiming he is owed \$16,570.65 in unpaid prevailing wages, penalty, and 99 hours of overtime.

The respondent contends that he paid Jelle correctly under the prevailing wage contracts and that he paid Jelle \$12.00 per hour on the non-prevailing wage contracts. He agrees that in some instances he failed to pay overtime on the non-prevailing wage portion of the claim but argues that those claims are barred by the expiration of the statute of limitations.

The claims investigator determined that Jelle had demonstrated that he was owed \$289.26 in prevailing wages as well as applicable penalties. The investigator

determined that Jelle's overtime claim brought under Title 39, Chapter 3 was barred under the applicable statute of limitations. Having carefully reviewed the evidence in this matter, the hearing officer finds that Jelle's claim, to the extent it is brought under Title 39, is barred because it was not filed within 180 days of the default in payment. The hearing officer also finds that Jelle has proven only that he is owed \$289.26 in unpaid prevailing wages.

*A. Jelle's Title 39 Claim For Overtime Wages Is Barred.*

Jelle's complaint appears to argue that he is owed overtime on non-prevailing wage hours that he worked during 2010 and 2011. He argues that the employer improperly used those overtime hours to average out other weeks where Jelle worked less than 40 hours in order to avoid paying overtime rates on those hours. Robbenolt contends that Jelle's claim with regard to those non-prevailing wage overtime hours is time barred.<sup>1</sup>

The Wage and Hour investigator determined that Jelle was not paid for overtime hours worked on the non-prevailing wage portion of Jelle's claim (in fact, the employer conceded as much, see Document 94), but found that the non-prevailing wage claim was barred by the statute of limitations. From the ERD documentation, it appears that the last work week on which overtime on the non-prevailing wage portion of the claim was unpaid was August 14 through 20, 2011. Jelle has presented no other evidence to suggest that Robbenolt failed to pay overtime after that date. During the proceeding before the Hearings Bureau, Jelle did not articulate how his non-prevailing wage claim survived the statute of limitations. Moreover, he did not dispute that he left his employment with Scissor Hands prior to the filing of his complaint.

Mont. Code Ann § 39-3-207 provides:

(1) An employee may recover all wages and penalties provided for the violation of 39-3-206 by filing a complaint within 180 days of default or delay in the payment of wages.

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<sup>1</sup>Robbenolt also argued in a pretrial motion that Jelle's prevailing claim was time barred by the statute of limitations contained in Mont. Code Ann. § 39-3-207. *See*, Robbenolt's Motion to Dismiss, Introduction. That motion was denied for the reasons stated in this tribunal's August 9, 2013 order denying the motion.

Here, Jelle did not file his claim regarding his non-prevailing wage overtime until July 2, 2012, more than 11 months after the last date when non-prevailing overtime wages were not paid (August 20, 2011). Jelle failed to file his claim for non-prevailing wage hours within the 180 day time limit of Mont. Code Ann § 39-3-207. His claim to non-prevailing wage overtime is barred by the statute of limitations.

*B. Jelle Is Owed \$289.26 In Unpaid Prevailing Wages.*

Pursuant to Mont. Code Ann. § 18-2-403(4)(b), an employer must pay employees the prevailing wage rate, which includes fringe benefits for health, welfare and pension contributions, for all public works contracts for non-construction projects. An employer may meet wage and fringe benefit requirements by paying the employee an amount in hourly wages that equals to the combined value of prevailing wage amount and required fringe benefits. Admin. R. Mont. 24.17.321(3). 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. *See also*, Admin. R. Mont. 24.17.621.

Jelle bears the burden of proof in this matter to show by a preponderance of the evidence that he is entitled to the additional wages he claims to be due. *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). 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." *Garsjo v. Department of Labor and Industry* (1977), 172 Mont. 182, 189, 562 P.2d 473 at 476-77, *citing Anderson v. Mt. Clemens Pottery Co.* (1946), 328 U.S. 680 at 687, and *Purcell v. Keegan* (1960), 359 Mich. 571, 103 N.W. 2d 494, 497.

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*, *supra*, 359 Mich. at 576, 103 N.W. 2d at 497.

Jelle's testimony on the additional hours he claims to have worked and his methodology of deducing the hours he worked is not sufficiently credible to meet his initial burden of proof. Jelle attempts to meet his initial burden by asserting that he worked three days per week on the prevailing wage contracts and three days per week on the non-prevailing contracts. However, he apparently has no recollection of the actual hours he spent on the prevailing wage projects but rather he deduces those numbers from the amount of his annual gross pay. From this, he deduces that he spent one half his time working on prevailing wage projects and from that he deduces the number of hours of work for which he was underpaid on the prevailing wage projects and concludes that he was underpaid for 200 days of prevailing wage work. Jelle's testimony and methodology of deducing the number of hours he was underpaid do not persuade the hearing officer that he has met his initial burden of proof.

Even assuming, however, that Jelle's methodology of proving the number of hours worked is sufficient to meet his initial burden of proof, the employer has come forward with records of both logs and time sheets to demonstrate that Jelle was in fact paid prevailing wages for the hours he worked on the prevailing wage projects. The logs and time sheets, taken in conjunction with Robbenolt's testimony that the entirety of the prevailing wage contracts could be accomplished in ten hours each week, convinces the hearing officer that Jelle is not due the number of hours he claims to be due in underpaid prevailing wage work. This is because Robbenolt's testimony regarding the number of hours spent on the prevailing wage contracts each week is corroborated in the time sheets that track the prevailing wage work that Jelle did.

In an effort to corroborate his claim, Jelle argues that he began working for Robbenolt on the prevailing wage contracts in March or April 2010. He contends that this is corroborated by the fact that Robbenolt wrote him checks starting as early as March 2010. Robbenolt contends that these checks were payment to Jelle for purchases of a bike, a sprayer, and grow equipment. The evidence regarding whether those checks were written for purchases or as payments for work is inconclusive. It is just as likely that the checks were indeed written for purchases (Jelle conceded that around this time he was working on Robbenolt's house for cash payments) as they were to pay Jelle for work. Because this evidence is inconclusive, it cannot be said to corroborate Jelle's claim for additional prevailing wages.

Jelle has also attacked the respondent's documentation and case by asserting in no uncertain terms that Robbenolt has fabricated both his testimony and his

documents. The hearing officer is not persuaded that the respondent fabricated any of the documents nor does he believe that Robbenolt lied.

However, as found by the Wage and Hour investigator, Jelle is due \$289.26 in underpaid prevailing wages. The hearing officer does not rely on Jelle's testimony in finding these wages to be owed but relies on the documentation in the case to reach this conclusion. The Komen document demonstrates that during the time period of October 25 to November 4, 2011, Jelle was underpaid on three days of prevailing wage work. The wage compilation spread sheets of the wage investigator (Documents 149 through 152) and the employer's logs and time sheets also support a finding that Jelle was underpaid on prevailing wages in the amount described above.<sup>2</sup>

### *C. Penalty And Cost Imposition On The Prevailing Wage Claim.*

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 . . . ." Twenty percent of the unpaid prevailing wages due in this case equates to \$57.84.

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. Jelle was underpaid for eight days. Robbenolt owes a forfeiture amount to Jelle of \$200.00.

Finally, Mont. Code Ann. § 18-2-407 requires that an employer who has underpaid prevailing wages shall pay audit fees to the department. The department's audit fees incurred here in the amount of \$564.49 are appropriate and Scissor Hands must pay them.

## **V. CONCLUSIONS OF LAW**

1. To the extent that Jelle seeks unpaid overtime wages on non-prevailing overtime hours that were improperly banked and then averaged by his employer, his claim is time barred. Mont. Code Ann § 39-3-207.

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<sup>2</sup>Jelle's arguments attempting to support his case and attacking the respondent's case in chief were often so cryptic that it was difficult if not impossible for the hearing officer to follow them.

2. Robert Robbenolt d/b/a Scissor Hands Lawn Service failed to pay Jelle \$289.26 earned and owing in prevailing wages.

3. Pursuant to Mont. Code. Ann. § 18-2-407 and Admin. R. Mont. 24.17.851, Robert Robbenolt d/b/a Scissor Hands Lawn Service owes a penalty in the amount of \$57.84.

4. Pursuant to Mont. Code. Ann. § 18-2-407, Robert Robbenolt d/b/a Scissor Hands Lawn Service owes \$25.00 per day forfeiture to Jelle, for eight days, in the amount of \$200.00.

5. Pursuant to Mont. Code. Ann. § 18-2-407, Robert Robbenolt d/b/a Scissor Hands Lawn Service must pay audit costs in the amount of \$564.49.

## VI. ORDER

Pursuant to the decision of the Wage and Hour Unit dated December 7, 2012, Robert Robbenolt d/b/a Scissor Hands Lawn Service has already paid into the Wage and Hour trust fund all amounts due. As no further amounts have been found to be due to the claimant, the Wage and Hour Unit shall release to Jelle the amounts held in trust for him (\$289.26 in unpaid prevailing wages, less properly withheld taxes, \$200.00 per diem penalty, and \$57.84 in penalty) when this order becomes final.

DATED this 10th day of October, 2013.

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 Admin. R. Mont. 24.17.847(2), 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.