

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM) Case No. 616-2013
OF ROBERT A. CISAR,)

Claimant,)

vs.)

FINAL AGENCY DECISION

SPECIALTY FLOORS NORTHWEST, LLC,)
a Washington limited liability company not)
registered with the Montana Secretary of)
State,)

Respondent.)

* * * * *

I. INTRODUCTION

On October 19, 2012, Robert Cisar filed a claim with the wage and hour unit of the Department of Labor and Industry alleging the respondent, Specialty Floors Northwest, owed him \$2,392.50 in unpaid wages. Specialty Floors Northwest failed to timely respond to Cisar's claim.

On November 14, 2012, the Wage and Hour Unit determined Cisar was owed \$2,392.50 in unpaid wages. A penalty of 110% was also imposed based upon the respondent's failure to respond. The respondent filed a timely request for redetermination.

On December 27, 2012, the Wage and Hour Unit issued a redetermination finding Cisar was owed \$106.25 due to an error in the employer's records regarding the number of hours Cisar worked during the period in question. A penalty of 15% was also imposed on the amount found to be owed to Cisar, for a total of \$122.19. Cisar filed a timely appeal seeking a contested case hearing.

On January 17, 2013, the employer submitted a check to the Wage and Hour Unit in the amount of \$107.06, which covered the amount found to be owed to Cisar, less any applicable withholdings, and the 15% penalty imposed by the Wage and Hour Unit in the November 14, 2012 redetermination.

Following mediation efforts, the Wage and Hour Unit transferred the case to the Department's Hearings Bureau on March 4, 2013. On March 8, 2013, the Hearings Bureau issued a Notice of Hearing and Telephone Conference. Following a scheduling conference on March 21, 2013, the matter was set for hearing on May 13, 2013. The parties agreed to proceed by telephone.

Hearing Officer Caroline A. Holien conducted a hearing on May 13, 2013. Claimant Robert Cisar appeared on his own behalf. Cisar and David Kilborn, Assistant Store Manager of Dillard's in Billings, Montana, presented sworn testimony. Cisar declined to call one of his listed witnesses. The Hearing Officer attempted to call Tony Chintholl, Nathan Napolitano, Eric Bello, and Uric Bello several times during the hearing and was unable to reach any one of the witnesses. Cisar had been advised at a previous pre-hearing conference that he was responsible for contacting his witnesses and making them available for hearing. At no time did Cisar request subpoenas for his witnesses, although he had ample opportunity to do so after the initial scheduling conference on March 21, 2013. Cisar requested the hearing be rescheduled so he could have time to contact his witnesses. Given that Cisar had approximately two months to contact his witnesses after the initial scheduling conference and before the time of hearing and apparently failed to do so, the Hearing Officer denied his request to reschedule the hearing.

Owner David Ward and his son, Alan Ward, also presented sworn testimony. Attorney Ross Cannon represented the respondent.

The administrative record compiled at the Wage and Hour Unit (Documents 1 through 69) was admitted into the record. Respondent's Exhibits 1 through 21 were admitted. The claimant offered a compact disc containing pictures of his work at the Dillard's store as an exhibit for hearing. The claimant had been previously told at the final pre-hearing conference that he was required to provide a copy of the disc to the employer prior to hearing if he wished to have the disc admitted. Cisar indicated he understood that requirement and would attempt to provide a copy of the disc to the employer. Cisar failed to provide a copy of the disc to the employer as directed. As such, the disc itself was not admitted.

The parties declined to file post-hearing briefs. The case was deemed submitted at the end of the administrative hearing.

II. ISSUE

Whether Specialty Floors Northwest, LLC, owes wages for work performed, as alleged in the complaint filed by Robert A. Cisar, and owes penalties or liquidated damages, as provided by law.

III. FINDINGS OF FACT

1. Specialty Floors Northwest, LLC (Specialty Floors) employed Robert A. Cisar as a project manager and lead installer beginning on or about April 10, 2012. Specialty Floors is a flooring installation company that serves the Northwest, including Montana.

2. Specialty Floors initially paid Cisar an hourly rate of \$30.00. Cisar was paid \$30.00 an hour through the pay period ending August 19, 2012. Owner David Ward reduced Cisar's hourly rate to \$25.00 beginning the pay period ending August 26, 2012 through the end of Cisar's employment on September 20, 2012. Specialty Floors' pay period is Monday through Sunday.

3. On August 21, 2012, Owner David Ward was notified by the Project Coordinator that Cisar had damaged a customer's wall during the installation process. Cisar had not reported damaging the wall to David Ward. David Ward called Cisar after speaking with the Project Coordinator and asked about the damage. Cisar denied damaging the wall. David Ward then called another employee on the project, who confirmed Cisar was responsible for damaging the wall. David Ward called Cisar and informed him that he was being discharged. David Ward subsequently sent Cisar an email that stated, "Please return my sander and edger and I will make sure to get your tile tools and final check here for pick up."

4. Cisar sent David Ward an email in reply asking him to reconsider his decision. David Ward and Cisar then spoke by telephone. David Ward told Cisar that he had another project lined up at the Dillard's store in Billings, Montana. David Ward told Cisar that he could return to work but he would not be hired back as a Project Leader. David Ward told Cisar that his hourly wage would be reduced from \$30.00 to \$25.00. David Ward told Cisar that he was responsible for his own travel expenses and the employer would pay for his room and board while he worked on the project. Cisar agreed. Cisar understood that he would be responsible for paying his travel expenses to and from the job site in Billings and that he would only be paid \$25.00 per hour. David Ward subsequently agreed to give Cisar money in advance of the trip as draws on his future income. On September 10, 2012, David Ward gave Cisar two checks totaling \$1,100.00. On September 17, 2012, David Ward gave Cisar one check in the amount of \$800.00. There was no written employment agreement covering the changes in the terms of Cisar's employment.

5. On August 31, 2012, Specialty Floors issued Cisar's first payroll check with the hourly rate of \$25.00 for work performed on a project in Washington. Cisar did not complain to David Ward about the rate of pay and accepted the check as payment for the eight hours of work he performed.

6. Cisar worked the following hours at the Dillard's job in Billings:

September 10, 2012	8 hours
September 11, 2012	12 hours
September 12, 2012	9.5 hours
September 13, 2012	17.5 hours
September 14, 2012	7 hours
September 15, 2012	13 hours
September 16, 2012	9 hours
TOTAL:	40 regular hours 36 overtime hours
September 17, 2012	9.5 hours
September 19, 2012	11 hours
September 20, 2012	11 hours
TOTAL:	31.5 regular hours

7. On September 17, 2012, David Ward sent his son, Alan Ward, to the Dillard's job site, after receiving complaints about the progress of the job and Cisar's performance. Cisar did not work on September 18, 2012. During this period, Alan Ward reported to his father various difficulties other workers had encountered on the job. Alan Ward also reported to his father that he had concerns about Cisar's performance.

8. On September 20, 2012, David Ward notified Cisar that he was being discharged effective immediately.

9. On September 21, 2012, Alan Ward gave Cisar his payroll check for the pay period of September 10, 2012 through September 16, 2012. The check was for 40 hours of work at an hourly wage of \$25.00 and 27 hours of overtime at an hourly wage of \$37.50. The employer erroneously failed to include nine hours of overtime Cisar had worked during this period. The check was for a gross amount of \$2,642.50. The applicable withholdings were made and \$1,100.00 for the draws issued to Cisar were also deducted from the gross amount. Cisar received a check in the net amount of \$1,284.64.

10. On September 27, 2012, Specialty Floors issued Cisar a payroll check for the pay period of September 17, 2012 through September 23, 2012. Cisar was paid for 40 regular hours of work at an hourly wage of \$25.00 and .30 overtime hours at an hourly wage of \$37.50 for a gross amount of \$1,018.75. The applicable

withholdings were made and \$800.00 for the draws issued to Cisar were also deducted from the gross amount. Cisar received a check in the net amount of \$629.75.

11. Specialty Floors owed Cisar \$2,350.00 for work performed during the week ending September 16, 2012. This accounts for 40 hours of work at Cisar's regular hourly wage of \$25.00 (40 hours x \$25.00 = \$1,000.00) and 36 hours of work at Cisar's overtime wage of \$37.50 (36 hours x \$37.50 = \$1,350.00). Specialty Floors owed Cisar \$787.50 for work performed during the week ending September 23, 2012. This accounts for 31.50 hours of work paid at Cisar's regular hourly wage of \$25.00 (31.50 x \$25.00 = \$787.50).

IV. DISCUSSION¹

Cisar argued he was owed \$30.00 an hour for work performed on the Dillard's project in Billings from September 10, 2012 through September 20, 2012. Cisar also argued that he was owed additional compensation for travel expenses. This tribunal, as previously noted in the Order Denying Summary Judgment, lacks jurisdiction over claims for expense reimbursement, as those expenses are not considered recoverable under the wage and hour statutes. *Johnson v. K & T Manufacturing, Inc.* (1981), 191 Mont. 458, 652 P.2d 66. Accordingly, the Department cannot award Cisar any travel reimbursement in this proceeding. The only issue left to be addressed is whether Cisar is owed additional compensation for work performed at the Dillard's project.

A. Cisar's Hourly Wage

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.” An employer and an employee are free to enter into their own employment agreement so long as the employee's regular rate of pay is equal to or greater than the applicable minimum wage under Admin. R. Mont. 24.16.2512(2)(e)(i).

It is undisputed that there is no written employment agreement. This case boils down to what the employment agreement was. Cisar argued he never agreed to work for \$25.00 an hour. David Ward testified that both the parties agreed that Cisar's hourly wage would be reduced from \$30.00 to \$25.00.

¹ 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.

Cisar denied ever being discharged by David Ward and then re-hired at an hourly rate of \$25.00. Cisar argued that he understood, based upon his training and years of experience, that Specialty Floors would continue to pay his hourly wage of \$30.00 during the Dillard's project even though he was not working as a project leader or lead installer.

David Ward testified he discharged Cisar in an email dated August 21, 2012. David Ward testified he then spoke with Cisar by telephone and agreed to re-hire him as an installer at an hourly wage of \$25.00. David Ward testified he had concerns about Cisar's performance and did not trust him to work as a project leader or lead installer. David Ward testified Cisar had agreed to work for \$25.00 an hour and did so on a project in Washington in late August 2012.

While the quality of Cisar's work is not at issue in this proceeding, David Ward's testimony as to what he communicated to Cisar regarding his reduced hourly wage is deemed credible. David Ward's testimony was clear, direct, and more detailed than Cisar's testimony. Further, Cisar's attempt to argue that the email dated August 21, 2012, in which David Ward indicates he will have Cisar's final pay check available, did not show he was discharged is not persuasive. A reasonable, average person in Cisar's position would understand that he had been discharged given the comments about returning tools and having the employee's final check made available for him to pick up. Further, given Cisar returned to work for Specialty Floors a short time later at an hourly wage of \$25.00, David Ward's testimony describes a more likely series of events and is deemed more credible than the evidence presented by Cisar.

The evidence shows Cisar agreed to work at the reduced hourly wage of \$25.00. The agreed upon hourly rate was greater than the applicable minimum wage. Therefore, Cisar's regular rate of pay is determined to have been \$25.00.

B. *Amount Owed to Cisar*

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.

Neither party disputed the accuracy of the Field Work Authorization Forms submitted by the employer, which showed how many hours Cisar worked on the Dillard’s project. The evidence shows Cisar worked 76 hours during the pay period beginning September 10, 2012 through September 16, 2012. Cisar was owed \$1,000 for the 40 hours of work performed at his regular hourly rate of pay of \$25.00 (40 hours x \$25.00). Cisar also performed 36 hours of work at an overtime wage of \$37.50 (\$25.00 x 1.5). Cisar was owed \$1,350 for 36 hours of work performed at his overtime rate of \$37.50 (36 hours x \$37.50), for a total of \$2,350.00.

On September 21, 2012, Specialty Floors issued Cisar a payroll check in the gross amount of \$2,642.00 for the payroll period of September 10, 2012 through September 16, 2012. Specialty Floors properly withheld \$1,100 for draws paid to Cisar prior to his traveling to Billings, as per their agreement. Specialty Floors mistakenly accorded nine hours of overtime pay earned during that pay period to the check issued for the following pay period.

The evidence shows Cisar worked 31.5 hours at his regular rate of pay of \$25.00 during the pay period beginning September 17, 2012 through September 23, 2012. Therefore, Cisar was owed \$787.50 for work performed during that period (31.5 hours x \$25.00). On September 27, 2012, Specialty Floors issued Cisar a payroll check in the gross amount of \$1,018.75 based upon 40 hours of work paid at the hourly wage of \$25.00 and .30 hours paid at the overtime wage of \$37.50. Specialty Floors properly withheld \$800.00 for draws paid to Cisar to cover his travel expenses to Billings, as per their agreement.

The evidence shows Cisar was owed a total of \$3,137.50 for all work performed from September 10, 2012 through September 23, 2012 (\$2,350.00 + \$787.50). The evidence also shows Cisar was actually paid \$3,031.25 in wages for that same period. Therefore, Specialty Floors owes Cisar \$106.25 (\$3,137.50 wages earned - \$3,031.25 wages actually paid).

C. Penalty on Amount Owed

Montana law assesses a penalty when an employer fails to pay wages when they are due. Mont. Code Ann. § 39-3-206. The evidence shows Specialty Floors submitted a check in the amount of \$107.06, which included a penalty of 15%, to the Wage and Hour Unit on January 17, 2013. Therefore, it is determined that Specialty Floors owes no additional compensation to Cisar.

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. Cisar has not shown that he is owed additional wages for work performed in Montana from September 10, 2012 through September 20, 2012.

VI. ORDER

Based upon the foregoing, the claim of Robert A. Cisar for additional wages for work performed from September 10, 2012 through September 20, 2012 is dismissed.

DATED this 11th day of June, 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.