

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

IN THE MATTER OF THE WAGE CLAIM)	Case No. 788-2010
OF OLIVER W. ARLINGTON,)	
)	
Claimant,)	
)	2015 REMAND:
vs.)	FINAL AGENCY DECISION
)	
MILLER'S TRUCKING, INC., a Montana)	
Corporation,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

Oliver Arlington worked for Miller's Trucking, Inc. as a log truck driver and loader operator from September 2008 through August 2009, delivering logs entirely within Montana in a Miller's truck, and maintaining one or more of Miller's trucks, performing routine maintenance and safety checks on the trucks. Arlington's employment with Miller's stemmed from an oral agreement between Arlington and Miller's owner, Tony Miller. Miller's paid Arlington 25% of the "load rate." Arlington filed a complaint with the Department's Wage and Hour Unit, asserting that Tony Miller had agreed that Miller's Trucking would pay ("guaranteed") \$60,000.00 annually for Arlington to work 40-hour work weeks, and that Arlington was also entitled to overtime pay for hours more than 40 per week. Miller's denied any guarantee, denied any overtime entitlement, and asserted that it had properly paid 25% of the load rate due Arlington, who had actually received more than all of the compensation to which he was entitled.

The Department's Wage and Hour Unit, the Office of Administrative Hearings, and the District Court on judicial review all found in favor of Miller's and against Arlington. On appeal, the Montana Supreme Court reversed and remanded for further Office of Administrative Hearings proceedings on two issues, with some additional evidence. On that first remand, the Office of Administrative Hearings (formerly the Hearings Bureau), with the undersigned Hearing Officer still presiding, found that Arlington's failure to provide his hours to Miller's as requested prevented Miller's from keeping records of his time worked and that Arlington's records of the

hours he worked were not credible. The District Court affirmed. On Arlington's second appeal, the Montana Supreme Court again reversed and, providing extensive analysis to guide the Hearing Officer on how to correct his errors, remanded for proceedings consistent with that order. *Arlington v. Miller's Trucking, Inc.*, ¶¶28, 37, 2015 MT 68, 378 Mont. 324, 343 P.3d 1222 [hereafter "Arlington II"].

The contested case hearing was held November 18, 2010. Exhibit Nos. 9-10, 20-49, 51, 78, 103, 106, 111, 118-158, 168-69, 178-79, 194, and 425-523 were admitted into evidence. The first remand hearing was held February 13, 2013. In addition to the exhibits already in evidence, Exhibit Nos. 107-09, 112, 180-192, 195-423, 529-536, 537-538, and 541 were admitted into evidence.

On the second remand, the parties agreed upon a schedule for additional briefing, with no hearing for presentation of additional evidence requested. As a result, the Hearing Officer issued his "2015 Remand: Scheduling Order," June 22, 2015, and set a briefing schedule. On July 15, 2015, the Hearing Officer convened a further telephone conference regarding the status of the motion in District Court for a stay of administrative proceedings herein. Arlington requested additional time to file his initial brief on remand, and a new schedule was set for the briefing on the second remand. No request to submit additional evidence was made until Arlington filed his motion to submit additional evidence in August 2015, see below.

Order Denying Petition for Leave to Present Additional Evidence

On August 11, 2015, Arlington filed and served a "Petition for Leave to Present Additional Evidence" regarding "[t]he August 5, 2015 retrieval of telephone messages from previously damaged telephone equipment, prevent[ing] the availability of telephone recorded information to this petitioner, prior to this date" (last paragraph, p. 1). The petition also stated "Each time this enlightening conversation is listened to one collects more facts that discredits [sic] Miller's and exposes [sic] a more truthful picture of its operation" (third paragraph, p. 2).

Miller's filed and served its "Response to Claimant's Petition for Leave to Present Additional Evidence" on August 24, 2015, opposing the petition on the grounds that (1) The record had not been reopened and Arlington had not asked that it be reopened until after the last deadline for filings on the remand had passed and Arlington did not show good cause for filing his late request to present additional evidence, and therefore the petition was untimely; and (2) The additional evidence was an illegal recording of a conversation, and should not be admitted herein because of the privacy concerns underlying the statutory prohibition.

Untimeliness precludes granting the petition. In his petition, Arlington offered an explanation for the late presentation of the evidence, that the “August 5, 2015 retrieval of telephone messages from previously damaged telephone equipment, prevented the availability of telephone recorded information to this petitioner, prior to this date” made the recording available for the first time on August 5, 2015. Taking that statement as true, there is nothing in the record to establish that the technology required to retrieve said recordings did not exist before August 5, 2015, or for that matter, before all of the proceedings herein including the original hearing. Thus, Arlington failed to establish good cause (due diligence) for his late proffer of the recording and the motion is denied.

The second basis for objection to the proffer of the recording is also clear. The prohibition in Mont. Code Ann. § 45-8-213(1)(c) against electronic recording of a human conversation made without the knowledge of all participants to that conversation would not apply to voice mail messages left after a recorded invitation to leave a (recorded) message had played. However, the four recordings on the CD Arlington proffered are not telephone voice mails. They instead are four identical recordings of the same conversation between two persons, who sounded like they were Tony Miller and Oliver Arlington.¹ The statutory prohibition does apply to recording a human conversation – a conversation between people – whether by telephone or in person, without the knowledge of all participants. There is no evidence that the other person with whom Arlington conversed had any knowledge that Arlington was recording the conversation. The statutory prohibition on its face would apply. An illegal recording cannot be introduced into evidence here, because doing so would defeat the Legislative public policy purpose to protect privacy by banning such a recording as an offense against public order. Therefore, on this basis as well, the motion is denied.

II. ISSUE

The issues herein are whether, on second remand, Arlington is entitled to wages that he earned from Miller’s and has not been paid, including overtime hours for which he was not paid an overtime rate.

III. FINDINGS OF FACT

Any findings in the original decision or the decision on the first remand that are inconsistent or in conflict with the following findings are hereby struck or

¹ To verify what the recordings on Arlington’s CD were, the Hearing Officer listened to each of the four tracks (all exactly the same length). It was readily apparent that the four recordings were of the same conversation with the same two voices saying exactly the same things.

amended to be consistent with the following findings. Any findings in effect before this decision that are consistent with this decision (with or without amendment) are incorporated by this reference as if set forth at length. To avoid numerical confusion, second remand findings are numbered with “R²” (for second remand) in front of each number.

R²¹. Table 1, on page 7, following Finding R²⁷ on the bottom of page 6, shows the total weekly “Hours” that Oliver Arlington worked for Miller’s Trucking, Inc. during September 2008 through August 2009, based upon his testimony and his calendar notations of hours worked (Exhibits 119-157), and the amounts of “Gross Wages” credited to Arlington, based upon Miller’s “Payroll Transaction Detail” sheets (Exhibits 179-191) regarding Arlington. Using those weekly hours and credited wages, the Hearing Officer has calculated Arlington’s variable hourly rates of regular pay.

R²². With two exceptions (see Finding R²⁶, p. 6), the Hearing Officer has applied Arlington’s “Gross Wages” (taken from Exhibits 179-191) as Arlington’s earnings for the hours he recorded he had worked (taken from Exhibits 119-157) from the date Arlington’s notes showed he would begin working through and including the week during which he received his last pay check and worked his last hours for Miller’s. Arlington’s calendar notations for September showed “Will Start September 15” (Exhibit 120) and showed that he had worked 85.50 “Hours” during the week starting Monday, September 15, and had worked 87.75 “Hours” during the week starting Monday, September 22, 2008 (Exhibit 119).

Example from Table 1:

Week	Hours	Pay Date	Gross Wages	Hours Worked	Hourly Rate	Gross Weekly Earned Wages
Sept. 15	85.50					
Sept. 22	87.75					

R²³. Miller’s “Payroll Transaction Detail,” Page 1 (Exhibit 179), showed that on Friday, October 3, 2008, Miller paid a net wage to Arlington, after deductions, that was based upon “Gross Wages” earned of \$2,603.50. The sum of the “Hours Worked” during those two weeks was 173.5 hours.

Example from Table 1:

Week	Hours	Pay Date	Gross Wages	Hours Worked	Hourly Rate	Gross Weekly Earned Wages
Sept. 15	85.50					
Sept. 22	87.75					
Sept. 29		Oct. 3	\$2,603.50	173.25		

R²⁴. The Hearing Officer divided the “Gross Wages” by the sum of the “Hours Worked” during the weeks to which that wage applied, which showed that

the regular “Hourly Rate” for the hours Arlington worked in the weeks beginning on September 15 and September 22, 2008 was \$15.03, rounded to the nearest penny. The “Hours” times the “Hourly Rate” for each week produced the “Gross Weekly Earned Wages” at the regular rate. However, rounding the hourly rate to the nearest penny and then multiplying it by the hours worked to arrive at the “Gross Weekly Earned Wages” figures caused discrepancies between Miller’s figure for “Gross Wages” and the “Gross Weekly Earned Wages.” Since Miller’s gross wage figure was actually used to compute net pay after deductions, these discrepancies were proportionally adjusted to match the actual gross wage figure before entering the “Gross Weekly Earned Wages” figures in the table. In the instance of this example, the “Gross Weekly Earned Wages” figures, using the hours from each week and the \$15.03 rate, were \$1,285.07 for the Sept. 15 week and \$1,318.88 for the Sept. 22 week, and the sum of those two numbers was \$2,603.95. Adjusting the figure for the Sept. 15 week down by 18 cents and the figure for the Sept. 22 week down by 27 cents, their sum equals the “Gross Wages” amount. The Hearing Officer followed the same procedures to fill in “Table 1” to cover the entirety of Arlington’s employment by Miller’s. To avoid confusion, the reader should keep in mind that hourly rates are based on gross wages credited for the pay date in the week after the last credited hours, with the two exceptions explained in Finding R²⁶, p. 6.

Example from Table 1:

Week	Hours	Pay Date	Gross Wages	Hours Worked	Hourly Rate	Gross Weekly Earned Wages
Sept. 15	85.50				\$15.03	\$1,284.89
Sept. 22	87.75				\$15.03	\$1,318.61
Sept. 29	...	Oct. 3	\$2,603.50	173.25		

R²⁵. There are six weeks in which Arlington’s Hourly Rate turned out to be lower than applicable Montana minimum wage. Under those circumstances, the hourly rate was adjusted to the applicable Montana minimum wage.²

A. During the weeks beginning on October 27 and November 3, 2008, Arlington worked 126.00 hours (90.50 hours the first week and 35.50 hours the second week, Exhibits 123-124). On the payday of November 12, 2008, Miller’s credited Arlington with \$612.69 in gross wages for that 126 hours of work (Exhibit 181), which was \$4.86 per hour. The Montana minimum wage during those weeks was \$6.55 per hour, and therefore Arlington actually earned gross wages of \$592.78 during the week beginning on October 27 and gross wages of \$232.53 during the week beginning on November 3, 2008. Table 1, “Gross Weekly Earned Wages,” has the actual gross earnings using the minimum wage for those two weeks.

² See, “Discussion,” p. 14.

B. During the week beginning on December 8, 2008, Arlington worked 49.50 hours (Exhibit 126). On the payday of December 17, 2008, Miller's credited Arlington with \$250.00 in gross wages for that 49.50 hours of work (Exhibit 182), which was \$5.05 per hour. The Montana minimum wage during that week was \$6.55 per hour, and therefore Arlington actually earned gross wages of \$324.23 during the week beginning on December 8. Table 1, "Gross Weekly Earned Wages," has the actual gross earnings using the minimum wage for that week.

C. During the weeks beginning on March 9, March 16, and March 23, 2009, Arlington worked 135.75 hours (61.71 hours the first week, 10.00 hours the second week, and 64.00 hours the third week, Exhibits 135-137). On the payday of April 3, 2009, Miller's credited Arlington with \$887.35 in gross wages for that 135.75 hours of work (Exhibit 185), which was \$6.54 per hour. The Montana minimum wage during those weeks was \$6.90 per hour, and therefore Arlington actually earned gross wages of \$426.08 during the week beginning on March 9, gross wages of \$69.00 during the week beginning on March 16, and gross wages of \$441.60 during the week beginning on March 23, 2009. Table 1, "Gross Weekly Earned Wages," has the actual gross earnings using the minimum wage for those three weeks.

R²⁶. The two exceptions mentioned at the beginning of Finding R²², p. 4, involve the paydays of Friday, May 29, 2009, and Friday, August 14, 2009. The last time Miller's paid Arlington before May 29, 2009 was Wednesday, April 29, 2009. Arlington did not work during the weeks beginning on the Mondays of April 27, May 4, May 11, and Monday, May 18, 2009. He did work in the week of May 25, 2009, which was the first time he had worked since the week before the April 29 payday. Thus, the only work for which Miller's could be paying Arlington on May 29, 2009 would be the work he was doing that very week. The other exception involves the August 14, 2009 payday, which occurred during the last week Arlington worked for Miller's – the week beginning Monday, August 10, 2009. The August 14 payday was also the last payday Miller's recorded on which it paid Arlington. Thus, the Hearing Officer credited all of the "Gross Wages" involved in the May 29, 2009 payday as being for the hours worked for pay during the week of May 25 through May 31, 2009. Mathematically, the two exceptions are treated effectively and fairly for determining Arlington's weekly pay rates, even though this ad hoc treatment can cause a bad headache.

R²⁷. The entirety of Table I appears on Page 7 following.

Table 1: Week	Hours	Pay Date	Gross Wages	Hours Worked	Hourly Rate	Gross Weekly Earned Wages
Sept. 15	85.50				\$15.03	\$1,284.85
Sept. 22	87.75				\$15.03	\$1,318.65
Sept. 29	84.25	Oct. 3	\$2,603.50	173.25	\$ 6.98	\$ 588.12
Oct. 6	82.25				\$ 6.98	\$ 574.15
Oct. 13	0	Oct. 15	\$1,162.27	166.50	N/A	0
Oct. 20	81.75				\$24.01	\$1,962.95
Oct. 27	90.50	Oct. 31	\$1,962.95	81.75	\$ 6.55*	\$ 592.78
Nov. 3	35.50				\$ 6.55*	\$ 232.53
Nov. 10	17.50	Nov. 12	\$ 612.69	126.00	\$16.81	\$ 294.17
Nov. 17	89.25				\$16.81	\$1,500.26
Nov. 24	52.00	Nov. 26	\$1,794.43	106.75	\$11.12	\$ 578.28
Dec. 1	0				N/A	0
Dec. 8	49.50	Dec. 12	\$ 578.28	52.00	\$ 6.55@	\$ 324.23
Dec. 15	0	Dec. 17	\$ 250.00	49.50	N/A	0
Dec. 22	0				N/A	0
Dec. 29	0				N/A	0
Jan. 5	88.50				\$23.31	\$2,063.64
Jan. 12	77.50	Jan. 16	\$2,063.64	88.50	\$13.27	\$1,028.35
Jan. 19	58.50				\$13.27	\$ 776.24
Jan. 26	60.00	Jan. 30	\$1,804.59	136.00	\$27.57	\$1,654.00
Feb. 2	0				N/A	0
Feb. 9	0				N/A	0
Feb. 16	85.25	Feb. 17	\$1,654.00	60.00	\$25.39	\$2,164.63
Feb. 23	91.75	Mar. 1	\$2,164.63	85.25	\$11.20	\$1,027.09
Mar. 2	47.75				\$11.20	\$ 535.10
Mar. 9	61.75	Mar. 13	\$1,562.19	139.50	\$ 6.90+	\$ 426.08
Mar. 16	10.00				\$ 6.90+	\$ 69.00
Mar. 23	64.00				\$ 6.90+	\$ 441.60
Mar. 30	0	Apr. 3	\$ 887.35	135.75	N/A	0
Apr. 6	0				N/A	0
Apr. 13	0				N/A	0
Apr. 20	62.25				\$14.35	\$ 893.01
Apr. 27	0	Apr. 29	\$ 893.01	62.25	N/A	0
May 4	0				N/A	0
May 11	0				N/A	0
May 18	0				N/A	0
May 25	48.25	May 29	\$ 696.48	48.25	\$14.43	\$ 696.48
June 1	81.25				\$15.76	\$1,280.40
June 8	50.75				\$15.76	\$ 799.76
June 15	67.50	June 16	\$2,080.16	132.00	\$18.91	\$1,276.17
June 22	62.75				\$18.91	\$1,186.20
June 29	64.50	July 1	\$2,463.28	130.25	\$15.89	\$1,024.55
July 6	79.25				\$15.89	\$1,259.27
July 13	85.75	July 16	\$2,283.82	143.75	\$16.93	\$1,451.66
July 20	56.75				\$16.93	\$ 960.40
July 27	75.25	July 31	\$2,412.06	142.50	\$ 8.11	\$ 610.16
Aug. 3	91.00				\$ 8.11	\$ 738.23
Aug. 10	77.00	Aug. 14	\$1,972.55	243.25	\$ 8.11	\$ 624.16

Gross Regular Wages Credited \$31,901.88 Gross Regular Wages Earned \$32,237.15

* Montana minimum wage for these weeks, not hourly rate based upon gross wage (\$4.86).

@ Montana minimum wage for these weeks, not hourly rate based upon gross wage (\$5.05).

+ Montana minimum wage for these weeks, not hourly rate based upon gross wage (\$6.54).

R²⁸. Table 1 shows the gross regular time pay earned by Arlington for his hours of work (as he kept track of them) from the week of September 15, 2008 through the week of August 10, 2009, which totaled \$32,237.15. Miller's paid Arlington for earning gross regular time pay of \$31,901.88, first making the appropriate deductions. Miller's still owes Arlington his net pay for earning gross regular time pay of \$335.27.

R²⁹. Table 1 does not address the weekly overtime premium pay of ½ the hourly wage for every hour over 40 worked during the week (meaning the Montana minimum wage for the weeks in which it applied and overtime hours were worked). Addressing only work weeks in which Arlington worked more than 40 hours, Table 2 shows the weekly overtime premium pay due to Arlington.

Week	Hours	O.T. Hours	Wkly Wage	½ Wkly Wage	Gross O.T. Premium Wage
Sept. 15	85.50	45.50	\$15.03	\$ 7.515	\$ 341.93
Sept. 22	87.75	47.75	\$15.03	\$ 7.515	\$ 358.84
Sept. 29	84.25	44.25	\$ 6.98	\$ 3.485	\$ 154.21
Oct. 6	82.25	42.25	\$ 6.98	\$ 3.485	\$ 147.24
Oct. 20	81.75	41.75	\$24.01	\$12.005	\$ 501.21
Oct. 27	90.50	50.50	\$ 6.55*	\$ 3.275	\$ 165.39
Nov. 17	89.25	49.25	\$16.81	\$ 8.405	\$ 413.95
Nov. 24	52.00	12.00	\$11.12	\$ 5.56	\$ 66.72
Dec. 8	49.50	9.50	\$ 6.55*	\$ 3.275	\$ 31.11
Jan. 5	88.50	48.50	\$23.31	\$11.155	\$ 541.02
Jan. 12	77.50	37.50	\$13.27	\$ 6.685	\$ 250.69
Jan. 19	58.50	18.50	\$13.27	\$ 6.685	\$ 123.67
Jan. 26	60.00	20.00	\$27.57	\$13.785	\$ 275.70
Feb. 16	85.25	45.25	\$25.39	\$12.6950	\$ 574.45
Feb. 23	91.75	51.75	\$11.20	\$ 5.60	\$ 289.80
Mar. 2	47.75	7.75	\$11.20	\$ 5.60	\$ 43.40
Mar. 9	61.75	21.75	\$ 6.90*	\$ 3.45	\$ 75.04
Mar. 23	64.00	24.00	\$ 6.90*	\$ 3.45	\$ 82.80
Apr. 20	62.25	22.25	\$14.35	\$ 7.175	\$ 159.64
May 25	48.25	8.25	\$14.43	\$ 7.215	\$ 59.52
June 1	81.25	41.25	\$15.76	\$ 7.98	\$ 329.18
June 8	50.75	10.75	\$15.76	\$ 7.98	\$ 85.79
June 15	67.50	27.50	\$18.91	\$ 9.455	\$ 260.01
June 22	62.75	22.75	\$18.91	\$ 9.455	\$ 215.10
June 29	64.50	24.50	\$15.89	\$ 7.945	\$ 194.65
July 6	79.25	39.25	\$15.89	\$ 7.945	\$ 311.84
July 13	85.75	45.75	\$16.93	\$ 8.465	\$ 387.27
July 20	56.75	16.75	\$16.93	\$ 8.465	\$ 141.79
July 27	75.25	35.25	\$ 8.11	\$ 4.055	\$ 142.94
Aug. 3	91.00	51.00	\$ 8.11	\$ 4.055	\$ 206.81
Aug. 10	77.00	37.00	\$ 8.11	\$ 4.055	\$ 150.04

Total Gross O.T. Premium Wage \$7,082.12

* Montana minimum wage for these weeks including overtime wages.

R²10. Oliver Arlington earned \$7,082.12 of overtime premiums, for the hours above 40 hours he worked according to his records, during his employment with Miller's. On its face, the evidence indicates that Arlington is owed \$7,082.12 for gross overtime premium wages, as well as \$335.27 for gross regular pay resulting from adjustment of his regular wages to comply with the applicable Montana minimum wage, so that the total gross pay Miller's owes him is \$7,417.39.

R²11. Miller's Trucking did not guarantee any certain minimum earnings per year to Arlington. The substantial and credible evidence of record does not support Arlington's testimony that he was guaranteed at least \$60,000.00 per year from his load rate. There is no credible corroborating evidence supporting that testimony. [NOTE: This is now the law of the case, following the Second Remand Order from the Montana Supreme Court.]

R²12. Miller's asserted that it was unable to obtain and maintain records of the hours Arlington worked because, even though Miller's requested, demanded, and required such hours from him, Arlington failed and refused to provide them. As a matter of law, the absence of Miller's record-keeping of Arlington's work hours required reliance upon Arlington's records of hours worked. Arlington's records of the hours he worked for Miller's, in evidence and referenced during both hearings, prove the hours that he worked. Miller's owes Arlington \$7,417.39 in earned and unpaid overtime and minimum wages. But for the unpaid additional regular wages due to the minimum wage requirements and the unpaid overtime premium wages, Miller's paid Arlington at least as much as he earned. The penalty for failure timely to pay overtime and minimum wages is 110% of the amount unpaid, which for \$7,417.39 in this instance is \$8,159.13, for a total due and owing to Arlington of \$15,576.52.

R²13. If Miller's pays the amount of earned and unpaid overtime premium and minimum wages and the applicable penalty within 30 days of the date of mailing of this Final Agency Decision, the department has the power and will exercise it to reduce the penalty to 55% on the unpaid overtime premium and minimum wage regular wages found due and owing herein which is \$4,079.56. Thus, payment within 30 days after the date of mailing of this Final Agency Decision, of \$11,496.95, will be payment in full of the amount due to Arlington. Thereafter, the full amount due and owing shall remain \$15,576.52.

IV. DISCUSSION

The Montana Supreme Court rejected the Hearing Officer's fact finding regarding the hours Arlington worked. ". . . [O]ur review of the record convinces us

a mistake has been made, and the Hearing Officer's finding that Arlington never worked over 40 hours in a week is clearly erroneous. See *Montanans v. State*, ¶19 (“if this Court's review of the record convinces us a mistake has been made, a finding is deemed clearly erroneous”).” *Arlington II*, ¶28. Having found that the Hearing Officer placed too heavy a burden of proof upon Arlington, the Court went on to detail the appropriate method for fact finding regarding Arlington's work hours.

[¶29] It is not unusual for the trier of fact to find that an employee's claimed overtime hours lack credibility. For example, in *Genao v. Blessed Sacrament School*, a federal district court made such a credibility determination under facts similar to those in this case. *Genao v. Blessed Sacrament Sch.*, 2009 U.S. Dist. LEXIS 95787 (E.D.N.Y. 2009). In *Genoa*, the plaintiff testified that he had spent 6 hours a day cleaning classrooms, all of which was overtime. *Genao*, 2009 U.S. Dist. LEXIS 95787, 22-24. A witness for the defense, however, pointed out that the work was completed by others in 3 hours per day and should not have taken the plaintiff any longer. The court found the plaintiff's claimed hours were not credible in light of the defense witness's testimony.

[¶30] The appropriate remedy when an employee's claimed hours lack credibility, however, is to reduce those hours to the extent they lack credibility. This is what the Court in *Genao* did. It reduced the plaintiff's claimed overtime hours to the extent they conflicted with the credible evidence presented by the defense. *Genao*, 2009 U.S. Dist. LEXIS 95787 at 23-24. In light of *Anderson's* directive that employee's evidence can be sufficient despite being untrustworthy, the preferred procedure is to reduce an employee's claimed hours to the extent they lack credibility, not to deny the employee's claims altogether. Similarly, where the employee's evidence is internally inconsistent, the appropriate remedy would be to discredit the greater of the employee's hour calculations, rather than determine the employee may not recover at all.

[¶31] We recognize the difficulty the trier of fact faces in determining how many hours an employee worked when the employee's evidence does not reliably establish hours worked An inaccurate method of computing an employee's time is preferable to denying the employee's claim for inaccurate

evidence. See e.g. *Bell v. Farmers Ins. Exch.*, 115 Cal. App. 4th 715, 750-51, 9 Cal. Rptr. 3d 544, 575 (2004) (trial court's method of calculating hours inherently inaccurate, but nonetheless sufficient in light of the important policy underlying overtime laws).

....

[¶37] We therefore reverse and remand to the District Court with instructions to remand to the Hearing Officer for determination, consistent with this opinion, of the overtime owed Arlington. Finally, we note that Arlington requests on appeal that his overtime pay be calculated according to a salary of \$60,000 per year. However, because Arlington was unable to prove an agreement for pay of \$60,000 per year, any overtime pay will need to be calculated pursuant to the regulations governing determination of the hourly rate for employees paid on a non-hourly basis. Mont. Admin. R. 24.16.2512(2).

Arlington II [section numbers included].

The Hearing Officer's previous findings of lack of credibility and inconsistency were reversed by the Court's second remand decision. The decision accurately summarized those findings:

[¶17] The Hearing Officer then found that Arlington's records of the hours he worked were not credible because: 1) they were internally inconsistent; 2) they were in conflict with credible testimony from other employees that Arlington was seen resting in his truck for hours that he claimed he was working; and 3) they were inconsistent with the credible testimony of other employees that it took them substantially less time to complete the same work than Arlington was claiming. ...

Arlington II [section numbers included].

The Court then ruled that credible evidence established that transporting two loads of logs a day would take a minimum of 40 hours per week, rather than taking 40 hours or less per week. The Court went on to hold that when Arlington also performed other required duties the Court found were confirmed in the evidence, he necessarily worked overtime.

[¶26] Arlington argues, however, that even Miller's evidence established that he worked in excess of 40 hours a week, at least during some weeks. Miller's presented testimony from the owner, Tony Miller, and several drivers that it takes from 4 to 5 hours, roundtrip, to load, haul, and unload each load. According to all of Miller's witnesses, drivers were hauling 2 to 3 loads per day. According to the testimony of Miller's own witnesses, then, truckers were spending a minimum of 40 hours per week just hauling logs (4 hours per load x 2 loads per day x 5 days per week = 40 hours). However, the 40 hours represent only the time spent loading, hauling, and unloading; those hours do not account for other tasks that drivers were required to perform. Before the drivers picked up their first load on Monday, they had to pick up their trucks at Miller's base in Judith Gap. According to Tony Miller, the drive from Judith Gap to the job sites near Roundup where the first load would be picked up took 1.5 hours each Monday. Tony Miller's testimony also established that when the drivers returned their trucks on Friday, the trip from their last drop off in Laurel to Miller's base in Judith Gap took 2 hours. The initial pick up and drop off of the truck would therefore add 3.5 hours to each week. Other uncontradicted evidence established that drivers had to refuel their trucks, do a pre-trip safety inspection each day, start their truck and let it warm up before they began driving, and were required to wash their trucks once a week—all of which adds further hours to the 40 to 75 hours per week spent hauling, loading, and unloading and the 3.5 hours to pick up and drop off the truck at the base. Arlington also presented uncontested testimony that the trucks occasionally got flat tires which the drivers had to repair, and he would sometimes have to take the truck to the shop and wait while it was repaired. Thus, the record establishes that, even assuming Arlington was hauling the minimum 2 loads per day in the minimum amount of time (4 hours), he was necessarily working 40 hours per week before including the various extraneous tasks necessarily attendant to his job.

[¶27] The Hearing Officer noted that, "by [Arlington's] own evidence, he averaged perhaps two loads a day, which, according to their testimony, other drivers could have

completed while working less than, or certainly not more than, 40 hours a week.” Four witnesses testified to the amount of time it took to complete each load. Tony Miller, Trent Wolstad, and Robert Beeman testified that it took 4 to 4.5 hours for each load. Marshall Aamold testified that it took 4 to 5 hours for each load. All four witnesses were called by Miller’s, and nothing in the record contradicted their testimony. Thus, the witnesses all testified that it took a minimum of 4 hours to complete a load. Therefore, as noted above, at two loads per day, Arlington would have hauled 10 loads per week, making for a minimum of 40 hours per week, before factoring in the weekly truck pick up and drop off and other incidental work.

Arlington II [section numbers included].

Arlington II includes the statement that the Hearing Officer could still reduce the hours reported by Arlington, within certain limits.

[*P32] The Hearing Officer may reduce the number of hours Arlington claims to have worked to the extent his claims lack credibility, and he may reduce them where there are inconsistencies. The Hearing Officer may not, however, reduce the hours below the amount that the defendant’s own evidence establishes Arlington necessarily must have worked. The clear directive in Anderson prevents an employee’s claims from being entirely denied simply because the employee’s evidence is untrustworthy and unreliable.

On the record, in light of the bases for the latest appellate decision, the Hearing Officer can no longer make any reduction to the number of hours Arlington testified that he worked. The Court has reversed the Hearing Officer’s findings on most of the facts upon which the Hearing Officer found Arlington’s testimony to lack credibility. What little evidence remains that might impeach Arlington’s testimony is so weak that standing alone it cannot rebut his testimony, endorsed by the Court as being credible evidence. The Court also found that the truckers Miller’s called as witnesses testified credibly to facts that established that Arlington had worked overtime, further supporting Arlington’s testimony. Consistent with those rulings, the Hearing Officer no longer sees credible and substantial evidence rebutting Arlington’s evidence.

Therefore, the findings herein reflect Arlington's calendar entries regarding the hours he worked, on which he sometimes noted multiple loads and sometimes noted multiple destinations and loads in a day's work. The findings herein also reflect the amounts he already has been paid, from Miller's Payroll Transaction Detail sheets. Montana law governs this proceeding. *Arlington v. Miller's Trucking, Inc.*, ¶¶45-46, 2012 MT 89, 364 Mont. 534, 277 P.3d 1198 [hereafter "Arlington I"]. Therefore, Admin. R. Mont. 24.16.2512(b)(i) dictates how to calculate his hourly wage.

(b) Pieceworker.

(i) Piece rates and supplements generally. When an employee is employed on a piece-rate basis, his regular rate of pay is computed by adding together his total earnings for the workweek from piece rates and all other sources (such as production bonuses) and any sums paid for waiting time or other hours worked (except statutory exclusions). This sum is then divided by the number of hours worked in the week for which such compensation was paid, to yield the piece workers "regular rate" for that week. For his overtime work the pieceworker is entitled to be paid in addition to this total weekly earnings at this regular rate for all hours worked, a sum equivalent to one-half this regular rate of pay multiplied by the number of hours worked in excess of 40 in the week. Only additional half-time pay is required in such cases where the employee has already received straight-time compensation at piece rates or by supplementary payments for all hours worked. Thus, if the employee has worked 50 hours and has earned \$92.00 at piece rates for 46 hours of productive work and in addition has been compensated at \$2.00 an hour for 4 hours of waiting time, his total compensation, \$100.00, must be divided by his total hours of work, 50, to arrive at his regular hourly rate of pay - \$2.00. For the 10 hours of overtime the employee is entitled to additional compensation of \$10.00 (10 hours at \$1.00). For the week's work he is thus entitled to a total of \$110.00 (which is equivalent to 40 hours at \$2.00 plus 10 overtime hours at \$3.00).

Arlington's pay based upon 25% per load is established by Miller's records. His hours are established by his records. Between the two sources, the Hearing Officer has performed the calculations mandated by the second remand, and the findings reflect those calculations. Payment based upon a percentage of each load is exactly analogous to piecework. Converting it to hourly pay requires applying the gross wages for each paycheck to the total hours worked to which that paycheck applied, to generate an hourly rate for that pay period, and to calculate an overtime

premium rate for any overtime worked in that pay period. Wherever the hourly pay rate for any week is less than the applicable minimum wage, it must be adjusted to comply with that law. That also was a part of the calculations.

Overtime wages are due for hours worked in a workweek in excess of 40 hours. Mont. Code Ann. § 39-3-405(1). Applicable minimum hourly wage rates must be paid for all hours of work, with certain exceptions, none of which apply to Arlington's work for Miller's. Mont. Code Ann. § 39-3-404(1).

Pursuant to Admin. R. Mont. 24.16.7561(1)(a), the penalty for unpaid overtime wages and/or unpaid minimum wages is always 110% of the unpaid amount. However, 24.16.7561(1)(b) provides for reduction of the penalty to 55% if two conditions are met – (1) None of the specific enumerated special circumstances in Admin. R. Mont. 24.16.7556 are present and (2) the employer pays the unpaid overtime or minimum wages and the 55% penalty in the time specified by the determination. The evidence herein does not establish the presence of any of the special circumstances enumerated in that rule. There was no award to Arlington under the Wage and Hour Unit's determination, and this decision is the first to award him any recovery. Thus the reduction provision of the rule can and should be applied to this present decision. Miller's can pay the total amount of wages due, plus the 55% penalty, not later than the deadline for a petition for judicial review of this decision, to resolve the case. Thereafter, the 110% penalty will apply.

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. Arlington did not prove that Miller's entered into an agreement with him to pay him at least \$60,000.00 annually, or any other set dollar amount [law of the case after *Arlington II*].

3. Miller's owes Arlington \$7,417.39 in earned and unpaid overtime and minimum wage amounts. The penalty for failure timely to pay overtime and minimum wages is 110% of the amount unpaid, which for \$7,417.39 in this instance is \$8,159.13. Miller's owes Arlington \$15,576.52. Admin. R. Mont. 24.16.7561 and 24.16.7556.

4. If Miller's pays the unpaid overtime and minimum wage wages and a reduced 55% penalty of \$4,079.56, a total of \$11,496.95, in full on or before the 30th

calendar day after issuance of this decision, that will constitute payment in full of the amount due under this decision. Unless such payment is made within the time allowed, the full amount due and owing pursuant to this decision shall remain \$15,576.52. Admin. R. Mont. 24.16.7561 and 24.16.7556.

VI. ORDER

Miller's Trucking, Inc. is hereby ORDERED to tender a cashier's check or money order in the amount of \$11,496.95, representing \$7,417.39 in unpaid wages and \$4,079.56 in a reduced penalty, made payable to Oliver W. Arlington, and mailed to the Employment Relations Division, P.O. Box 201503, Helena, Montana 59620-1503, postmarked no later than 30 days after the mailing date of this decision. Thereafter, if no such timely payment is made, Miller's Trucking, Inc. owes Oliver W. Arlington \$7,417.39 in unpaid wages and 110% penalty of \$8,159.13, for a total award of \$15,576.52. In either instance, Miller's may reduce the amount of wages paid, but not the penalty, by the applicable payroll taxes and deductions.

DATED this 23rd day of March, 2016.

DEPARTMENT OF LABOR & INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ TERRY SPEAR
TERRY SPEAR
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.