

**STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
HEARINGS BUREAU**

<b>IN THE MATTER OF THE WAGE CLAIM</b>	)	<b>Case No. 77-2001, 78-2001</b>
<b>OF DAVID C. BERTOLINO AND</b>	)	
<b>CANDACE K. BERTOLINO</b>	)	
<b>Claimant,</b>	)	<b>FINDINGS OF FACT;</b>
	)	<b>CONCLUSIONS OF LAW;</b>
<b>vs.</b>	)	<b>AND ORDER</b>
	)	
<b>RICHARD PEGG, d/b/a FRONTIER TOWN,</b>	)	
<b>Respondent.</b>	)	

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**I. INTRODUCTION**

David C. and Candace K. Bertolino filed initial wage claims with the Wage and Hour Unit of the Department of Labor & Industry against Richard Pegg, d/b/a Frontier Town, Inc., on July 18, 2000. They alleged that they were employees of Frontier Town and performed services for which they were not paid during the period of July 3 through July 10, 2000.

The Department's Wage and Hour Unit issued determinations in these cases on October 3, 2000, finding that Frontier Town owed wages in the amount of \$640.00 to David Bertolino, and \$370.00 to Candace Bertolino. The determination also held that a penalty of 110% would be applied to both claims, pursuant to §39-3-206, MCA.

Frontier Town filed a timely appeal on October 20, 2000, contending that the claimants have never been employees of Frontier Town or Frontier Town, Inc., and, therefore, the determination was based on false premises and assumptions.

A hearing in the matter was initially scheduled for April 17, 2001, but was continued to June 19, 2001, at Pegg's request. Submission deadlines were also extended, allowing the parties until May 25, 2001, to complete discovery, and until June 4, 2001, to exchange proposed exhibits and witness lists. Bertolinos filed their proposed exhibits 1 through 10 prior to the exchange deadline. Frontier Town filed its proposed exhibits with the Hearing Officer on June 6, 2001. Bertolinos did not receive Frontier Town's proposed exhibits. Pegg indicated that he had sent the exhibits to Bertolinos but did not have documentation or verification that he had done so.

Hearing Officer Michael T. Furlong conducted a hearing on the matter on June 19, 2001. Richard Pegg represented the respondent and appeared in-person at the hearing in the Walt Sullivan Building, Helena, Montana. Pegg (pro se), represented Frontier Town but elected not to testify.

Mike Banks appeared as a respondent witness. Bertolinos appeared and offered testimony by telephone from their residence in Minnesota. Tricia Davis testified by telephone as a claimant witness.

Claimants' Exhibits 1 through 10 were admitted into evidence without objection. Respondent's Exhibits A through D, F, G, J, L, N, and P, were admitted into evidence without objection. Respondent's Exhibits E, H, I, K, M, and O, offered by the respondent, were objected to by the claimants on the basis that they were not filed pursuant to the scheduling order and that they were irrelevant. The Hearing Officer sustained the objection and excluded Exhibits E, H, I, M, and O.

## **II. ISSUE**

Whether Richard Pegg, d/b/a Frontier Town, owes wages to Candace Bertolino and David Bertolino pursuant to § 39-3-205, MCA.

## **III. FINDINGS OF FACT**

1. Frontier Town, Inc., is a bar/restaurant establishment located on MacDonald Pass near Helena, Montana. The facility also includes lodging accommodations. Richard Pegg owned and operated the business during the year 2000.

2. In May 2000, Pegg hired Tricia Davis as general business manager. Pegg told Davis that he needed to find someone with computer experience to update the computer system at Frontier Town. He also told Davis that he was interested in finding someone with general maintenance skills to work on the renovation of the facility.

3. Davis was a long-time acquaintance of Candace Bertolino and David Bertolino, who are married. Davis had previously been involved in a business venture with Candace, who has an extensive computer background and programming skills. David is an experienced bartender who has worked in the construction business for a number of years.

4. Davis mentioned the Bertolino's background and experience to Pegg and suggested that they might be qualified to perform the services Pegg was seeking at Frontier Town. Pegg expressed an interest in the Bertolinos and asked Davis to contact them about the work.

5. In June 2000, Davis contacted the Bertolinos to see if they would be interested in working at Frontier Town. The Bertolinos were residing in Minnesota at that time, and both were employed there. When the Bertolinos expressed interest, Davis made arrangements for Candace to travel to Helena, Montana on June 14, 2000, to meet with Pegg and look over the work arrangement. After meeting with Pegg and Davis, Candace expressed interest in the job. At Pegg's request, Candace contacted David who agreed to come to Helena to look over the operation.

6. Upon David's arrival at Frontier Town, he and Candace met with Pegg to discuss the work arrangements. Pegg offered to pay Candace \$6.00 per hour and David \$10.00 per hour to work

through the summer months. In addition to the hourly compensation, Pegg offered them meal privileges and free lodging in an apartment at Frontier Town.

7. The Bertolinos accepted Pegg's offer and began making plans to return to Minnesota to get personal belongings and arrange to secure their home for the summer. While in Helena in June, the Bertolinos' vehicle became inoperable. Pegg provided them the use of one of his personal vehicles to enable them to go to Minnesota. The Bertolinos left Frontier Town in Pegg's vehicle for Minnesota on June 28. Upon their return to Minnesota, both notified their employers that they would be terminating employment and moving to Montana. They returned to Frontier Town and commenced performing work on July 3, 2000.

8. Under the work agreement, Candace Bertolino was to work under the direction of Davis and Pegg. Her duties consisted of incorporating a new computer program and managing the bar. David Bertolino was to perform maintenance work under Pegg's direction and also to work in the restaurant kitchen when needed. 9. Candace continued to work in the bar and in the office. Davis observed Candace Bertolino performing daily tasks in the bar and the office between July 3 and July 10, 2000. Pegg received a letter from a customer complaining about the service they received from Candace and the way she conducted herself in the bar. Pegg responded to the customer with a letter in which he mentioned that Candace was not an employee of Frontier Town.

10. The restaurant manager saw David working in the Frontier Town kitchen on more than one occasion during the period from July 3 to July 10.

11. On July 11, Bertolinos told Pegg that they were quitting employment because they were uncomfortable with the work relationship with Pegg. They moved into the city of Helena temporarily. They returned to Frontier Town on the following scheduled payday to pick up their paychecks. When they approached Pegg for their checks, Pegg told them that they were never considered to be employees and had not earned wages.

12. Candace and David each worked 8 hours per day, or 64 hours ( $8 \times 8 = 64$ ), from July 3 through July 10, 2000 (exhibit 6). They indicated that they had worked the number of hours entered on the time cards, which were signed by Davis. 13. Pegg did not record the amount of time Candace and David spent performing services at Frontier town.

#### **IV. DISCUSSION/RATIONALE**

Montana law requires that employers pay employee wages when due, in accordance with the employment agreement, pursuant to § 39-3-204, MCA, and in no event more than 15 days following termination of employment. §39-3-205, MCA. 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.

Pegg contends that the Bertolinos were never employees of Frontier Town, but rather that they were staying at Frontier Town as vacation guests with free lodging, accommodations and meal privileges. Therefore, they did not earn wages and no business pay records were kept to account

for the time the Bertolinos claim they spent performing services between July 3 and July 10, 2000. While the evidence reveals that Pegg was aware that the Bertolinos performed services during their stay at Frontier Town, Pegg alleges that the work hours entered on the time cards they submitted and verified with the general manager's signature, were falsified and exaggerated. Pegg believes that the general manager only signed the time cards because of her close friendship with the Bertolinos.

Bertolinos, on the other hand, claim that they entered into an employee/employer relationship with Pegg after discussing the terms and conditions of employment at a meeting with him in June 2000. They maintain that the time cards they submitted were an accurate account of the time they spent performing tasks at Frontier Town at the direction Pegg and the general manager between July 3 and July 10, 2000.

The record shows that Candace and David Bertolino were employees of Frontier Town. It was the Bertolinos understanding from the time they initially met with Pegg in June 2000, that they were to be hired as employees to provide services at Frontier Town through the summer months. They accepted Pegg's offer to pay them an hourly wage in addition to free lodging and eating privileges. For that reason, they terminated their jobs in Minnesota, moved to Montana and commenced performing services at the Frontier Town establishment. The Bertolinos' testimony was corroborated by the general manager, who initially contacted the Bertolinos, at Pegg's request, to come to Frontier Town and interview for the two job openings. The evidence does not reveal that the Bertolinos were offered or accepted an arrangement with Pegg where they were staying at Frontier Town as vacation guests in exchange for their services.

The record further supports a finding that Candace and David Bertolino were suffered and permitted to perform services at Frontier Town under the direction of Pegg and the establishment's general manager from July 3 to July 10, 2000. Pegg had directed David to do maintenance tasks and to work in the restaurant. The restaurant manager's testimony shows that he had observed David performing details in the kitchen on more than one occasion. The general manager testified that she had observed Candace working in the bar and the business office on a regular basis during the period in question. Pegg also knew that Candace had served customers in the bar which is supported by the fact that he had replied to a customer about a complaint regarding her performance.

Management cannot accept the benefit of work performed without compensating the employee, 24.16.1005 (3) ARM. Therefore, Candace and David Bertolino must be paid for services rendered.

## RECORD KEEPING

The burden of proof regarding hours worked is on the employer, not the employee. See *Garsjo v. Department of Labor & Industry*, 172 Mont. 182, 562 P.2d 473 (Mont. 1977); and ARM 24.16.1012. If the employer fails to record the employee's hours, reference is then made to the employee's records. However, the employee is not to be penalized for failing to keep precise time records.

[W]here the employer's records are inaccurate or inadequate and the employee can not offer a convincing substitute, a more difficult problem arises. The solution, however, is not to penalize the employee any recovery on the grounds that he was unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with their statutory duty; it would allow the employer to keep the benefits of an employees [sic] labors without paying due compensation as contemplated by the Fair Labor Standards Act. In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.

Garsjo, 172 Mont. 182, 562 P.2d 476, citing Anderson v. Mt. Celmens Pottery, 328 U.S. 680, 687, 66 S.Ct 1187, 1192, 90 L.Ed.d 1515, 1523 (1946).

The Hearing Officer has the obligation to determine, if possible from the evidence presented, the number of hours worked by the claimants. Pegg did not keep any pay records during the time they performed services; therefore, he failed to fulfill his burden to provide an accurate and adequate accounting of Candace and David Bertolino's work time, as required by law. The time records presented by Candace and David Bertolino from July 3, to July 10, 2000, are sufficient to establish a just, reasonable and reliable inference that they had worked the hours as shown. Candace and David Bertolino are entitled to wages in accordance with the work agreement. Under the terms and conditions of hire, Candace Bertolino is entitled to \$6.00 per hour for all hours worked, and David Bertolino is entitled to \$10.00 per hour for all hours worked.

Under the circumstances, Pegg violated §39-3-204, MCA, by failing to pay wages to Candace Bertolino, in the amount of \$384.00 (\$6.00 x 64 hours), and to David Bertolino, in the amount of \$640.00 (\$10.00 x 64 hours). The law also requires employers to pay an overtime premium of 1½ times the regular hourly rate when employees work more than 40 hours per week. §39-3-405, MCA. Pegg owes Candace Bertolino overtime premium of \$48.00 and David Bertolino \$80.00.

Candace and David Bertolino are also entitled to statutory penalty pursuant to §39-3-206, MCA, and ARM 24.16.7561. In accordance with ARM 24.16.7561, a penalty of 110% of the wages determined is due and owing. Pegg owes Candace Bertolino penalty in the amount of \$475.20 and David Bertolino penalty in the amount of \$792.00.

#### **IV. CONCLUSIONS OF LAW**

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

2. Richard Pegg violated §§39-3-204 and 39-3-205, MCA, by failing to pay Candace and David Bertolino wages when due and §39-3-405, MCA, for failure to pay overtime. Pegg owes Candace Bertolino \$432.00 in wages. Pegg owes David Bertolino \$720.00 in wages.

3. Pegg is liable for a penalty of 110% for failure to pay wages when due. Pegg owes Candace Bertolino a penalty of \$475.20 and David Bertolino a penalty of \$792.00.

#### **V. RECOMMENDED ORDER**

Richard Pegg is hereby ORDERED to tender a cashier's check in the amount of \$907.20, made payable to Candace Bertolino, and a cashier's check in the amount of \$1512.00, made payable to David Bertolino, representing wages and penalty, mailed to the Employment Relations Division, PO Box 6518, Helena, Montana 59604-6518, no later than the date stated in the notice below.

DATED this 5th day of September, 2001.

DEPARTMENT OF LABOR & INDUSTRY  
HEARINGS BUREAU

By: /s/ Michael T. Furlong

Michael T. Furlong  
Hearing Officer

NOTICE: You are entitled to judicial review of this final agency decision in accordance with § 39-3-216(4), MCA, by filing a petition for judicial review in an appropriate district court within 30 days of service of the decision. See also § 2-4-702, MCA.

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 § 39-3-212, MCA. Such an application is not a review of the validity of this Order.