

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

IN THE MATTER OF THE PREVAILING)	Case No. 883-2001
WAGE CLAIM OF DAVID A. LAIRD,)	
Claimant,)	FINDINGS OF FACT;
vs.)	CONCLUSIONS OF LAW;
FRED COLEMAN d/b/a COLEMAN)	AND ORDER
CONSTRUCTION,)	
Respondent.)	

I. INTRODUCTION

Michael T. Furlong conducted a hearing in this matter on September 3, 2002 in Helena, Montana. The Claimant, David A. Laird, was present and was represented by John Frohnmayer, Attorney at Law. Vincent Hoffman appeared as a Claimant witness. The Respondent was represented by David B. Gallik, Attorney at Law. Fred Coleman, Lacey Coleman, and Kathy Coleman appeared as Respondent witnesses. Agency Exhibits 1 through 166, Claimant Exhibits 200 through 202, and Respondent Exhibits A through F were admitted into the record without objection.

On November 21, 2000, the Claimant filed a claim alleging he was owed \$4,598.24 for work performed during the period of July 1, 2000 to November 5, 2000. On June 11, 2001, the Wage and Hour Unit issued a determination finding that the Claimant was owed \$8,228.68 in wages and penalties, from which the Respondent filed a request for redetermination. On December 7, 2001, the Wage and Hour Unit issued a redetermination finding that the Claimant was owed \$5,484.37. The Wage and Hour Unit found a violation of the Prevailing Wage Act concerning the wage claim filed by the Claimant pursuant to Admin. R. Mont. 24.16.9010(1). On December 12, 2001, the Respondent filed its notice of appeal, and on December 17, 2001, the Claimant filed a notice of cross appeal from the redetermination.

II. ISSUE

Whether the Respondent failed to pay the prevailing wage rate for particular work pursuant to Mont. Code Ann. § 39-3-205 and Admin. R. Mont. 24.16.9010.

III. FINDINGS OF FACT

1. Coleman Construction was awarded State of Montana, Department of Transportation, Heavy and Highway Construction State Project No. SMP0199(01), known as the "Butte District Crush and Stock Pile".

2. Under the above contract, Coleman Construction was required to crush and stock pile gravel mix at five separate locations in Montana, as follows:

P-46 (MT-43) mile post 26.2 (Wisdom)

P-46 (MT-43) mile post 52.0 (Divide)

X81001 mile post 2.6 (Dillon)

I-15 mile post 15.0 (Lima)

S - 278 mile post 31.0 (Polaris)

3. All of the job locations under the state contract were more than 60 miles from Butte.

4. Vincent Hoffman was employed by Coleman Construction as the project superintendent, estimator, and vice president from July 2000 to November 2000. In his capacity, he supervised projects awarded Coleman Construction in Idaho, in addition to the highway public works contract awarded to the five above locations in Montana.

5. Fred Coleman, owner, had authorized Hoffman to hire a crusher operator in July 2000. Hoffman interviewed and hired David Laird for the position. Laird was immediately assigned to Idaho to work on a different project unrelated to Coleman Construction's public works contract in Montana. At the time of the interview, Laird was a Montana resident and lived within the state.

6. Hoffman informed Laird that he was being hired as a crusher operator and after his reassignment to Montana would be paid wages in that capacity pursuant to the rates required under the Davis-Bacon Act for his services at the Butte crusher gravel sites. Laird continued to work in Idaho from July 9 to August 5, 2000, at which time he was transferred to Montana and began work at sites designated in the public works contract.

7. Laird was required to submit time cards where he was to enter a description of his daily tasks and number of hours he worked on a weekly basis. He was paid at different hourly rates based on the daily tasks on the time cards. The wage rates were established from those set forth in the Montana statewide prevailing Davis-Bacon highway construction manual. He was paid as follows:

Type of Work Hourly Rate Zone Pay Fringe Benefits

Laborer \$14.50 \$3.70 \$3.79

Equipment/Crusher

Operator \$17.82 \$3.70 \$4.30

Truck Driver \$17.44 \$3.70 \$4.26

Loader Operator \$17.30 \$3.70 \$4.30

Non-Public Works Work \$12.00 \$0.00 \$0.00

8. While employed at the Montana work sites following his transfer, Laird was paid at the above crusher operator rate when operating the controls of the crusher equipment for a total of 229 hours. He was paid labor hourly rates for time he spent setting up and breaking down the crusher equipment at the different locations and also for the time he spent performing equipment maintenance for a total of 172.5 hours. He was paid loader operator rates for a total of 28 hours for the time he operated the loader equipment. He was paid at the truck driver rate for the time he spent transporting equipment to new crusher sites and driving the water truck for a total of 12 hours.

9. He was also paid a straight \$12.00 per hour without zone pay or fringe benefits for the time he was required to attend safety training in the course of his work. Coleman required Laird to attend fire training and mine safety training on two separate occasions. One of the crushers that he was assigned was operating near the area forest fires. The mine safety training was necessary to enhance his safety skills (32 hours - Non Public Works).

10. Laird worked at the Wisdom stock pile gravel site from August 7, 2000 to September 6, 2000.

11. Laird worked at the Polaris stock pile gravel site from September 7 through September 19, 2000.

12. Laird worked at the Lima stock pile gravel site from October 2, 2000 to October 7, 2000.

13. Laird worked at the Dillon stock pile gravel site from October 16, 2000 through October 27, 2000.

14. The gravel pit used to supply the stock pile of gravel at Dillon came from a pit commonly referred to as the "Hayden Pond". The gravel used to supply gravel at Wisdom came from a pit on the property of the Harrington Ranch. Coleman Construction did not sell the gravel from either pit or stock pile as a commercial operator.

15. Laird had previous employment as a crusher operator for 11 months prior to his employment at Coleman Construction. Since his termination with Coleman Construction, he has been employed as a crusher operator. His work for those employers was subject to the Montana Prevailing Wage laws since the employers were engaged in public works contracts with the State of Montana for heavy and highway construction.

16. Under the terms and conditions of employment with those employers, he has had to perform the same range of job tasks as he performed while employed at Coleman Construction. He has

always been paid the prevailing wage by those employers for all hours he worked at the rate established for crusher operators.

17. The training Coleman Construction required Laird to attend to enhance his safety skills while operating equipment was directly related to his performance as a crusher operator while working on designated public work contract sites.

18. Laird had confronted Coleman several times when he noticed he was being paid less than the prevailing hourly wage established for a crusher operator. Coleman insinuated that he would be paid later to make up the wage differential after the company received compensation from the government for the use of the company's equipment during the fire season.

19. During the period he performed work at the work sites in Montana, Coleman Construction payroll records show he was paid wages in the amount of \$7,650.54 for all work performed (Claimant's Exhibit A through I). If paid at the crusher operator prevailing wage rate including zone pay and fringe benefits (\$25.82 per hour) for all hours worked, he would have earned \$11,243.57 or an additional \$3,593.03 in wages.

IV. DISCUSSION/RATIONALE

The State of Montana accepted Coleman Construction's bid and awarded them public works contract, State Project No. SMP0119(01), which involves heavy and highway construction. Therefore, Coleman Construction is subject to the statutes and administrative rules governing the Montana Prevailing Wage Act.

The purpose of implementing the prevailing wage rules is to protect local markets, to maintain the general public welfare of Montana workers on public works projects, to eliminate wage cutting as a method of competing for public works contracts, to maintain wages and rates paid on public works at a level significant to attract highly skilled labor performing quality workmanship, and to prevent the rate of wages from adversely affecting the equal opportunity of Montana contractors to bid on public works. Admin. R. Mont. 24.17.101.

Laird was a bona fide resident living in Montana at the time he was hired and assigned to work on a heavy and highway construction public works contact awarded to Coleman Construction by the State of Montana on August 5, 2000. Therefore, the central issue to this case is to determine whether Laird was paid the standard prevailing wage rate and fringe benefits for the services he performed while employed by Coleman Construction.

Laird contended that the assigned duties and responsibilities he was performing for Coleman Construction was that of a "crusher operator". Therefore, he claimed pay for all hours worked consistent with the position of crusher operator at a rate of \$17.82 per hour in addition to fringe benefits of \$4.30 per hour and zone benefits at a rate of \$3.70 per hour.⁽¹⁾ Coleman Construction argued that Laird did not always work as a crusher operator in the course of his job assignments. Therefore, Coleman Construction claimed that he was paid at the prevailing wage and fringe benefits rates for the variety of duties he performed including laborer, truck driver, maintenance

worker and non public works training assignments, pursuant to the provisions governing the prevailing wage laws.

Coleman Construction also argued that they are not subject to pay prevailing wage rates provided under the provisions of the Montana Prevailing Wage Act related to services provided at the Wisdom and Polaris sites. Coleman Construction asserted that they have been engaged in contracts with commercial suppliers for goods and supplies from those locations, and therefore are exempt from paying wage rates pursuant to Mont. Code Ann. § 18-2-401(3)(a)(b)(ii).

Laird's Rate of Pay and Job Classification

In deciding this case, it is essential to determine the occupation of Laird's job while employed at Coleman Construction. Pursuant to Mont. Code Ann. §§ 18-2-401 and 18-2-402, the Department of Labor and Industry determines the standard prevailing rate of wages for occupations. The Department generally applies the classification of jobs found under the public works contracts by using the definition index from the Dictionary of Occupational Titles (DOT) in order to consistently enforce the Wage Payment Act. The DOT defines the job classification of DOT #570685018 - crusher operator as follows:

DOT Description:

Tends conveyors and grinders that crush raw gypsum into specified pebble size: Opens storage gates and starts grinders, feeders, and belt conveyors. Observes flow of materials on conveyors. Cleans carriers and removes wedged rock from conveyors and clogged chutes, using scraper and poker. Opens slide gates to allow flow of pebbles into storage bins or trucks. May fill supply chutes with gypsum rock, using tractor equipped with scoop.

The record reveals that during the course of his employment with Coleman Construction, Laird was hired and performed as a crusher operator within the meaning and guidelines found in the above DOT description and with the Montana Prevailing Wage Act. No matter how Coleman Construction decided to classify his work time resulting in differing wage rates, Laird's predominant duties fall under the same range of job related obligations customarily performed in the heavy and highway construction industry by those designated as 'crusher operators'. His time cards show that nearly all of his work time was involved with the operation or related maintenance and relocation transportation essential for the crusher equipment operation for Coleman Construction to meet their contract obligation (Exhibits 45-52).

Laird has been employed as a crusher operator on different public works projects awarded to other employers with basically the same duties and responsibilities he did for Coleman Construction. He has always been paid at the statutory prevailing wage assigned to the position of 'crusher operator' without differing wage rates for particular duties performed on those jobs. The industry practice for payment of a crusher operator thus is inconsistent with Coleman Construction's practice of only paying prevailing wage for hours spent doing the specific duties of operating the crusher.

The details Coleman Construction assigned Laird clearly fall within the work of a crusher operator. Under the initial terms and conditions of hire, Coleman Construction had advised Laird that he would be performing under the job title as a 'crusher operator'. Laird was assured that he would be paid the required statutory prevailing wage rate in that capacity while performing work directly related to the 'Butte District Crush and Stock Pile' public works contract awarded to Coleman Construction. He was never advised that any of his assigned tasks would classify him outside his job title of a crusher operator.

When Laird noticed he was not being compensated at the statutory prevailing rate for crusher operators, he confronted the employer and was again assured that he would be paid correctly later when money became available within the company at the crusher operator prevailing wage rate. Laird was employed in the capacity of crusher operator within the meaning of the above administrative rules and statutory provisions for all of the work he performed for Coleman Construction in Montana.

Coleman Construction was not a Commercial Supplier of Gravel

Coleman claimed that the gravel material used to stock pile at the Wisdom site that came from the Harrington Ranch was sold by Coleman Construction as a commercial supplier of gravel. He also verified that gravel used to stock pile at the Dillon site came from the Hayden Pond pit, and that the gravel was owned and sold by Coleman Construction as a commercial supplier of gravel. Coleman Construction contends that such sale of goods from those sites is not classified as construction services and therefore, any claim by Laird for additional pay for hours worked at those sites should be denied pursuant to Mont. Code Ann. § 18-2-401(3)(b).

18-2-401. Definitions. Unless the context requires otherwise, in this part, the following definitions apply:

(3) (a) "Construction services" means work performed by an individual in construction, heavy construction, highway construction, and remodeling work.

(b) The term does not include:

(i) engineering, superintendence, management, office, or clerical work on a public works contract; or

(ii) consulting contracts, contracts with commercial suppliers for goods and supplies, or contracts with professionals licensed under state law.

Coleman Construction entered into a public contract with the Montana Department of Transportation to crush and stock pile gravel at designated sites for a highway construction project. Coleman Construction's contention that as a commercial supplier of the aggregate for highway construction they should not be subject to the prevailing wage laws is inconsistent with the definition of "heavy and highway construction wage rates" set forth in Mont. Code Ann. § 18-2-401(8), which specifically mentions prevailing wage rates apply to projects engaged in new or reopened pits that produce aggregate. The record does not support a finding that it was the

contemplation of the parties that Coleman was a "commercial supplier". Nowhere does the contract state or imply that Coleman Construction was designated as a "commercial" supplier. To the contrary, the contract is clear in that Coleman Construction was subject to the Montana Prevailing Wage law. Further, Coleman Construction failed to offer convincing evidence showing they were actually engaged in the selling of aggregate to the general public as a normal course of business.

Coleman Construction did not produce any specific contracts or identify any customers they serviced as a commercial supplier. Laird and Hoffman were unaware that Coleman Construction was involved in any activities of commercially supplying gravel to the general public from any of the five sites involved under the public works contract.

On this record, Coleman Construction did not provide service under the public contract as a "commercial supplier" within the meaning of Mont. Code Ann. § 18-2-402(3)(b). Coleman Construction is subject to pay prevailing wage rates for Laird's services as a crusher operator at both sites.

Wages Due and Penalty

Fred Coleman d/b/a Coleman Construction failed to pay the prevailing wage rate to David A. Laird for his services as a "crusher operator" pursuant to Mont. Code Ann. § 39-3-205 and Admin. R. Mont. 24.17.121 and Admin. R. Mont. 24.17.124 in the amount of \$3,593.03.

David A. Laird is also entitled to a penalty pursuant to Mont. Code Ann. § 39-3-206 and Admin. R. Mont. 24.16.7561. Admin. R. Mont. 24.16.7561 requires a penalty of 55% of the wages due and owing. Fred Coleman d/b/a/ Coleman Construction owes David A. Laird penalty in the amount of \$1,976.17 (\$3,593.03).

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. Coleman Construction violated Mont. Code Ann. § 39-3-205, by failing to pay David A. Laird wages when due.
3. Coleman Construction is liable for a penalty of 55% for failure to pay wages when due pursuant to Mont. Code Ann. § 39-3-206.

VI. ORDER

Fred Coleman d/b/a Coleman Construction is hereby ORDERED to tender a cashier's check or money order in the amount of \$5,569.20, representing \$3,593.03 in wages and \$1,976.17 in penalty, made payable to, and mailed to the Employment Relations Division, P.O. Box 6518, Helena, Montana 59624-6518, no later than 30 days after service of this decision.

DATED this 12th day of December, 2002.

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 Mont. Code Ann. § 18-2-407(2), by filing a petition for judicial review in an appropriate district court within 30 days of service of the decision. See also Mont. Code Ann. § 2-4-702.

If there is no appeal filed and no payment is made pursuant to this Order, the Commissioner of the Department of Labor and Industry will apply to the District Court for a judgment to enforce this Order pursuant to Mont. Code Ann. § 39-3-212. Such an application is not a review of the validity of this Order.

1. Laird received the established zone pay rate - not in dispute.