

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

IN THE MATTER OF THE WAGE CLAIM)	Case No. 94-2002
OF BRADLEY A. BECK,)	
Claimant,)	
)	
vs.)	FINDINGS OF FACT;
)	CONCLUSIONS OF LAW;
)	AND ORDER
SUPERIOR CONCRETE, LTD,)	
a Montana Corporation,)	
Respondent.)	

I. INTRODUCTION

Bradley Beck filed a wage claim on July 5, 2001, alleging that Superior Concrete, LTD (Superior Concrete) owed him unpaid wages in the amount of \$2,620.00 On August 10, 2001, the Wage and Hour Unit of the Department of Labor and Industry issued a determination finding that Superior Concrete owed Beck \$5,502.00 in wages and penalties. Superior Concrete appealed the determination, denying that it owed Beck any additional wages. The Wage and Hour Unit considered Superior Concrete's appeal and additional information, and issued a redetermination on October 18, 2001, finding that the company owed Beck \$1,965.00 plus appropriate penalties. Superior Concrete appealed. On January 18, 2002, Bernadine Warren, Hearing Officer for the Department of Labor and Industry, conducted a telephonic hearing in this matter. Beck testified on his own behalf. Roger Terwilliger, president of Superior Concrete, LTD, represented the company and testified on its behalf.

Exhibits 1 through 51, proposed by the Hearing Officer, were admitted into the record without objection. Respondent exhibits A through F were admitted into the record without objection. Respondent exhibits G through K were admitted into the record over Beck's hearsay objection. Beck proposed no exhibits. Both parties stipulated to proceeding by telephone.

II. ISSUES

- a. Whether Superior Concrete, LTD improperly withheld wages and made improper deductions from paychecks to Bradley Beck;
- b. Whether Superior Concrete, LTD, owes Bradley Beck a bonus for work performed; and
- c. Whether Superior Concrete, LTD, owes penalty for failure to pay wages, as provided by law.

III. FINDINGS OF FACT

1. Superior Concrete hired Bradley Beck as a wall foreman in September 2000. Beck was replacing the outgoing wall foreman who was leaving for personal reasons.
2. Prior to being hired, Beck and Roger Terwilliger, president of the company, discussed Beck's wage requirements. They settled on an hourly wage of \$17.00, plus \$2.00 per yard for every yard of concrete the claimant poured. Beck was responsible for tracking the concrete yardage, and then turning in the figures to Terwilliger for both payment and for billing purposes. Beck offered to cover up to 50% of the cost of any mistakes he made pouring concrete, which would require re-pouring or other work. Wall foremen generally earn \$20.00 to \$22.00 per hour. Beck agreed to accept a lesser hourly wage in return for the concrete yardage payments.
3. During September 2000, Beck poured at least 150 yards of concrete. The journal for September, in which Beck recorded the yards poured, and which was given to Terwilliger, is missing.
4. Between October and December 2000, the claimant poured 353 yards of concrete.
5. Between January 1 and May 2, 2001, Beck poured 334 yards of concrete.
6. On January 24, 2001, Terwilliger paid Beck \$300.00 in addition to his regular hourly wage, his additional yardage payment for 150 yards of concrete poured. This was the first time Superior Concrete had paid Beck for any concrete yardage poured.
7. In mid-April 2001, Beck announced that he was giving his two-week notice, and that he was quitting so that he could open his own concrete business. Terwilliger was very upset because Beck would be in direct competition with Superior Concrete.
8. On May 2, 2001, Beck completed his final project for Superior Concrete, and informed Terwilliger that he would not perform any further work for the company. At that time, Superior Concrete owed Beck for 62.5 hours of work, plus all concrete yardage poured over the course of his employment, except for the 150 yards already paid.
9. Beck asked Terwilliger for his final paycheck plus pay for the concrete yardage. Terwilliger refused to give Beck his final paycheck until Beck turned in the company truck, a concrete calculator, shop keys, gas card and water jug.
10. Sometime after Beck quit, Terwilliger went to Beck's residence and picked up

the company truck. The shop keys and gas card were in the truck.

11. Beck filed a claim with the Wage and Hour Unit on July 5, 2001 contending that Superior Concrete owed him 62.5 hours of work, paid at a rate of \$17.00 per hour, and 800 yards of concrete poured, paid at a rate of \$2.00 per yard.

12. On August 24, 2001, the Wage and Hour Unit received a check from Superior Concrete, made payable to Beck, in the amount of \$702.09. The check is being held by the Wage and Hour Unit pending resolution of Beck's claim. The check included payment for 62.5 hours of work at a rate of \$17.00 per hour. Withheld from the monies was \$65.00. Added into the gross, and later subtracted out, was \$300.00. Terwilliger withheld \$65.00 from Beck's pay to cover the cost of cleaning the company vehicle that Beck had been using. Because he also had failed to make proper withholdings from the January 24, 2001 concrete yardage check, his bookkeeper had added \$300.00 to the gross, withheld taxes on the gross amount, then subtracted the \$300.00 out to reach the net pay.

13. Beck estimates that he poured at least 800 yards of concrete between his date of hire and his last day of employment, with 150 of that poured in September 2000. Since Superior Concrete paid the claimant for 150 yards of concrete in January 2001, Beck requests payment for an additional 650 yards at a rate of \$2.00 per yard.

IV. DISCUSSION

Montana law requires that employers pay employees wages when due, in accordance with the employment agreement, pursuant to §39-3-204, 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. "Wages" are any money due an employee by an employer. § 39-3-201(6), MCA.

Beck first requests that Superior Concrete pay him for 650 yards of concrete poured at the rate of \$2.00 per yard. Superior Concrete disagrees, maintaining that the yardage payment was simply a bonus for perfect work. However, there is no evidence in the record to support a finding that Superior Concrete meant to pay the amount as a bonus. It issued a check to Beck in January for 150 yards of poured concrete without regard to the perfection or imperfections of his work. The pay was not contingent upon the quality of Beck's work. Beck's offer to pay half the cost of any repouring or mistakes he made was outside the wage agreement. Beck agreed to accept a lesser hourly wage in return for the yardage payment. The payment, then, was a part of his total wage package, and is not considered a bonus.

The courts have repeatedly held that parties cannot privately waive statutes enacted to protect the public in general. Phoenix Physical Therapy v Unemployment Insurance Division, 284 Mont. 95, 104, 943 P.2d 523, 528 (1997). The court cautioned in Garsjo v. Department of Labor and Industry, 172 Mont. 182, 188, 562 P.2d (1977), that "an employee may not enter into an agreement which operates to waive compensation for overtime actually worked." The court recognized that the laws of Montana that ensure an employee's right to receive minimum wage and overtime pay are expressions of public policy created to protect workers, and restraining

those from withholding overtime pay is vindication of a public right rather than a private right. Withholding wages is considered a continuing public offense. Although this case does not involve overtime or minimum wage violations, the same theories apply.

Since the yardage payment is considered wages, the Department has an obligation to determine from the evidence presented the number of yards of concrete Beck poured. The evidence presented shows Beck poured 687 yards of concrete between October 2000 and May 2001. However, Superior Concrete failed to keep records of concrete poured by Beck in September 2000.

The burden of proof regarding hours worked, or, in this case, the amount of concrete poured, is on the employer, not the employee. See Garsjo, supra. If the employer fails to record the employee's hours, or yards of concrete poured, reference is then made to the employee's records. However, the employee is not to be penalized for failing to keep precise 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. Clemens Pottery, 328 U.S. 680, 687 (1946).

Superior Concrete failed in its burden to provide an accurate and adequate accounting of Beck's work in September 2000, as required by law. As a result, Beck's estimate that he poured 150 yards of concrete in September 2000 prevails. The facts show that Superior Concrete paid the claimant for 150 yards of concrete poured, which satisfies the obligation for September yardage. Thus, it owes him payment at \$2.00 per yard for 687 yards of concrete poured between October 2000 and May 2001.

Superior Concrete contends that Beck agreed to cover one-half the cost of repours, and it was, therefore, justified in not paying the \$2.00 per yard payment to Beck. However, Attorney General Opinion No. 17, Volume 36 (August 27, 1975) held that an employer may not make deductions from an employee's pay for damages caused by the employee during the course of his employment, losses caused by the employee's poor judgment, or liability insurance deductible charges attributable to employee negligence. The opinion held that an employer may not withhold wages, even pursuant to a union contract, unless the deductions were made for board, room, and other incidentals supplied by the employer as part of the conditions of employment. Even if the law allowed deductions from wages for the cost of repours, Superior Concrete

provided no evidence of the cost of repours or other costs that were attributable to Beck's negligence or error. Thus, Superior Concrete may not withhold any amount of the concrete yardage payment to Beck to cover losses incurred by the company that resulted from Beck's negligence or error. It owes him payment for 687 yards of concrete poured, or \$1,374.00.

Beck next contends that Superior Concrete failed to pay him for 62.5 hours of labor. However, Superior Concrete mailed the Wage and Hour Unit a check to cover that work, minus \$65.00 to cover vehicle cleaning. The Wage and Hour Unit is currently holding that check. Superior Concrete contends that the \$65.00 withholding was proper.

Attorney General Opinion No. 25, Volume 11 (March 25, 1953), still in effect, held that an employer cannot withhold wages from an employee to pay a debt to the employer, unless the debt is for room, board or other incidentals which the employee has agreed may be deducted as a condition of employment. "Other incidentals" include items the employer furnishes to the employee that are not required for the performance of the employee's duties. These would include items such as furnished transportation that is not required for work purposes, electricity, water or gas furnished for the non-commercial use of the employee, or fuel, such as kerosene, coal or firewood, for the employee's non-work use. These types of incidentals may properly be deducted from the employee's wages, provided the employee agrees to the deductions, and the agreement is voluntary and uncoerced. (See 29 CFR § 531.30, 29 CFR § 531.3(a), and 29 CFR § 531.3(b), FLSA interpretive regulations regarding items that may legally be deducted from an employee's wages without disturbing minimum wage requirements.)

Items that are primarily for the benefit of the employer are not considered incidentals, and may not be deducted from an employee's pay. These items include, in part, the cost of uniforms, the cost of maintaining uniforms (if the employer maintains the uniforms), or the use of automobiles by sales employees where the use of the automobile is necessary to the employer's business. An employee may properly authorize an employer to make deductions and to turn the deducted amount over to a third party, such as union dues, child support payments, or charitable contributions. However, any deduction that either directly or indirectly produces a profit to the employer is not allowed.

As provided by the cases and Attorney General opinions, Superior Concrete may not withhold any amount of payment to Beck to cover the cost of cleaning the company vehicle. Therefore, Superior Concrete owes Beck \$65.00 improperly withheld from his wages for the cost of cleaning a vehicle. The total amount of unpaid wages Superior Concrete owes Beck, then, is \$1,439.00, in addition to the check previously tendered to the Employment Relations Division.

An employer who fails to pay an employee as provided by law or who violates any other provision of the law is guilty of a misdemeanor and must pay a penalty of up to 110% of the unpaid wages. § 39-3-206, MCA. ARM 24.16.7566 provides that a penalty equal to 55% of the wages due the employee will be imposed if none of the special circumstances of ARM 24.16.7556 apply. That rule requires that a 110% penalty be applied to those cases where the employer fails to cooperate or provide requested information, the employer's records are falsified or intentionally misleading, or the employer has violated similar wage and hour statutes within the three years previous to the wage claim. In this case, nothing in the record shows that Superior

Concrete failed to cooperate, falsified records or violated similar wage and hour statutes within the past three years. Thus, a 55% penalty, or \$791.45, is properly assessed.

V. CONCLUSIONS OF LAW

1. The State of Montana and the Commissioner of the Department of Labor and Industry have jurisdiction over Beck's claim for unpaid wages under § 39-3-201 et seq. MCA. State v. Holman Aviation, 176 Mont. 31, 575 P.2d 925 (1978).
2. Superior Concrete failed to pay Beck wages in accordance with its employment agreement. It owes him \$1,439.00 in unpaid wages. Beck is entitled to a penalty of \$791.45 pursuant to §39-3-206, MCA and ARM 24.16.7566.

VI. ORDER

Respondent Superior Concrete, LTD is hereby ORDERED to tender a cashier's check or money order in the amount of \$2,230.45, representing the unpaid wages and penalties, made payable to Bradley Beck, and mailed to the Employment Relations Division, PO Box 6518, Helena, Montana, 59624-6518, no later than 30 days from the date of this Order.

DATED this 25th day of January, 2002.

DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

By: /s/Bernadine E. Warren
Bernadine E. Warren
Hearing Officer