

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

IN THE MATTER OF THE WAGE CLAIM)	Case No. 623-2003
OF MICHAEL A. HEIDLEBAUGH,)	
Claimant,)	
)	
vs.)	FINDINGS OF FACT;
)	CONCLUSIONS OF LAW;
)	AND ORDER
CONCRETE CONTRACTORS INC.,)	
)	
Respondent.)	

I. INTRODUCTION

In this matter, Michael Heidlebaugh (Heidlebaugh) appeals from a Wage and Hour determination and redetermination that denied his claim for additional wages that he claims are due to him from Concrete Contractors, Inc., (Concrete Contractors). Hearing Officer Gregory L. Hanchett convened a contested case hearing in this matter on October 22, 2003 and November 12, 2003. Heidlebaugh represented himself. Darel Graves, attorney at law, represented Concrete Contractors. Heidlebaugh, Narles Yde, a former employee of Concrete Contractors, and Jason Welnel, president of Concrete Contractors, all testified under oath. Exhibits 000001 through 000048 and Exhibits 000056 through 105 were admitted into the record by stipulation. Exhibits 000049 through 000055 were excluded from the record.⁽¹⁾ In addition, Respondent's Exhibits A, B, C, D, and E were admitted into evidence by stipulation. Having considered the testimony and exhibits presented at the hearing, the hearing officer concludes that Concrete Contractors owes Heidlebaugh \$202.00 in overtime wages. This determination is supported by the following findings of fact, conclusions of law, and order.

II. ISSUE

Is Heidlebaugh entitled to additional wages as alleged in his complaint, and penalty as provided by law?

III. FINDINGS OF FACT

1. Heidlebaugh worked for Concrete Contractors pouring and finishing concrete. He began this job during May, 2002. Concrete Contractors agreed to pay Heidlebaugh an hourly wage of \$13.00 for his work. He received his first paycheck from Concrete Contractors on May 24, 2002.

2. Heidlebaugh last worked for Concrete Contractors on August 2, 2002. At that time, he quit to return to his studies at school. Concrete Contractors paid Heidlebaugh the following amounts by check during his summer of employment:

May 24, 2002	\$390.00
June 7, 2002	\$894.00
June 24, 2002	\$960.00
July 8, 2002	\$960.00
July 27, 2002	\$1,040.00
August 8, 2002	\$1,040.00
September 10, 2002	\$500.00

3. Heidlebaugh's June 7, 2002 check, though written to "HCCU" (Helena Community Credit Union), was endorsed by Heidlebaugh and credited toward Heidlebaugh's personal checking account.

4. Heidlebaugh recorded the number of hours he worked each week on a time sheet. He turned in this time sheet each week to either Jason Welnel or Scott Senn (a manager for Concrete Contractors). Heidlebaugh was paid based on the number of hours he turned in.

5. Heidlebaugh made no copies of his weekly time sheets. Each week, after Heidlebaugh turned in his time sheet, Welnel or Senn input the hours recorded on the sheet into a computer. Welnel then threw away Heidlebaugh's time reports. Welnel's only record of the hours turned in by Heidlebaugh is a list compiled by him (Exhibit A) of the hours spent on each job taken from information stored in the computer. The record does not show the days that Heidlebaugh worked nor does it record the number of hours he spent working each day.

6. Between July 22, 2002 and August 2, 2002, Heidlebaugh worked at five different locations for Concrete Contractors. Those locations were the Hamilton "Phosphate" job, the Hamilton Basketball Court job, the Truscott job, the Nistler job, and the Hamlin Furman job. Narles Yde, also employed by Concrete Contractors, helped Heidlebaugh complete these jobs. Welnel did not supervise Heidlebaugh and was not present at any of the job sites while Heidlebaugh was working at them.

7. Between July 22, 2002 and August 2, 2002, Heidlebaugh worked several days of 12 or more hours in duration and 6 days each work week. On the Hamilton "Phosphate" job, Heidlebaugh and Yde needed 2 to 3 days to set the forms for the project. After the forms were set, an additional full day was needed to "grade" the site, that is, add the aggregate filler upon which the concrete foundation would be poured. A fourth day was then spent pouring and finishing the concrete. On average, Heidlebaugh and Yde started at 5:00 a.m. or 6:00 a.m. and finished at 6:00 p.m.

8. At the Hamilton basketball court job, Heidlebaugh and Yde needed 2 days to 3 days to set up the forms which took 8 hours each day. They worked 10 additional hours to "grade" the slab, and 10 more hours to pour and finish the slab.

9. Heidlebaugh and Yde completed several more hours of work on the Nistler slab and steps as well as on the other jobs. Between July 22, 2002 and August 2, 2002, Heidlebaugh worked 116 hours. Yde worked 105 hours during that period.

10. After Heidlebaugh filed this action with the Wage and Hour unit, but before the determination issued, Concrete Contractors tendered \$233.00 to the Wage and Hour Division for wages that Concrete Contractors believed it owed to Heidlebaugh. Heidlebaugh refused the payment, and the Division returned the check to Concrete Contractors.

IV. DISCUSSION

Montana law requires that employers pay wages when due, in accordance with the employment agreement, pursuant to Mont. Code Ann. § 39-3-204. 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 the employer. Mont. Code Ann. § 39-3-201(6).

The burden of proof regarding hours worked is on the employer, not the employee. *Garsjo v. Department of Labor and Industry* (1977), 172 Mont. 182, 562 P.2d 473. If the employer fails to keep adequate records of 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.

Where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes, a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is 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 his statutory duty; it would allow the employer to keep the benefits of an employee's 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.

Anderson v. Mt. Clemens Pottery Co. (1946), 328 U.S. 680, 687.

Heidlebaugh's complaint alleges that he is owed additional wages for overtime hours he worked between July 22, 2002 and the date he quit, August 2, 2002. At the hearing, Heidlebaugh tried to expand the scope of the complaint by alleging that he was owed additional hours for work he completed in June, 2002. Concrete Contractors disputes Heidlebaugh's contention both with respect to the amount of work performed between July 22 and August 2, 2002 and the number of hours completed during June, 2002. Concrete Contractors argues that Heidlebaugh worked only 77 hours during the July 22 to August 2, 2002, (40 hours during the week between July 22 and July 28, 2002, and 37 hours during the week between July 29 and August 2, 2002) period and that he has been paid for all work that he completed.

To prove his case, Heidlebaugh relies on his own testimony, the May 22, 2003 affidavit (Document 000006) and February 28, 2003 affidavit (Documents 000007 through 000009) of Charles Ferguson, and the testimony of Yde. Heidlebaugh's testimony with respect to additional hours he claims to have completed before July 22, 2002 is inconclusive. He did not describe any specifics of jobs. Heidlebaugh's suggestion that he was not given a check on June 7, 2002 (because the check that Concrete Contractor's produced was made out to "HCCU") is ludicrous. Heidlebaugh signed and cashed that check and it was deposited to Heidlebaugh's account. In short, Heidlebaugh presented no substantial evidence to show either that he worked any extended hours before July 22, 2002 or that he was not properly paid during that period.

Ferguson's affidavits of February 28 and May 22, 2003, which support Heidlebaugh's contentions, are wholly incredible in light of Ferguson's February 14, 2003, affidavit. In the February 14 affidavit, Ferguson offers testimony that contradicts his February 28 and May 22 affidavits. The presumption that a witness is presumed to speak the truth may be overcome by, among other things, a witness' inconsistent statements or evidence that contradicts the witness' testimony. Mont. Code Ann. § 26-1-302(1) and (3). Ferguson's contradictory affidavits cannot be relied upon.

Welnel's testimony with respect to Heidlebaugh's hours does not support Heidlebaugh's case, either. Welnel did not keep track of Heidlebaugh's hours and did not ever go to the job sites while Heidlebaugh was working.

The only testimony that the hearing officer finds substantial is that of Yde. Yde worked with Heidlebaugh during the July 22 to August 2, 2002 time period. He worked almost identical hours and he testified in a very credible fashion that on average, he and Heidlebaugh worked 12 hours per day during the July 22 to August 2, 2002 period. His testimony creates a reasonable inference that Heidlebaugh worked the 116 hours he claims he did during that period.

Against this, the employer has failed to keep adequate records of the amount of hours that Heidlebaugh worked during this time period. This is the employer's burden, and, where the employer fails to maintain adequate records, and the employee establishes through just and reasonable inference that he has performed work for which he was not compensated, then the employee is entitled to recovery. *Anderson, supra*. Heidlebaugh has demonstrated that he performed work during July 22, 2002 through August 2, 2002 for which he was not compensated.

For July 22, 2002 to August 2, 2002, Concrete Contractors paid Heidlebaugh \$1,040.00. Having worked 116 hours, Heidlebaugh should have been paid for 80 regular hours and 36 hours of overtime. At \$13.00 per hour regular wages, Heidlebaugh would earn \$19.50 in overtime wages. For his 80 regular hours, he was entitled to \$1,040.00 (80 x \$13.00). He was entitled to overtime wages of \$702.00 (36 x \$19.50). Thus, he should have been paid a total of \$1,742.00. He was paid \$1,040.00 on August 8, 2002 and an additional \$500.00 on September 10, 2002, totaling payment in the amount of \$1,540.00. He was thus underpaid in the amount of \$202.00.

The law provides for an employer to be assessed a penalty of up to 110% for wages due and unpaid. Mont. Code Ann. § 39-3-206. However, the rules of the Department implementing this

provision provide that when the wages owed are paid by the employer prior to the issuance of a determination, no penalty will be imposed. Admin. R. Mont. 24.16.7551(1). Concrete Contractors attempted to pay an additional amount, \$233.00, to Heidlebaugh after the commencement of this proceeding, but Heidlebaugh refused to accept the payment. Concrete Contractors tendered a check to the Wage and Hour Division on October 9, 2002, prior to the Division's determination in this matter. Having done so, no penalty can be imposed against Concrete Contractors.

V. CONCLUSIONS OF LAW

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

2. Concrete Contractors owes unpaid overtime wages to Heidlebaugh in the amount of \$202.00.

3. No penalty can be imposed in this matter because Concrete Contractors tendered \$233.00 to the Wage and Hour Division prior to any determination issuing. That amount exceeded the amount due to Heidlebaugh. Therefore, the provisions of Admin R. Mont. 24.16.7551 are applicable to this case and preclude imposition of a penalty against Concrete Contractors.

VI. ORDER

Concrete Contractors is ordered to tender a cashier's check or money order in the amount of \$202.00 made payable to Michael Heidlebaugh, 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 23rd day of December, 2003.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ GREGORY L. HANCHETT
GREGORY L. HANCHETT
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 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. These exhibits comprise the Department of Labor and Industry's Independent Contractor Certification Unit's (ICCU) finding that Heidlebaugh was an employee of Concrete Contractors, not an independent contractor. While the case was still at the Wage and Hour Division, Concrete Contractors defended in part on the basis that Heidlebaugh was an independent contractor. At the hearing in this matter, counsel for Concrete Contractors indicated that the employer did not contest the ICCU's finding. Because Concrete Contractors did not contend that Heidlebaugh was an independent contractor, the exhibits were not relevant to any determination to be made by the hearing officer and were, therefore, excluded from evidence.