

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

IN THE MATTER OF THE WAGE CLAIM)	Case No. 968-2003
OF STEVEN L. WITTE,)	
Claimant,)	
)	
vs.)	FINDINGS OF FACT;
)	CONCLUSIONS OF LAW;
)	AND ORDER
MOUNTAIN SIDE CONSTRUCTION &)	
MONTANA BOULDER,)	
Respondent.)	

I. INTRODUCTION

Steven Witte filed a complaint with the Department of Labor and Industry Wage and Hour Unit seeking additional overtime wages from Mountain Side Construction (Mountain Side) which he claims are owed to him. The wage and hour unit found that Mountain Side owed Witte additional wages of \$2,228.50. Mountain Side appealed this determination. Witte did not appeal from the Wage and Hour Division's determination. At the pre-hearing conference in this matter, Witte agreed that he sought only the \$2,228.50 that the Wage and Hour Unit found to be owing to him.

Hearing Examiner Gregory L. Hanchett convened a contested case hearing in this matter on December 15, 2003. Witte represented himself and testified under oath. Jennifer Hertzler, Wayne Hertzler, and James Freeman testified under oath on behalf of Mountain Side. The parties stipulated to the admission of Documents 000001 through 000203. Having considered the evidence and arguments presented by the parties, the hearing examiner finds that Mountain Side owes wages to Witte as set out below.

II. ISSUE

Does Mountain Side owe additional wages to Witte and penalty as provided by law?

III. FINDINGS OF FACT

1. Mountain Side Construction is a Montana business with a gross annual profit in excess of \$500,000.00.

2. Mountain Side employed Witte as a laborer/craftsman from January, 2001 until November 24, 2002. Witte was initially hired at a rate of \$14.00 per hour. His overtime rate during this

period was \$21.00 per hour. Beginning in June, 2002, Mountain Side paid Witte at a rate of \$16.00 per hour. During this period of time, his overtime rate was \$24.00 per hour.

3. Mountain Side paid Witte based on the hours he recorded and turned in to Mountain Side on hour logs (Documents 000134 through 000147).

4. Mountain Side agreed, at Witte's request, to bank Witte's overtime hours. Witte did not get paid for his overtime hours. Although Mountain Side did not ordinarily permit its workers to work overtime, it allowed Witte to do so in order to help him out with some financial difficulties Witte was facing at the time.

5. Mountain Side failed to pay Witte for overtime hours that he had banked. The dollar amount for the overtime hours that he banked is \$1,892.50.

6. Mountain Side did not pay Witte for work he completed on November 21 and 22, 2002. Witte worked 21 hours on these two days at \$16.00 per hour.

7. One of the jobs where several of the disputed hours were earned was the "Bostedt" project. This job involved work at two different sites. Jim Freeman, another employee of Mountain Side, worked on this project with Witte. The two did not always work together at the same site, nor, when working at the same site, did they always arrive and depart at the same time.

IV. DISCUSSION AND ANALYSIS

A. The Fair Labor Standards Act Applies To This Case

The Department of Labor and Industry is authorized to enforce the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA). *Hoehne v. Sherodd, Inc.* (1983), 205 Mont. 365, 668 P.2d 232. Mountain Side's gross annual profit for the time material to this complaint was in excess of \$500,000.00. Accordingly, the provisions of the FLSA apply to this case.

B. Mountain Side Owes Witte Regular and Overtime Wages

FLSA prohibits employers to whom the act applies from employing their employees in excess of 40 hours in a single work week unless the employee is compensated at a rate not less than one and one-half times the regular rate at which the employee is employed. 29 U.S.C. § 207(a)(1). Mountain Side does not dispute that it owes Witte \$336.00 in additional regular wages. Neither does Mountain Side dispute that it banked Witte's overtime hours or that banking of overtime is impermissible under Montana law. Rather, Mountain Side's dispute arises with the Wage and Hour Division's determination with respect to the overtime hours owed to Witte. Mountain Side contends that in reaching its determination that Witte was due an additional \$1,892.50 for unpaid overtime wages, the Wage and Hour Division failed to take account of a \$600.00 check issued to Witte on March 23, 2001 (Check #3037 for \$600.00, Document 000096). After accounting for this check, Mountain Side contends that Witte is owed no more than \$1,628.50, representing \$336.00 in unpaid regular wages and \$1292.50 in overtime wages. Mountain Side further

contends that Witte padded his hours on the Bostedt job and that these padded amounts should be further deducted from the amounts due to Witte.

Mountain Side's contention that the Wage and Hour Division did not properly credit the \$600.00 check is incorrect. The documentation provided by the employer (Exhibit 000159) shows that Mountain Side issued Witte a check for \$600.00 for the pay period ending March 24, 2001. This corresponds to Check #3037 in the amount of \$600.00. The Wage and Hour Division credited Mountain Side with having paid Witte \$602.00 (see Document 000036). Not only did the Wage and Hour Division properly credit Mountain Side's payment to Witte, the division actually credited Mountain Side with having paid Witte \$2.00 more than was actually paid to Witte. Thus, there is no merit to Mountain Side's contention that the \$1,892.00 amount owed to Witte in unpaid overtime wages should be reduced by \$600.00. With this contention disposed of, the only contention remaining to be resolved is whether Witte padded his hours.

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 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.

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.

Witte presented evidence, in the form of weekly log sheets which he completed at the end of each work week, that supports his claim that he is owed for the additional hours of overtime. To rebut this evidence, Mountain Side presented the testimony of Robert Freeman, the claimant's co-worker. In essence, Freeman testified that he worked alongside Witte on several occasions, and Freeman did not work as nearly as many hours as Witte claims to have worked. Witte, however, presented compelling evidence that on several occasions he traveled to a job site in a different vehicle than Freeman and Witte might arrive earlier at the site or leave later from the site. He also presented evidence that on occasions, he stopped and completed tasks at a different work site than Freeman before joining Freeman at another job site.

Witte has sustained his burden of proof under the *Garsjo* case. He has presented substantial evidence his time logs filled out in close proximity to the date of the work to support the number

of hours of overtime which he worked but for which he was not paid. Mountain Side has presented no documentary evidence to rebut Witte's evidence. The evidence that Mountain Side did present Freeman's testimony is insufficient to overcome Witte's evidence. Accordingly, Witte has demonstrated that he is entitled to additional compensation for the hours of overtime for which he has not been paid.

C. Imposition of Penalties or Liquidated Damages

This case involves two different types of wage claims (failure to pay regular wages and failure to pay overtime wages). Different types of penalty provisions apply to each of the wage claims. Under these circumstances, penalties are calculated by applying the appropriate administrative rule to each component of the claim determined to be valid. Admin. R. Mont. 24.16.7569. With respect to the \$336.00 claim for unpaid wages, the provisions of Mont. Code Ann. §39-3-206 and Admin. R. Mont. 24.16.7566 require that a penalty equal to 55% of the unpaid wages must be paid.

The portion of Witte's claim relating to the unpaid overtime is governed by the penalty provisions of the FLSA. Mont. Code Ann. § 39-3-408. The FLSA has a liquidated damages provision which states:

Any employer who violates the provisions of Section 206 or Section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid . . . wages . . . and in an additional equal amount as liquidated damages.

29 U.S.C. § 216.

However, the Portal to Portal Act alters the liquidated damages provision of the FLSA. The act states in pertinent part:

In any action commenced prior to or on or after the date of the enactment of this Act to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 16 of such Act.

29 U.S.C. § 260. The court may refuse to award liquidated damages if the employer demonstrates it acted reasonably and in good faith.

To demonstrate "good faith" under this exception, an employer must show "the act or omission giving rise to [the violation] was in good faith and that [they] had reasonable ground for believing that [their] act or omission was not a violation of the [FLSA]." *Brock v. Shirk* (9th

Cir. 1987), 833 F.2d 1326, 1330. This test has both subjective and objective components. *Id.* Good faith requires an honest intention and no knowledge of circumstances which might have put the employer on notice of FLSA problems. *Id.*

In this case, Mountain Side did not act with an intention to evade the FLSA overtime provisions. Mountain Side permitted Witte to work overtime hours and banked Witte's overtime hours at Witte's request in order to assist Witte through some financial difficulties. Mountain Side had no knowledge that its conduct violated wage and hour provisions. Furthermore, there is no evidence that Mountain Side has previously violated any applicable wage and hour requirements. Under the circumstances of this case, Mountain Side has met its burden and the imposition of liquidated damages is not appropriate.

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. Mountain Side is an enterprise engaged in interstate commerce and subject to FLSA requirements.

3. Mountain Side violated the requirement of paying \$336.00 dollars in wages to Witte when due in violation of Mont. Code. Ann. § 39-3-204. A 55% penalty in the amount \$184.80 is also due as a result of this violation. Admin. R. Mont. 24.16.7566.

4. Mountain Side also violated 29 USC § 207(a)(1) by failing to pay Witte overtime wages in the amount of \$1,892.50 when due.

5. Mountain Side had a good faith basis for believing that it had not violated the prescriptions of FLSA and therefore liquidated damages should not be imposed in this case.

VI. ORDER

Mountain Side Construction is ordered to tender a cashier's check or money order in the amount of \$2,413.30, made payable to Steven Witte, 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 24th day of February, 2004.

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.