

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM) Case No. 2517-2004
OF JIMMY COOK)

Claimant,)

vs.)

JIM WINETEER,)
d/b/a ELKHORN CONTRACTORS)

Respondent.)

**FINDINGS OF FACT;
CONCLUSIONS OF LAW;
AND ORDER**

* * * * *

I. INTRODUCTION

On May 20, 2004, Jimmy W. Cook filed a claim with the Wage and Hour Unit of the Department of Labor and Industry maintaining that Jim Wineteer, d/b/a Elkhorn Contractors (Wineteer) owed him \$870.00 in unpaid wages for work performed during the period beginning March 31, 2004, and ending April 28, 2004. Wineteer responded that Cook was an independent contractor.

On August 30, 2004, the Independent Contractor Central Unit issued a determination that Cook was an employee of Elkhorn Contractors.

On September 15, 2004, the Wage and Hour Unit issued a determination that Elkhorn Contractors owed Cook \$870.00 in unpaid wages and \$130.50 in penalty. On October 2, 2004, Wineteer appealed the determination. The Wage and Hour Unit referred the matter to a mediator who contacted the parties and attempted to mediate the dispute. On December 10, 2004, the mediator dismissed the matter indicating that all efforts to resolve the dispute were unsuccessful. He referred the matter to the Hearings Bureau.

On December 29, 2004, David H. Frazier, Hearing Officer, held a pre-hearing conference in this matter. Cook participated by telephone. Wineteer was not available at the telephone number he provided and the telephone conference proceeded in his absence. During the conference, Cook agreed to a hearing date of February 17, 2005, because of his current work schedule, and indicated that he would be calling one witness during the hearing. On December 30, 2004, the Hearing Officer issued a scheduling order notifying the parties that the deadline for submission of requests for relief, final contentions, additional documents, and witness lists, requests for subpoenas and stipulated facts was February 4, 2005 and that the hearing would take place by telephone on February 17, 2005. The Hearing Officer did not receive any additional information from either party prior to the hearing.

On February 17, 2005, the Hearing Officer held a hearing in this matter. All parties participated by telephone. Cook was present. Homer Simon, Cook's father, appeared as a witness in his behalf. Wineteer was present. Documents 1 through 39 were admitted into the record without objection.

II. ISSUE

The issue in this matter is whether Wineteer owes wages for work performed as alleged in Cook's complaint and penalties or liquidated damages as provided by law.

III. FINDINGS OF FACT

1. James Wineteer, d/b/a Elkhorn Contractors, employed Cook as a laborer from April 1, 2004, through April 20, 2004. Wineteer agreed to pay Cook \$10.00 per hour.

2. Wineteer decided to pay Cook in cash and did not keep a record of the hours he worked or the wages he paid. He required that Cook keep notes on his hours of work and provide that information to him.

3. Between April 1, 2004, and April 6, 2004, Cook worked 49.25 hours. Between April 8, 2004 and April 14, 2004, Cook worked 40 hours. On April 14, 2004, it occurred to Cook that Wineteer owed him a considerable amount of money for wages. He had worked a total of 89.25 hours and earned gross wages amounting to \$892.50. He became concerned about getting paid and asked Wineteer for his wages.

4. On or about April 14, 2004, Wineteer paid Cook \$320.00 by personal check. He told Cook that was all he could afford to pay him at that time. Wineteer has not produced a copy of that check for this record, but Cook acknowledges that Wineteer paid him that amount.

5. On April 15, 16 and 17, 2004, Cook worked 4 hours each day. He worked for 3.5 hours on April 18, 2004, and for 4.5 hours on April 20, 2004. He worked a total of 20 hours between April 15 and April 20. The total wages due for that week were \$200.00.

6. On April 21, 2004, Cook did not show up for work. Wineteer called him and asked him why he was not at work. Cook told him that he was not going to work again until Wineteer paid him.

7. Cook worked a total of 109.25 hours between April 1, 2004 and April 20, 2004. At \$10.00 per hour, Wineteer owed him a total of \$1,092.50 in gross wages. Wineteer has only paid Cook \$320.00. This leaves \$772.50 or pay for 77.25 hours of work, unpaid.

IV. DISCUSSION AND ANALYSIS

A. UNPAID WAGES

Montana law requires that employers pay employees wages within 10 days of when they become due in accordance with the employment agreement. Mont. Code Ann. § 39-3-204.

An employee seeking unpaid wages has the initial burden of proving work performed without proper compensation. *Anderson v. Mt. Clemens Pottery Co.* (1946), 328 U.S. 680, *Garsjo v. Department of Labor and Industry* (1977), 172 Mont. 182, 562 P.2d 473. An employee can meet this burden by producing evidence that shows the extent and the amount of work "as a matter of just and reasonable inference." *Id.* at 189, 562 P.2d at 476-77, citing *Anderson*, 328 U.S. at 687, and *Purcell v. Keegan* (1960), 359 Mich. 571, 103 N.W. 2d 494, 497

Once an employee has shown as a matter of just and reasonable inference that he or she is owed wages, "the burden shifts to the employer to come forward with evidence of the precise amount of the work performed or with evidence to negate the reasonableness of the inference to be drawn from the evidence of the employee. And if the employer fails to produce such evidence, it is the duty of the court to enter judgment for the employee, even though the amount be only a reasonable approximation.' * * *." *Garsjo*, 172 Mont. at 189, 562 P.2d at 477, quoting *Purcell v. Keegan, supra*, 359 Mich. at 576, 103 N.W. 2d at 497. It is of no consequence that the employee cannot show with exacting precision the number of hours worked. To require such evidence from an employee would "place a premium on an employer's failure to keep proper records in conformity with statutory duty," seriously undermining the strength of the wage protection statutes. *Garsjo* at 189, 562 P.2d at 476, citing *Anderson*, 328 U. S. at 687.

Since Wineteer kept no record of Cook's hours, but required that Cook keep a record of his own hours, the only information available related to Cook's hours is the information submitted by Cook. Wineteer provided no record of hours worked by, or payment of wages to, Cook. Cook provided sufficient evidence to show the hours worked. Wineteer produced no payroll records to dispute the hours and wages claimed by Cook.

During the hearing, Cook relied heavily on Document 28, his statement of hours and payments. He has not indicated that he worked prior to April 1, 2004 or after April 20, 2004. During that period of time, as indicated above, Cook worked a total of 109.25 hours. His gross pay for those hours, at \$10.00 per hour, would be \$1,092.50. There was some discrepancy in testimony related to how much Wineteer paid Cook on or about April 14, 2004, but Cook acknowledged that he received \$320.00. Wineteer has produced no record of this payment. As above, if the employer fails to record a payment of wages, the employee's evidence is sufficient to prove the claim if the evidence shows as a matter of just and reasonable inference that the employee is due the money he claims. Here, the evidence demonstrates as a matter of just and reasonable inference that Wineteer has failed to pay Cook for 77.25 hours or \$772.50 in gross wages.

B. PENALTY

Montana law assesses a penalty when an employer fails to pay wages when they are due. Mont. Code Ann. §39-3-206. By failing to pay Cook for the total number of hours he worked during the periods beginning April 1, 2004, and ending April 20, 2004, Wineteer failed to pay Cook his wages when they were due and he is, therefore, subject to the penalty. Based upon Admin. R. Mont. § 24.16.7551(2), and § 24.16.7566 (1) the penalty is 55% on the unpaid wages, or \$424.87

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, 176 Mont. 31, 575 P.2d 925 (1978).

2. Wineteer owes Jimmy Cook \$772.50 in unpaid wages for work performed between April 1, 2004 and April 20, 2004, and \$424.87 in penalties for unpaid wages.

VI. ORDER

1. Jim Wineteer, d/b/a Elkhorn Contractors, is hereby ORDERED to tender a cashier's check or money order in the amount of \$1,197.37, representing unpaid wages and penalties, made payable to Jimmy Cook, and mailed to the Employment Relations Division, PO Box 6518, Helena, Montana, 59624-6518.

DATED this 23rd day of March, 2005.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ DAVID H. FRAZIER
David H. Frazier
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.

Cook FOF dfp