

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM)	Case No. 57-2005	
OF JESSICA B. HARNE))	
)	
Claimant,)	FINDINGS OF FACT;	
)	CONCLUSIONS OF LAW;
vs.)	AND ORDER	
)	
STUDIO M., INC., a Montana Corporation))	
)	
Respondent.)		

* * * * *

I. INTRODUCTION

On July 12, 2004, Jessica B. Harné filed a claim with the Wage and Hour Unit of the Montana Department of Labor and Industry, alleging that Studio M, Inc., owed her \$629.93 in unpaid wages for work performed during the period beginning May 20, 2004, and ending June 11, 2004.

On August 23, 2004, Michael Barger, d/b/a Studio M, filed a response indicating that the previous manager discharged Harné because a bank deposit she made was \$1,000.00 short, and then quit. Barger indicated that he was not sure what had occurred but was convinced that Harné's claim was fraudulent.

On September 14, 2004, the Wage and Hour Unit issued a determination finding that Studio M owed Harné \$629.93 in unpaid wages and \$692.92 in penalty. The determination advised Studio M that a request for redetermination must be postmarked by no later than October 4, 2004. By letter dated October 4, 2004, which was faxed to the Wage and Hour Unit at 12:01 a.m. on October 5, 2004, Studio M filed an appeal.

On October 6, 2004, the Wage and Hour Unit issued an Order on Default affirming the September 14, 2004, determination on the basis that Studio M had failed to contest the determination of the Wage and Hour Unit in a timely fashion.

On February 15, 2005, the Hearing Officer held an in-person hearing in this matter at the Missoula Job Service Workforce Center. All parties participated in-person. Chris Thomas, Harne's husband, represented Harne. Harne was not present. Michael Barger represented Studio M. Ann Olson, co-owner, appeared as a witness in behalf of Studio M. Documents 1 through 54, provided to the parties prior to the hearing, were admitted into the record without objection. Document 55, offered by Thomas, was admitted into the record without objection. Documents 56 and 57, offered by Barger, were admitted into the record without objection.

II. ISSUES

A. Whether Michael Barger, d/b/a Studio M, failed to timely appeal the determination as provided in Mont. Code Ann. §39-3-216.

B. Whether Michael Barger, d/b/a Studio M owes wages for work performed as alleged in Harne's complaint and penalties or liquidated damages as provided in Mont. Code Ann. §39-3-206.

III. FINDINGS OF FACT

ISSUE A.

1. On July 12, 2004, Jessica B. Harne filed a claim with the Wage and Hour Unit of the Montana Department of Labor and Industry, alleging that Studio M, Inc., owed her \$629.93 in unpaid wages for work performed during the period beginning May 20, 2004, and ending June 11, 2004.

2. On July 12, 2004, the Wage and Hour Unit asked the respondent for a reply by July 23, 2004. On August 2, Barger requested an extension of the deadline to August 4, 2004. On August 4, 2004, Barger asked for an extension to August 9, 2004. On the day the previous manager discharged Harne, that manager walked out and never returned. Olson and Barger were trying to figure out what the previous manager had done with Harne's hours and payroll records. On August 19, 2004, Barger faxed a reply to Harne's claim to the Wage and Hour Unit which was not legible. The Wage and Hour Unit asked Olson to provide the response by mail. On August 23, 2004, the respondent filed a response and provided all the information it had on Harne's hours and pay.

3. On September 14, 2004, the Wage and Hour Unit issued a determination finding that Studio M owed Harne \$629.93 in unpaid wages and \$692.92 in penalty. The determination advised Studio M that a request for redetermination must be postmarked no later than October 4, 2004.

4. The determination was mailed to the correct address. At the time, the respondent was moving its business out of 631 Woody Street in Missoula, but did not have a new location yet. The Post Office was forwarding the respondent's mail to Olson's post office box. Olson retrieved the mail every other day. On September 30, 2004, she found the September 14 determination from the Wage and Hour Unit in her mail.

5. Olson read the determination and understood it. She noted that she had until October 4, 2004, to file an appeal. At the time, she was involved in finding a new location for the business and moving into it. At the end of the day on October 4, 2004, Olson realized that she must file an appeal. She wrote a letter of appeal and took it to Kinko's to fax it to the Wage and Hour Unit. The fax was sent at 12:01 a.m. on October 5, 2004, based upon the time on Kinko's fax machine.

ISSUE B.

1. Michael Barger, d/b/a Studio M, employed Harne as a cosmetologist on a part-time basis from May 1, 2004, through June 3, 2004. Barger agreed to pay Harne \$6.10 per hour. There was no time clock for Harne to use. Barger instructed Harne to keep track of her own hours and to give them to him at the end of each day so they could go over them while he entered them into the computer. Tips were paid directly to Harne and not reported to Barger. Barger told Harne that he would deduct the cost of supplies she used from her pay.

2. Between May 1, 2004, and May 13, 2004, Harne worked 18 hours. On May 28, 2004, Studio M paid her for those hours. Harne's gross pay for that period was \$109.80. From that, Studio M deducted appropriate taxes and paid her \$100.40.

3. From May 12, 2004, through May 17, 2004, Harne and Thomas were on vacation. Harne worked a total of 13 hours on May 18 and May 19, 2004. On or about June 3, 2004, Studio M paid Harne for those hours. The check was returned for insufficient funds and Harne resubmitted it, paying a \$5.00 fee. The bank paid it on an undisclosed date.

4. Prior to the hearing in this matter the parties agreed that Harne worked for 45.15 hours between May 20, 2004 and June 3, 2004, and that Harne did not work any hours after June 3, 2004. The respondent agreed that it had not paid Harne for those hours and Thomas agreed to accept payment for that number of hours. Thomas requested that the respondent pay the \$5.00 late fee on the June 3 paycheck. The parties agreed that the respondent would not deduct the cost of supplies from the wages owed and that Harne would waive the late check fee.

IV. DISCUSSION AND ANALYSIS

A. *Studio M's Appeal Should Be Permitted.*

Studio M requests relief from the Default Order, contending that it tried to file a timely appeal. Montana Wage and Hour law provides relief to parties who fail to respond promptly to a determination because of failure to receive mail. Mont. Code Ann. § 39-3-216(3), provides that the Department of Labor and Industry shall by rule provide relief for persons who do not receive a determination by mail.

The pertinent rule, Admin. R. Mont. 24.16.7544, provides, in part:

(1) A party which alleges that it did not receive timely notice by mail of the claim, determination or hearing process provided by these rules has the burden of proof of showing that the party ought to be granted relief. The party seeking relief must present clear and convincing evidence to rebut the statutory presumption ... that a letter duly directed and mailed was received in the regular course of mail.

In this case, the respondent does not dispute that it received the determination in a timely manner. It is clear that the respondent made a concerted effort to file a timely appeal and missed doing so by 1 minute. In *Centech Corporation v. Sprow*, 307 Mont. 481, 38 P. 3d 812, 2001, the Montana Supreme Court stated that it agreed with Centech that the Department of Labor and Industry has the authority to suspend, waive or modify its rules in order to prevent manifest prejudice to a party, to assure a fair hearing, or to afford substantial justice. The Supreme Court concluded that it unreasonably elevates form over substance to dismiss an appeal when a significant effort was made to file a timely appeal, that when a party makes a good faith effort to file an appeal by accepted methods, justice requires that the attempt be honored. It is entirely possible that the clock in Kinko's fax machine is off by 1

minute. As a result, dismissal of this respondent's appeal would defy substantial justice and result in manifest prejudice.

B. *Studio M owes wages and penalties.*

1. 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 .

In this matter, the respondent and the claimant agree that 45.15 hours at \$6.10 per hour or \$275.41 in gross wages is owed. The respondent agreed to pay this amount, minus standard deductions for an employee, and to promptly provide Harne with a W-2 form.

2. Penalty

Montana law assesses a penalty when an employer fails to pay wages when they are due. §39-3-206, MCA. By failing to pay Harne for the total number of hours she worked during the period beginning May 20, 2004, and ending June 3, 2004, Studio M failed to pay Harne her wages when they were due. The respondent 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 \$151.47.

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. Studio M owes Harne \$275.41 in unpaid wages for work performed between May 20, 2004 and June 3, 2004, and \$151.47 in penalties for unpaid wages.

VI. ORDER

Michael Barger, d/b/a Studio M is hereby ORDERED to tender a cashier's check or money order in the amount of \$426.88, representing \$275.41 in wages and \$151.47 in penalty, made payable to Jessica B. Harne, 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 6th day of April, 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.