

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIMS)	Case Nos. 2243-2006 & 1766-2006
OF RONALD L. DANIELS AND)	
BRYAN D. STEEBER,)	
)	
Claimants,)	
)	
vs.)	FINDINGS OF FACT;
)	CONCLUSIONS OF LAW;
SCOTT LEWEY d/b/a LEWEY)	AND ORDER
ENTERPRISES, a business name not)	
registered with the Montana Office of)	
Secretary of State, d/b/a S.G.C., an)	
assumed business name registered in)	
Montana,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

In this matter, respondent Scott Lewey, d/b/a Lewey Enterprises, d/b/a SGC appeals a determination of the Wage and Hour Unit which found it owed unpaid wages to claimants Ronald L. Daniels and Bryan D. Steeber. Specifically, the Wage and Hour Unit found that Lewey owes Daniels \$393.75 in unpaid wages and Steeber \$513.76 in unpaid wages. By independent motion of the Hearings Officer and on agreement of the parties, the two cases were consolidated.

The Hearing Officer held a contested case hearing in this matter on October 19, 2006, in Bozeman, Montana. Scott Lewey represented the respondent. Bryan Steeber and Ronald Daniels were present. Hyatt Moore, former construction supervisor, appeared as a witness for Daniels.

The parties stipulated to the admission of Claimants’ Exhibits A through C, Respondent’s Exhibits 1 through 20, Documents 1 through 21 from the Employment

Relations Division (ERD) case for Daniels and Documents 1 through 69 from the ERD case for Steeber.

Based upon the testimony presented at hearing as well as the documents now contained in the respective files, the Hearing Officer makes the following findings of fact, conclusions of law, and final order in this matter.

II. ISSUE

The issue in this case is whether Lewey owes wages, as alleged in the complaints filed by the claimants, and owes penalties or liquidated damages, as provided by law.

III. FINDINGS OF FACT

1. Lewey employed Daniels as a carpenter and driver from December 12, 2005, through March 20, 2006, and Steeber as a carpenter from December 18, 2005, through February 3, 2006. Lewey agreed to pay Daniels \$20.00 per hour for his labor and \$20.00 per day to drive the employer's truck. He agreed to pay Steeber \$18.00 per hour for his labor.

2. Lewey paid both Daniels and Steeber on an irregular basis. Sometimes Lewey paid them on a weekly basis and sometimes on a bi-weekly basis. He frequently paid Daniels and Steeber in cash without keeping a record of the payment or by check without providing them with an explanation of what was withheld, if anything. He often could not pay them their full wages. He paid them partial wages and made up the rest later. Lewey often included Moore's pay in the checks to Daniels because Moore had no drivers license or verification of identity, so could not cash a check. Daniels paid Moore when he cashed the check.

3. During Daniels' and Steeber's employment, Lewey subcontracted to Paul Rodin. Lewey provided Daniels and Steeber with timesheets which they completed at the end of each week. Daniels and Steeber sometimes had them approved by Rodin's superintendent, who was on the job site more frequently than Lewey. Lewey maintains that Rodin made substantial payments of wages to Daniels and Steeber, against his advice. There is a copy of a check made out to Steeber (Exhibit 20) but it is only of the front of the check. Steeber denies having received the check and there is no verification that he cashed it. There is no other verification of any payments made by Rodin in this record.

4. On or about March 3, 2006, Lewey told Daniels that he was no longer going to pay him \$20.00 per day for driving the company truck. Daniels acknowledged the decision. Daniels went on vacation during the period beginning December 21, 2005, and ending January 1, 2006. Before he left, Lewey advanced him approximately 2 weeks of gross pay without withholding taxes.

5. The documentation shows that Lewey paid Daniels the following.

TABLE 1:

Check	Date Paid	Period Paid	Hours	Rate	Amount	Amount
1197	12/14/2005	Not Available		\$20.00/hr		\$400.00
1199	12/16/2005	12/12/05 thru 12/16/05	39	\$20.00/hr +\$20.00 per day	\$880.00 Gross	\$720.00 Net
2127	12/17/2005	12/19/05 thru 12/21/05	17	\$20.00/hr	\$340.00 Gross	\$360.00 ¹ Net
1222	01/06/2006	01/02/06 thru 01/05/06	32	\$20.00/hr	\$640.00 Gross	\$400.00 Net
1276	01/20/2006	01/06/06 thru 01/20/06	84	\$20.00/hr	\$1680.00 Gross	\$654.00 Net
	01/26/2006	01/23/06 thru	40	\$20.00/hr	\$800.00	\$375.00
1221	02/06/2006	Not Available		\$20.00/hr		\$200.00
1345	02/10/2006	01/26/06 thru 02/10/06	72	\$20.00/hr	\$1440.00 Gross	\$752.00 Net
Totals			284		\$5680.00	\$3861.00

There were questionable additions and deductions from Daniel's pay:

¹This appears to be the advance payment made before Daniels left for vacation.

TABLE 2:

Check Number	Taxes Deducted	Other Additions or Deductions
1197	Not Available	
1199	\$67.32	Advance Repayment Deducted: \$92.68
2127	\$29.07	Advance Repayment Deducted: \$7.32 Advance Payment Added: \$16.39
1222	\$243.96	Advance Payment Added: \$3.96
1276	\$742.52	Advance Repayment Deducted: \$283.48
1291	\$319.20	Advance Repayment Deducted: \$105.00
1321	Not Available	
1345	\$625.16	Advance Repayment Deducted: \$424.55 Advance Payment Added: \$361.71

6. This documentation shows that Daniels worked a total of 284 hours between December 12, 2005, and February 10, 2006. 284 hours of work at \$20.00 per hour yields a gross pay of \$5,680.00, which Lewey paid. However, Daniels worked until March 20, 2006. There is no evidence that Lewey paid him for the period between February 10, 2006 and March 20, 2006, a period of 38 days. Daniels agrees that he was paid for his work during that period of time, except for his last 20 hours of work.

7. There is no evidence that Lewey paid Daniels the \$20.00 per day for driving the truck between January 2, 2006, and March 3, 2006, a period of 60 days. Based upon the pay periods, it appears that Daniels worked 5 days a week. During this 60 day period there are 45 work days. 45 work days times \$20.00 per day equals \$900.00

8. There is no documentation to show that Lewey paid Daniels for his last week of work, which according to Daniels, was 20 hours. 20 hours times \$20.00 per hour equals \$400.00.

9. Lewey maintains that Steeber worked a total of 199 hours. He claims to have paid Steeber at the rate of \$18.00 for 192 of those hours, and that 7 of those

hours were overtime, paid at the premium rate of \$27.00 per hour. Lewey paid Steeber the following.

TABLE 3:

Check No.	Date Paid	Period Paid	Hours Worked	Rate	Amount Due	Amount Paid
1209	12/23/05	12/18/05 thru 12/24/05	23	\$18.00/hr	\$414.00	\$214.00
1005	01/01/06	12/25/05 thru 12/31/05	33	\$18.00/hr	\$594.00	\$594.00
1215	01/04/06	Not Available		\$18.00/hr		\$270.00
1217	01/06/06	01/01/06 thru 01/07/06	40	\$18.00/hr	\$720.00	\$400.00
2155	01/10/06	Not Available		\$18.00/hr		\$60.00
2251	01/18/06	01/08/06 thru 01/14/06	16	\$18.00/hr	\$288.00	\$200.00
1286	01/26/06	01/15/06 thru 01/21/06	40	\$18.00/hr	\$720.00	\$583.92 ²
3006	04/07/06	Not Available		\$18.00/hr		\$143.24
Totals			152		\$2736.00	\$2465.16

TABLE 4:

Check Number	Taxes Deducted	Other Additions or Deductions
1209	\$51.67	Advance Repayment Deducted: \$148.33

² This appears to be net wages based upon a gross wage of \$720.00, which accounts for the difference between the amount due and the amount paid on this table.

1005	\$100.44	Advance Payment Added: \$100.44
1215	Not Available	
1217	\$194.55	Advance Repayment Deducted: \$314.45
2155	Not Available	
2251	\$25.03	Advance Repayment Deducted: \$62.97
1286	\$136.08	No Advance Payments Added or Deducted
3006	Not Available	

10. On April 7, 2006, following an audit of Steeber's wages, Lewey paid Steeber \$143.24, maintaining that this paid him in full for all hours worked. The documentation above shows that Steeber worked a total of 152 hours during the period reported. 152 hours at \$18.00 per hour yields a gross amount of wages due of \$2,736.00. With the \$143.24 paid on April 7, Lewey paid Steeber a total of \$2,465.16. Steeber agrees that he was paid that amount but maintains that he was not paid for his last 40 hours of work.

11. Lewey asked Steeber for the hours he worked during his last week of work and Steeber responded by letter (Document 33), asking for his final 40 hours of pay. There is no evidence that he was paid for that week. 40 hours at \$18.00 per hour equals \$720.00.

IV. DISCUSSION AND ANALYSIS³

Montana law requires employers to pay wages when due in conformity with the employment agreement, and in no event later than 15 days following termination of employment. Mont. Code Ann. §§ 39-3-204 and 39-3-205. 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. Employers must also pay an overtime premium of 1½ times the regular hourly rate when employees work more than 40 hours in a work week. Mont. Code Ann. §39-3-405.

³Statements of fact in this discussion are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

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. To meet this burden, the employee must produce evidence to “show the extent and 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; see also, *Marias Health Care Srv. v. Turenne*, 2001 MT 127, ¶¶13, 14, 305 Mont. 419, 422, 28 P.3d 494, 495 (holding that lower court properly concluded that the plaintiff’s wage claim failed because she failed to meet her burden of proof to show that she was not compensated in accordance with her employment contract).

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*, *supra*, 359 Mich. at 576, 103 N.W. 2d at 497.

Neither Lewey, Daniels nor Steeber kept comprehensive records of Daniels’ and Steeber’s hours or pay. It is clear that Lewey made payments to Daniels and Steeber based upon what he could pay at the time the payment was made, based upon estimated hours, without making deductions and without keeping track of advance payments. Both Daniels and Steeber maintain that they were not paid for their last week of work. Steeber maintains that he worked 40 hours during his last week and Daniels maintains that he worked 2.5 days, or 20 hours, during his last week. Lewey maintains that they were not paid because they were overpaid earlier. There is no verification of that fact.

The claimants in this matter seek to recover wages which they claim were not paid. Because they did not keep comprehensive contemporaneous records and are not sure how much they were underpaid, they seek their unpaid wages for their last week of work. They maintain they were paid on an irregular basis during their employment and know they were underpaid, but do not know by how much. Lewey responds and admits that he could not always pay the claimants their full pay. He has submitted the records of pay which he could recover or create.

The claimants have shown by just and reasonable inference that they were not paid according to the employment agreement. Having met that burden, the burden

then shifts to Lewey to negate the reasonableness of the inference to be drawn. This he has failed to do.

The documentation related to the net pay for both Daniels and Steeber is questionable. The copies of the checks are valid copies provided by Lewey's bank. In Daniel's case, the check stubs were made to look like they came from a bank. In Steeber's case, that effort was not made but the product is very similar to the documentation in Daniels' case. It is noted that a bank will provide copies of checks which have been processed but cannot provide copies of information, such as check stubs, which they do not have. The check stubs provided by Lewey to explain the deductions are not the original documents created when the checks were written. The headings on the check stubs do not match the headings on the checks. The checks are hand written, not printed by a computer program. It is also significant that no matter what was deducted from the gross pay, the net pay usually came out as an even number. It is noted that Lewey deducted and added odd amounts from and to Daniel's and Steeber's pay, designated as advance repayments and advance payments, which made the net pay come out in even numbers. This appears to have been done after the fact, apparently to match the amount of the pay already made on an earlier date. There is no doubt that these documents were created after the fact and that an effort was made to make them look contemporaneous. It is not reasonable to assume that Daniels or Steeber asked for advances in the odd amounts which were deducted from their pay.

As a result, the claimants' testimony in this matter is credible. They have met their initial burden of proof to show that they were not paid in accordance with their wage agreement.

Overall, the faulty information and the attempts to make the information look contemporaneous, supports a finding that the claimants in this matter were credible. Within the incomplete framework of the documentation, it is clear that Lewey did not pay the claimants their full wages.

A. WAGES DUE TO DANIELS

Lewey's documentation does not reveal the amount of the advance payments which he has deducted in odd amounts, at various times, from Daniel's pay. There is no evidence to show that the deductions for advance payments were appropriate for anything except to make the documentation show that the net pay was correct. Under these conditions, the deductions were not appropriate. Lewey deducted a total of \$913.03 from Daniel's pay in order to recover advances in pay for which there is no supporting documentation and which Daniels denies he received. Lewey did not pay him

for 45 days of driving amounting to \$900.00. Further, there is no documentation to show that Lewey paid Daniels for his last 20 hours of work, amounting to \$400.00.

While Lewey maintains that Daniels was overpaid, there is no substantial evidence to support that contention. There is no dispute over the dates Daniels worked and Lewey maintains that Daniels was overpaid in order to avoid paying him for his last 20 hours of work.

In the absence of any other documentation or substantial evidence, it is clear that Lewey owes Daniels \$913.03 for inappropriate deductions from his pay, \$900.00 for unpaid driving responsibilities, and \$400.00 for his last 20 hours of work, for a total of \$2,213.03.

B. WAGES DUE TO STEEBER

Lewey disputes Steeber's dates of employment, maintaining that his last day of work was January 31, 2006. However, Steeber has submitted copies of notes which he made subsequent to his employment, related to his last week of work (Document 68). He apparently recorded the days of the week incorrectly because he apparently did not consult a calendar. However, because of credibility issues, it must be concluded that Steeber worked through February 3, 2006.

Lewey's documentation of Steeber's pay is incomplete. It does not include information related to Steeber's hours or pay between January 22 and February 3, 2006, which is a two-week period. Steeber concedes that he was paid for the week ending January 28, 2006, but states that he was not paid for the week ending February 4, 2006.

Further, the documentation does not reveal the amount of the advance payments which Lewey deducted in odd amounts, at various times. The total deducted from Steeber's pay amounts to \$525.75. This is an odd amount for an advance payment.

In the absence of any other documentation or substantial evidence, it is clear that Lewey owes Steeber for \$525.75 improperly deducted from Steeber's pay, plus 40 hours at \$18.00 per hour, or \$720.00, for his last week of work, which is a total of \$1,245.75.

C. PENALTIES OWED

Montana law assesses a penalty when an employer fails to pay wages when they are due. Mont. Code Ann. §39-3-206. An employer who fails to pay an employee as provided by this law must be assessed a penalty not to exceed 110% of the wages due. *Id.* When there is substantial credible evidence that the employer's payroll records are falsified or intentionally misleading, the maximum penalty of 110% is mandatory. Admin. R. Mont. 24.16.7556. Lewey's attempts to present documentation which was created to look like contemporaneous records but which are clearly not contemporaneous, and his various deductions and additions from and to gross pay in order to make the net pay come out to what he had estimated was due in the past, requires a finding that he must pay the maximum penalty.

Applying these regulations, Lewey owes Daniels a 110% penalty on \$2,213.03, or \$2,434.33, for a total of \$4,647.36. Lewey owes Steeber a 110% penalty on \$1,245.75, or \$1,370.32, for a total of \$2,616.07.

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. Lewey owes Daniels \$2,213.03 in unpaid wages, plus \$2,434.33 in penalty, or \$4,647.36 in total.

3. Lewey owes Steeber \$1,245.75 in unpaid wages plus \$1,370.32 in penalty, or \$2,616.07 in total.

4. Appropriate taxes should be withheld from the unpaid wages portion of the award, but not from the penalty.

VI. ORDER

Lewey is hereby ORDERED to tender the following cashier's checks or money orders: (1) a cashier's check or money order, representing \$2,213.03 in wages, minus appropriate withholding of taxes, and \$2,434.33 in penalty, made payable to Ronald L. Daniels, and (2) a cashier's check or money order representing \$1,245.75 in wages, minus appropriate withholding of taxes, and \$1,370.32 in penalty, made payable to Bryan D. Steeber. These checks and/or money orders must be mailed to the Employment Relations Division, P.O. Box 6518, Helena, Montana 59624-6518, no

later than 30 days after service of this decision. Lewey may deduct applicable withholding from the wage portion but not from the penalty portion of the amounts due.

DATED this 4th day of December, 2006.

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.