

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM)	Case No. 225-2006	
OF DEREK W. MCARTHUR,)		
)	
Claimant,)		FINDINGS OF FACT;
)	CONCLUSIONS OF LAW;
vs.)		AND ORDER
)	
ALL MONTANA CONSTRUCTION INC.,)		
a Montana corporation,)		
)	
Respondent.)		

I. INTRODUCTION

In this matter, All Montana Construction, Inc., (All Montana) appeals from a default order finding that it owed Derek McArthur wages totaling \$1,575.00 and a statutory penalty of 110% of the wages due, amounting to \$1,732.50.

Hearing Examiner Gregory L. Hanchett held a contested case hearing in this matter in Bozeman, Montana on January 27, 2006. Derek McArthur appeared and represented himself. Derek, Lisa McArthur, and John Harris testified on MacArthur's behalf. Craig Hines, president of All Montana, testified on behalf of the Respondent. The parties stipulated to the admission of Documents 1 through 26 contained in the Hearings Bureau file as well as Claimant's Exhibits 1 through 12 and Respondent's Exhibits A through J. Based on the evidence adduced at hearing, the hearing examiner makes the following findings of fact, conclusions of law, and final order in this matter.

II. ISSUES

A. Should the default entered against All Montana be set aside?

B. If the default is set aside, is McArthur entitled to additional wages and penalty as provided by law?

III. FINDINGS OF FACT

A. *Facts pertinent to the default.*

1. On August 3, 2005, Derek McArthur filed a wage claim against All Montana. On August 4, 2005, the Wage and Hour Unit sent notice of the wage claim to Craig Hines.

2. Hines did not receive the notice of the wage claim because the post office box number printed on the envelope had been juxtaposed and read 796 instead of 769.

3. On August 11, 2005, Hines called into the Wage and Hour Unit and stated that he disagreed with McArthur's claim. McArthur was told that he needed to respond in writing to the claim. In an effort to comport with this requirement, Hines faxed in the requested documentation, but it was not received by the Wage and Hour Unit.

4. On August 19, 2005, the Wage and Hour Unit issued a determination finding that Hines owed wages to McArthur and that Hines had failed to respond to the request. The order required Hines to appeal the determination in writing no later than September 6, 2005.

5. On August 23, 2005, the determination that had been mailed to Hines was returned by the post office to the Wage and Hour Unit. See Document 17.

6. On August 29, 2005, Hines called into the Wage and Hour Unit indicating that he had received the determination and that he could not understand why he had received an adverse determination since he had sent in the requested documentation. Hines then resent the information that had been requested.

7. On September 12, 2005, the Wage and Hour Unit issued a default determination, finding that Hines had not appealed the August 19, 2005 determination.

8. On September 15, 2005, Hines again contacted the Wage and Hour Unit and indicated that he had sent the material requested for a second time after the August 29, 2005, conversation with the wage compliance specialist.

B. Facts pertinent to the merits of the claim.

1. McArthur worked as a construction laborer for All Montana from May 2005 through July 12, 2005. All Montana paid McArthur an hourly wage of \$9.00. His overtime hourly wage, based on his \$9.00 per hour compensation, was \$13.50 per hour.

2. McArthur provided Hines with signed time sheets reflecting the number of hours he worked each week. Hines failed to keep all of these time sheets. Hines also tried to keep track of his employees' hours by creating his own time sheets for the employees. The time sheets he created, however, were inaccurate.

3. At the time of the filing of his wage claim on August 3, 2005, Hines had not paid McArthur for any of his work between June 12, 2005 and July 12, 2005. Almost immediately after the filing of the complaint (before the issuance of the determination), Hines paid McArthur \$1,712.25 for 190.25 regular hours of work ($\$9.00 \times 190.25 = \$1,712.25$) and \$199.13 for 14.75 hours of overtime work ($\$13.50 \times 14.75 = \199.13).

4. In fact, during this time, McArthur worked 198.25 hours of regular work. In addition, he worked 45 hours of overtime work. Thus, McArthur was in fact due total regular wages of \$1,784.25 ($\$9.00 \times 198.25 \text{ hours} = \$1,784.25$) and total additional overtime wages of \$607.50 ($\$13.50 \times 45 \text{ hours} = \607.50).

5. All Montana underpaid McArthur by \$72.00 for McArthur's regular hours work ($\$1,784.25 \text{ owed} - \$1,712.25 \text{ paid} = \$72.00 \text{ unpaid regular wages}$). Hines also underpaid McArthur by \$408.37 for McArthur's overtime work ($\$607.50 \text{ owed} - \$199.13 \text{ paid} = \$408.37 \text{ unpaid overtime wages}$).

6. A statutory penalty of 55% of the unpaid regular hours wages amounts to \$39.60. A statutory penalty of 110% of the unpaid overtime wages amounts to \$449.21.

IV. DISCUSSION¹

A. *Good Cause Exists to Excuse the Untimely Filing of the Appeal.*

The applicable administrative rules provide that a default order, such as the one entered in this case, will be issued if the employer fails to timely file a written response to a determination. Admin. R. Mont. 24.16.7541 (1). An employer's failure to file a timely written response to a wage complaint will result in the entry of a determination that is adverse to the employer. Admin. R. Mont. 24.16.7541 (5).

Hines testified that he in fact timely responded to the claim (by faxing in his response) and that he also timely faxed in the material again after learning of the adverse determination on August 29, 2005. Hines' testimony at the hearing on this issue was credible and was not rebutted by any other sworn testimony. Because Hines attempted to timely comply with his obligations to respond to both the initial claim and the adverse determination, there is good cause to set aside the default in this case.

Moreover, the Montana Supreme Court has articulated the following test for determining whether good cause exists to set aside a default order or judgment:

As noted in Rule 55(c), a default judgment may only be set aside "for good cause shown." We have previously specified what is necessary to establish such good cause:

"In order to justify the district court in granting the motion, the defendant was required to show: (a) That he proceeded with diligence; (b) his excusable neglect; (c) that the judgment, if permitted to stand, will affect him injuriously, and that he has a defense to plaintiff's cause of action upon the merits." [Citations omitted].

Blume v. Metropolitan Life Ins. Co. (1990), 242 Mont. 465, 791 P.2d 784, 786.

Applying the factors articulated in *Blume*, good cause exists to set aside the default in this case. Hines' testimony establishes that he proceeded with diligence in presenting his case to the Wage and Hour Unit. Not once, but twice, he attempted to provide documentation to the Wage and Hour Unit. The judgment, if permitted to stand, will result in All Montana paying far more to McArthur than even McArthur

¹Statements 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.

himself believes he is due.² Under these circumstances, even if All Montana had been late in protesting McArthur's claim, good cause would nonetheless exist to set aside the default.

B. McArthur is Due Additional Overtime and Regular Wages.

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).

An employee seeking unpaid wages has the burden of proving work performed without proper compensation. *Anderson v. Mt. Clemens Pottery Co.* (1946), 328 U.S. 680; *Garsjo v. Dept. 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." *Garsjo* 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; *Marias Health Care Srv. v. Turenne*, 2001 MT 127, ¶¶13, 14, 305 Mont. 419, 28 P.3d 494.

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, supra* (quoting *Purcell* at 576, 103 N.W. 2d at 497). The employee need not show with exacting precision the number of hours worked. To impose such a requirement on 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 supra, citing Anderson, supra*. The courts will not do this, and neither will the department.

² McArthur indicated at the hearing that in fact he was due only an additional eight hours of regular pay and that he had worked 45 hours of overtime but had only been paid for 14.5 hours of overtime. This amount is far less than the amount found to be due under the default order. Thus, to permit the default to stand in this case will result in a windfall to McArthur which even McArthur recognizes he is not due.

McArthur met his initial burden of proof to show that he was due additional regular and overtime wages. As McArthur's document Number 7 demonstrates, McArthur worked an additional 8 hours of regular time work and an additional 45 hours of overtime for which he was not paid.

Once McArthur met his initial burden of proof, All Montana had the burden 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 McArthur's evidence. This All Montana failed to do. Hines's time keeping with respect to McArthur's hours was in shambles. Hines did not know which of the time cards he kept were attributable to McArthur. He was unable to produce all of McArthur's time cards. Hines himself candidly admitted that he was not on site at all times while McArthur was working. He was thus not in a position to observe all of McArthur's hours of work. The employer's evidence did not rebut McArthur's testimony. Accordingly, the hearing examiner found that McArthur is owed for 8 hours of regular time work and 45 hours of overtime for which he has not been paid.

C. All Montana Construction, Inc owes Penalty.

Montana law assesses a penalty when an employer fails to pay wages when they are due. Mont. Code Ann. §39-3-206. For cases involving overtime claims, a penalty of 110% must be imposed in the absence of certain circumstances, none of which are applicable to this case. Admin. R. Mont. 24.16.7561. For claims involving compensation other than minimum wage and overtime compensation, a penalty of 55% must be imposed in the absence of certain circumstances, none of which apply to this case. Admin. R. Mont. 24.16.7566. Where a claim involves a failure to pay both overtime and regular wages, the penalties must be calculated by applying the appropriate penalty to each component of the claim. Admin. R. Mont. 24.16.7569.

All Montana underpaid McArthur by \$72.00 for McArthur's regular hours worked. All Montana also underpaid McArthur by \$408.37 for McArthur's overtime hours worked. Applying all three of the above regulations to these amounts, All Montana owes statutory penalties as set forth in the findings.

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. Good cause exists to set aside the default in this matter.

3. McArthur has demonstrated by a preponderance of the evidence that he is due additional regular and overtime wages from All Montana.

4. All Montana owes McArthur \$72.00 in unpaid regular wages and \$408.37 in unpaid overtime wages. In addition, All Montana owes McArthur penalty of \$39.60 on the unpaid regular wages and \$449.21 on the unpaid overtime wages.

VI. ORDER

All Montana is hereby ORDERED to tender a cashier's check or money order in the amount of \$969.48, representing \$72.00 in unpaid regular wages, \$408.67 in unpaid overtime wages, \$39.60 in penalty on the regular wages, and \$449.21 in penalty on the unpaid overtime wages, payable to Derek McArthur, 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. All Montana may withhold appropriate deductions for income taxes and social security on the wage portion, but not the penalty portion.

DATED this 7th day of March, 2006.

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.

McArthur FOF ghp