

1. Did Cronin Paint fail to pay prevailing wages to Watters ?

III. FINDINGS OF FACT:

1. Cronin entered into a contract with the City of Billings, Montana to complete painting for the Operations Fire Building at the Billings International Airport (BLIA Project) (Exhibit 7). This contract required Cronin to pay prevailing rate of wages pursuant to Mont. Code Ann. § 18-2-403 (Exhibit 7, page 3).

2. Cronin also entered into a contract with Hardy Construction for painting at the City of Billings Operations Center located on Midland Road (Midland Road Project) (Exhibit 6). This contract also provided that it was “subject to Montana Prevailing Rates” (Exhibit 6). This project was a public works project.

3. Cronin also entered into a painting sub-contract with General Contractor’s Construction Company to complete painting on the City of Billings Animal Shelter (Exhibit 9).

4. All three of the above contracts were subject to prevailing wage rates prescribed in Mont. Code Ann. § 18-2-403. Cronin signed the respective contracts and subcontracts and, in addition, was on notice of the requirement that he pay prevailing wages in accordance with Mont. Code Ann. § 18-2-403.

5. Cronin employed Watters as a painter/laborer on all these projects at various times between August 2003 and May 2004. Under the prevailing wage requirements applicable to the district where the work was completed, Watters was due prevailing wage rate of \$16.58 per hour and a benefit rate of \$7.65 per hour for a total hourly wage and benefit of \$24.23 per hour¹.

6. Although Watters had previously worked as a subcontractor for Cronin, at no time during his work for Cronin on the three projects at issue here was Watters any type of subcontractor. Cronin directed Watters’ work, telling Watters where he was to work, when he was to show up for work and how Watters was to complete the work.

7. Watters worked a total of 553 hours on all three projects during the time period in question. He did not work more than 40 hours during any one week, thus all hours were regular hours. At prevailing wage rates, Watters was thus due total

¹ At hearing, Cronin stipulated that this was the prevailing wage rate.

compensation of \$13,399.19 (553 hours x \$24.23 per hour) for his work on the three projects. Cronin took no tax or benefit withholdings from the wages that he paid to Watters.

8. Watters worked the following hours during the following times and was compensated at the following rates on the BLIA Project:

Week ending	check #	Check date	Hours worked	Hourly Rate	Wages Due	Wages Paid
08/09/03	6248	08/08/03	22	\$ 24.23	\$533.06	\$440.00
08/16/03	6255	08/11/03	28	\$ 24.23	\$678.44	\$560.00
08/23/03	6269	08/18/03	20	\$ 24.23	\$484.60	\$400.00
08/30/03	6282	08/25/03	23	\$ 24.23	\$557.29	\$460.00
09/06/03	6297	09/02/03	23	\$ 24.23	\$557.29	\$460.00
09/13/03	6301	09/06/03	15	\$ 24.23	\$363.45	\$300.00
	6210	07/14/03				\$500.00

As the above table demonstrates, Watters worked a total of 131 hours and should have been compensated a total of \$3,174.13. He was only compensated \$3,120.00 for his work and is thus due additional wages of \$54.13 for his work at the Billings Operation Center.

9. Cronin wrote check number 6210 (noted in the table in Paragraph 8, above), in the amount of \$500.00 and gave it to Watters for the purpose of having an air compressor fixed. Cronin intentionally left the “payee” line on the check blank so that Watters could give the check directly to the company fixing the compressor. Instead of doing this, Watters filled in his own name on the check, cashed it, and kept the money.

10. Watters worked the following hours during the following times and was compensated at the following rates on the Billings Animal Shelter Project:

Week ending	check #	Check date	Hours worked	Hourly Rate	Wages Due	Wages Paid
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09/25/03	6335	09/25/03	Draw			\$450.00
10/04/03	6345	09/29/03	30	\$ 24.23	\$726.90	\$600.00
10/18/03	6373	10/14/03	38	\$ 24.23	\$920.74	\$535.00
10/25/03	6384	10/20/03	28	\$ 24.23	\$678.44	\$335.00
	6393	10/24/03	40	\$ 24.23	\$969.20	\$800.00
11/15/03	6428	11/10/03	24	\$ 24.23	\$363.45	\$480.00
	6437	11/17/03	30	\$ 24.23	\$726.90	\$600.00
	6454	11/24/03	6	\$ 24.23	\$145.38	\$120.00

As the above table demonstrates, Watters worked a total of 196 hours and should have been compensated a total of \$4,749.08. He was only compensated \$3,920.00 for his work and is thus due wages of \$829.08 on the Animal Shelter Project.

11. Watters worked the following hours during the following times and was compensated at the following rates on the Midland Road Project:

Week ending	check #	Check date	Hours worked	Hourly Rate	Wages Due	Wages Paid
03/20/04	6620	03/15/04	36	\$ 24.23	\$872.20	\$720.00
	6712	03/23/04	Draw			\$600.00
03/27/04	6638	03/22/04	38	\$ 24.23	\$920.74	\$760.00
04/03/04	6655	03/29/04	36	\$ 24.23	\$872.28	\$720.00
04/10/04	6670	04/02/04	34	\$ 24.23	\$823.82	\$680.00
04/17/04	6687	04/12/04	24	\$ 24.23	\$581.52	\$480.00
	6697	04/16/04	22	\$ 24.23	\$533.06	\$440.00
05/01/04	6718	04/26/04	36	\$ 24.23	\$872.28	\$720.00

As the above table demonstrates, Watters worked a total of 226 hours² and should have been compensated a total of \$5,475.98. He was only compensated \$5,120.00 for his work and is thus due wages of \$355.98 on the Midland Road Project.

12. Check number 6712 (noted above in the table in Paragraph 9) was written to Watters for \$1,200.00. Only \$600.00 of that check, however, was compensation to Watters for work on the Midland Road Project. The other \$600.00 was paid to Watters as compensation for work on an unrelated project and thus only a portion of the total amount of the check can be credited to Cronin as compensation to Watters on any of the three projects involved in this case.

13. For all of his work at prevailing wage rates on the BLIA Project, Watters received \$12,160.00 after earning \$13,399.19. Cronin owes Watters \$1,239.19 in unpaid wages at prevailing wage rates.

14. Cronin wrote check number 6076 to Watters Refinishing on April 24, 2003. This check (written five months prior to Watters beginning his work as an employee on the first of the three projects, the BLIA Project) was not related to any of the three projects at issue in this case. It was payment to Watters for unrelated work at a time when Watters was subcontracting for Cronin.

15. Cronin did not keep certified payroll records of the amounts he paid to Watters for the work Watters completed on these projects. When Watters first began working on these projects, Cronin asked him to turn in time sheets recording his hours of work. Cronin then paid Watters from these time sheets. At some point while Watters was still working on these projects, he was no longer required to keep track of his time in writing. He would simply report his number of hours to Cronin who would then pay Watters from these oral reports.

16. Watters was underpaid for a period of 74 days. In addition, 20% of the delinquently paid prevailing wages amounts to \$247.84. Finally, the department has incurred audit costs in the amount of \$360.94.

² The wage and hour compliance specialist's redetermination concluded that Watters worked 228 hours on the Operations Center Project. The compliance specialist's testimony, however, was that that number could have been in error and that Watters in fact could have worked 226 hours on the Midland Road Project.

IV. DISCUSSION³

A. *Cronin Owes Additional Wages To Watters*

In this appeal, Cronin does not dispute that Watters worked 553 hours on the three projects at issue in this case nor does he dispute that Watters was to be compensated at the prevailing wage rate discussed in the facts. Rather, his appeal centers on his contention that Check Numbers 6076, 6210, and 6712 were not properly credited against amounts owed Watters for the three projects. Cronin asserts that if these payments to Watters are properly credited, then nothing is due to Watters. Contrary to Cronin's position, however, Cronin has been properly credited for all amounts paid to Watters and there nonetheless remain wages due to him.

Pursuant to Mont. Code Ann. § 18-2-403(2)(b), for all public works contracts for construction projects the contractor must pay employees the prevailing wage rates, which include fringe benefits for health, welfare and pension contributions. Mont. Code Ann. § 18-2-407 requires employers to pay the prevailing wages on public works contracts or be subject to a penalty of up to 20% of the delinquent wages plus a forfeiture of \$25.00 for each day that the employee is underpaid. In addition, Mont. Code Ann. §§ 18-2-422(2) and 18-2-423 require that employers on public works contracts keep payroll records for such contracts and provide those records to the Department.

The credible evidence in this matter establishes that Check Number 6076 was not paid to Watters as compensation for any of these projects. Rather, the money was paid to Watters long before the project to which Cronin claims it should be credited (the BLIA Project) ever started. That check was paid to Watters for a different job and Cronin has provided no legal basis for attributing it to wages due to Watters on the Billings Airport project.

The credible evidence in this matter also establishes that only ½ of Check Number 6712 should be credited as part of the wages paid to Watters. The other half of that \$1,200.00 check was paid to Watters for work unrelated to any of the three projects. Cronin has presented no legal basis for attributing the whole amount of that check as wages to Watters for the three projects.

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.

The hearing examiner is convinced, however, that check number 6210 was paid or at least should be treated as wages paid to Watters for the BLIA Project. Watters wrote his name in as the payee on the check and he cashed the check. While Watters contends that he paid the money over to a repair place to fix a compressor, the evidence fails to convince the hearing examiner that he did so. Rather, it appears that he kept that money. Accordingly, of the three checks at issue in this case, that check in its entirety should be credited as wages paid to Watters for the BLIA Project. Crediting this amount as wages paid to Watters still leaves a \$1,239.19 deficit in the amount paid to Watters for his work on the three projects.

B. Cronin Owes a Penalty.

Mont. Code Ann. § 18-2-407 provides that a contractor to a public works contract who pays employees at less than the prevailing wage as established under the public works contract “shall forfeit to the department a penalty at a rate of up to 20% of the delinquent wages plus fringe benefits . . .” Admin. R. Mont. 24.17.851 establishes criteria to determine penalty and cost imposition in cases where a contractor fails to pay the prevailing wage. The regulation utilizes the following criteria:

- (a) the actions of the contractor in response to previous violations;
- (b) prior violations;
- (c) the opportunity and degree of difficulty to comply;
- (d) the magnitude and seriousness of the violation;
- (e) whether the contractor knew or should have known of the violation.

In addition, Admin. R. Mont. 24.17.851(3) permits consideration of the amount of the underpayment of wages in arriving at the penalty to be imposed.

Balancing all of these factors, the hearing examiner finds most compelling the fact that Cronin had notice of the requirement that he pay prevailing wage, that he did know or reasonably should have known that the prevailing wage rate in this case was \$24.37, yet he consistently paid Watters at a rate of \$20.00 per hour. Under these circumstances, imposition of the 20% penalty, amounting to \$247.84, is appropriate.

C. Cronin Must Pay The Statutorily Prescribed \$25.00 per day Forfeiture.

Mont. Code Ann. § 18-2-407 also provides that a contractor, subcontractor, or employer who fails to pay prevailing wages shall forfeit to the employee the amount of wages owed plus \$25.00 a day for each day that the employee was underpaid.

Here, Watters remained underpaid for a period of 74 days. The total amount of the forfeiture required by law is \$1,850.00 ($\$25.00 \times 74 \text{ days} = \$1,850.00$).

D. Cronin Must Pay The Departments Audit Costs.

In addition to the above penalties and forfeiture, Mont. Code Ann. § 18-2-407 requires Cronin to pay the department's audit fees upon a finding that the employer has failed to pay the prevailing wage. Cronin has not disputed that the department incurred \$360.94 in audit costs and Cronin must pay this amount.

V. CONCLUSIONS OF LAW

1. Cronin employed Watters on three public works contracts but failed to pay him prevailing wages on those projects as required by statute.

2. Cronin owes Watters total additional wages of \$1,239.19.

3. Pursuant to Mont. Code. Ann. § 18-2-407 and Admin. R. Mont. 24.17.851, Cronin owes a penalty in the amount of \$247.84.

5. Pursuant to Mont. Code. Ann. § 18-2-407, Cronin owes \$25.00 per day forfeiture to Watters in the amount of \$1,850.00.

6. Pursuant to Mont. Code. Ann. § 18-2-407, Cronin must pay audit costs in the amount of \$360.94.

VI. ORDER

Cronin Painting and Decor is hereby ORDERED to tender a cashier's check or money order in the amount of \$3,697.97, representing \$1,239.19 in unpaid wages, \$247.84 in penalty, \$1,850.00 in forfeiture to the affected employee, and \$360.94 in audit costs, made payable to the Employment Relations Division, 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 26th day of January, 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. § 18-2-407(2), 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.