



## II. ISSUES

Are Harlas, Christopher, Jeffrey and Adams entitled to additional wages as found by the Wage and Hour Unit and penalty as prescribed by law?

## III. FINDINGS OF FACT

1. Anne and Gordon Walters are the proprietors of Cascade Exploration located in Roundup, Montana. Cascade Exploration is involved in several ventures, including sifting through gem laden ore to retrieve gems for sale.

2. On July 5, 2004, the Walters hired Harlas, Christopher, and Jeffrey to work for Cascade Exploration. Harlas did office work and Christopher and Jeffrey drove trucks and did some construction for the Walters.

3. In early January, 2005, the Walters began to receive shipments of gem stone ore at their property. The ore arrived in 55 gallon drums and came from a mining operation located in Colorado.

4. Shortly after the gem stone ore arrived, Walters enlisted the assistance of Harlas, Christopher and Jeffrey to begin sorting through the ore to extract the gem stones. Beginning on February 3, 2005, the Walters hired Adams on to assist in sifting through the ore for gem stones. The Walters showed all four employees how to extract the gem stones from the ore.

5. Because the work of sifting for gem stones was in addition to the hours that the four employees already worked, Gordon Walters agreed to pay Harlas \$7.00 per hour to sift for gem stones and a portion of the profits. Gordon Walters initially stated he would pay Christopher \$7.00 per hour plus a portion of the profits, but ended up agreeing to pay Christopher \$5.00 per hour plus a portion of the profits for sifting ore for gem stones. Gordon Walters agreed to pay Jeffrey and Adams each \$7.00 per hour for their work plus a portion of the profits from the sale of the gem stones. However, there is no evidence that the Walters ever made any profit from selling the gem stones. It also appears that the Walters' business did not exceed \$110,000.00 in gross annual income.

6. The Walters directed all four employees in their work while they were sifting for gem stones. In particular, the Walters set the hours during which the employees would do the sifting.

7. Harlas, Christopher, Jeffrey and Adams each maintained on separate calendars a record of the number of hours they worked sifting for gem stones. Harlas' calendar (Harlas' case Documents 34 through 39) shows that Harlas spent a total of 124 hours sifting for gem stones for the Walters between January 15, 2005 and the date she quit working for the Walters on April 8, 2005. Christopher's calendar (Christopher O'Neill case Documents 24 through 33) shows that he worked a total of 306 hours sifting for gem stones between January 26, 2005 and the date he quit, May 20, 2005. Jeffrey's calendar (Jeffrey O'Neill case Documents 37 through 41) shows that he worked a total of 234 regular hours sifting for gem stones between January 15, 2005 and the date he quit, May 20, 2005. Adams' calendar (Linda Adams Case Documents 40 through 44) shows that she worked a total of 356 regular hours and 134 overtime hours sifting for gem stones between February 3, 2005 and the date she quit, May 3, 2005.

8. The Walters kept no records of the number of hours worked by Harlas, Christopher, Jeffrey or Adams sifting for gem stones. The Walters never paid any of the four employees for their work in picking gem stones. Gordon Walters would continually promise to pay the employees, but kept coming up with excuses as to why they could not be paid. The Walters' continual failure to pay the four employees resulted in Harlas, both O'Neills, and Adams leaving their jobs at Cascade Exploration.

9. Harlas is due \$868.00 in unpaid regular wages having worked a total of 124 regular (non overtime) hours picking gem stones (124 hours x \$7.00 per hour=\$868.00). Christopher is due \$1,530.00 in unpaid regular wages having worked a total of 306 regular (non overtime) hours picking gem stones (306 hours x \$5.00 per hour=\$1,530.00). Jeffrey is due \$1,638.00 in unpaid regular wages having worked a total of 234 regular (non overtime) hours picking gem stones (234 hours x \$7.00 per hour=\$1,638.00). Adams worked a total of 356 regular hours and 134 overtime hours at a regular hourly wage of \$7.00 per hour and an overtime wage of \$10.50 per hour ( $\$7.00 \times 1.5 = \$10.50$ ). She is due a total of \$2,492.00 in additional regular wages (356 hours x \$7.00=\$2,492.00) and \$1,407.00 in unpaid overtime wages (134 hours x \$10.50=\$1,407.00).

10. Harlas is due \$477.40 in penalty on the unpaid wages due to her (55% of \$868.00=\$477.40). Christopher is due \$841.50 in penalty on the unpaid wages due to him (55% of \$1,530.00=\$841.50). Jeffrey is due \$900.90 in penalty on the unpaid wages due to him (55% of \$1,638.00=\$900.90). Adams is due \$1,370.60 in penalty on the unpaid regular wages due to her (55% of \$2,492.00=\$1,370.60) and \$1,547.75 in penalty on the unpaid overtime wages due to her (110% of \$1,407.50=\$1,547.75).

#### IV. DISCUSSION<sup>1</sup>

##### A. *The Walters Owe Harlas, The O'Neills, and Adams Additional Wages.*

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.

For businesses whose annual gross sales do not exceed \$110,000.00, the minimum wage is set at \$4.00 per hour. Mont. Code Ann. §39-3-409.

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

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<sup>1</sup>Statements of fact in this discussion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

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.

The testimony of Harlas, the O'Neills and Adams is sufficient to meet their respective burdens to show that each was not paid for the hours of work that each is claiming. Their testimony is also found credible with respect to the amount of hourly wages each was to be paid. Harlas, Jeffrey and Adams credibly testified that each was to be paid \$7.00 per hour for sifting through the ore for gem stones. Christopher credibly testified that he was to be paid \$5.00 per hour for sifting for gem stones.

The Walters kept no records of the hours each employee worked and, therefore, have failed to refute each employee's prima facie case. Their assertion that Harlas, the O'Neills' and Adams never picked gem stones is not credible in light of the claimants' testimony and the corroborating evidence that the Walters had gem stone ore shipped to their property from the mine they leased in Colorado. Accordingly, the hearing examiner finds that Harlas, each of the O'Neills, and Adams has proven by a preponderance of the evidence that each worked the number of hours and is due the wages as shown above in Findings of Fact Paragraphs 7 and 9.

#### *B. The Walters Owe Penalty on The Unpaid Wages*

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 to be assessed must be calculated by applying the appropriate penalty to each component of the claim. Admin. R. Mont. 24.16.7569.

Applying these three regulations, the Walters owe Harlas \$477.40 in penalty on her unpaid wages. The Walters owe Christopher \$ \$841.50 in penalty on his unpaid wages. The Walters owe Jeffrey \$900.90 in penalty on his unpaid wages.

Finally, the Walters owe Adams a total of \$2,918.35 in penalty, representing \$1,370.60 in penalty on the unpaid regular wages and \$1,547.75 penalty on the unpaid overtime wages.

## 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. The Walters owe Harlas \$868.00 in unpaid regular wages and \$477.40 in penalty for a total due Harlas of \$1,345.40.

3. The Walters owe Christopher O'Neill \$1,530.00 in unpaid regular wages and \$841.50 in penalty for a total due Christopher of \$2,371.50.

4. The Walters owe Jeffrey O'Neill \$1,638.00 in unpaid regular wages and \$900.90 in penalty for a total due Jeffrey of \$2,538.90.

5. The Walters owe Adams \$2,492.00 in unpaid regular wages and \$1,370.60 in penalty on those regular wages as well as \$1,407.00 in unpaid overtime wages and \$1,547.75 penalty on those overtime wages for a total due Adams of \$6,817.35.

## VI. ORDER

Gordon and Ann Walters d/b/a Cascade Exploration are hereby ORDERED to tender the following cashier's checks or money orders in the following amounts (1) a cashier's check or money order in the amount of \$1,345.40, representing \$868.00 in wages and \$477.40 in penalty, made payable to Glenna Harlas, (2) a cashier's check or money order in the amount of \$2,371.50, representing \$1,530.00 in wages and \$841.50 in penalty, made payable to Christopher O'Neill, (3) a cashier's check or money order in the amount of \$2,538.90 representing \$1,638.00 in wages and \$900.90 in penalty, made payable to Jeffrey O'Neill, and (4) a cashier's check or money order in the amount of \$6,817.35, representing \$3,899.00 in wages and \$2,918.35 in penalty, made payable to Linda J. Adams. 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. The Walters may deduct applicable withholding from the wage portion but not the penalty portion of the amounts due.

DATED this 3rd day of July, 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.