

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIMS)	Case Nos. 1268-2007 & 1269-2007
OF MELISSA L. DEMERS AND)	
MARTIN R. FANCHER,)	
)	
Claimants,)	
)	
vs.)	FINDINGS OF FACT;
)	CONCLUSIONS OF LAW;
)	AND ORDER
MONTANA COMPONENTS HOUSING)	
CORPORATION, a Montana corporation,))	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

Respondent Montana Components Housing Corporation (MCHC) appealed a determination of the Wage and Hour Unit which found it owed unpaid wages to claimants Melissa Demers and Martin Fancher. Specifically, the Wage and Hour Unit found that MCHC owes Demers \$3,250.00 in unpaid wages and Fancher \$3,250.00 in unpaid wages. On the motion of the Hearing Officer, with the agreement of the parties, the two cases were consolidated.

The Hearing Officer held a contested case hearing in this matter on June 27, 2007, in Missoula, Montana. Kim Powell, general manager, represented the respondent. Jay Powell, owner, appeared as a witness for the respondent. Melissa Demers and Martin Fancher were present.

The parties stipulated to the admission of Documents 1 through 55 from the Employment Relations Division (ERD) case file for Demers and Documents 1 through 33 from the ERD case file for Fancher. Photographs marked E-32, E-35, E-36, and E-44, corresponding to the lot numbers, offered by the respondent during the hearing, were admitted into the record without objection. 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 MCHC 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. Kim Powell hired Demers and Fancher on October 24, 2006 to build a 24 x 30 garage on lot 32 in West Mountain Estates in Alberton, Montana. MCHC was to provide the materials. Demers and Fancher told Powell that they had been making \$25.00 to \$35.00 per hour, each, for the last three years. Powell offered to pay them \$1,500.00 for their labor to build the garage. They accepted the offer. Powell did not require that the garage be finished by any certain time.

2. MCHC builds component housing in a warehouse in Corvallis, Montana, and ships a completed house to be set on a foundation, where the trusses for the roof are installed. The corporation owns lot 32 and had set the house on it. The roof and siding had been completed on it by the time Powell hired Demers and Fancher. The garage they were hired to build was to be attached to the house.

3. There are five other lots in West Mountain Estates which are adjacent to lot 32: lots 35, 36, 39, 40, and 44. Lots 35, 36, 39, 40 and 44 are owned by Title Services. The funding for the construction on those lots is held in an escrow account by Title Services. Title Services contracts for and pays for the work done on those lots.

4. Demers and Fancher are married. They live and work together. They were formerly self employed as M&M Builders and had independent contractor certifications. Their independent contractor certifications and business registration expired on May 3, 2006. Because of litigation, they are prohibited by the court to work as independent contractors or as business owners under the name M&M Builders. After they filed their wage and hour claims, MCHC responded that they were independent contractors. The Wage and Hour Unit referred the matter to the Independent Contractor Central Unit, who issued a determination on March 22, 2007, that they were employees while they worked for MCHC.

5. Powell paid them on an irregular basis, when they asked for a draw against their final wages for work on the garage. They asked for draws when they needed groceries or gas. Powell did not keep a record of the dates of payments or withhold for taxes. He kept track of the total he paid them. He did not keep track of the hours they worked because he was paying them for the job, not by the hour. Demers and Fancher kept track of their hours.

6. By October of 2006, Demers and Fancher had the garage finished except for several pieces of sheathing to put on the roof. The weather was cold and rainy. Before they got that work done, Powell asked them to do some finish work in the house on lot 32. He did not discuss how they would be paid for that work. They worked on the incomplete stairway, corrected the framing for some interior doors and installed them, leveled and straightened the

front and back exterior doors, lacquered the trim in the front room, and finished the gable end on the roof over the deck.

7. During the summer of 2006, MCHC contracted with Title Services to put component houses on the foundations on lots 35 and 44. They had previously contracted to frame a house in place on lot 36. The houses for lots 35 and 44 were completed and ready to be set in place by November 1, 2006. On November 2, 2006, MCHC delivered the houses to the lot sites in Alberton.

8. On November 2, 2006, Powell directed Demers and Fancher to help set the component houses on the foundations on lots 35 and 44. Demers and Fancher each worked 11½ hours that day on that project.

9. On November 7, 2006, Demers and Fancher worked on the house in lot 32. On November 8, 2006, they set the trusses for the roof on the house on lot 44. On November 10, 2006, they put the fascia and sheathing on it. On November 15 and 16, they worked on the house in lot 32. On November 17, they installed fascia on the house on lot 36 and put felt on the roof on the house on lot 44. On November 22 and 23, they put trusses and sheathing on the roof of the house on lot 35.

10. In mid November of 2006, Powell delivered a backhoe to lot 32 to do some landscaping. While he was using it, he backed into his 1985 Chevrolet pick up truck, causing significant damage. He estimated the value of the truck to be around \$1,000.00. He did not want to pay to have it repaired and offered it to Demers and Fancher. They accepted it as a partial payment of wages. Powell told them to get their own insurance on it. They asked him to transfer the title so they could get insurance.

11. Powell billed Title Services for the work done on the houses on lots 35 and 44. He did not consider paying Demers and Fancher for their work on those houses, maintaining that they should be paid by Title Services.

12. In December of 2006, Powell sent Demers and Fancher to work on a house MCHC had constructed in Stevensville, Montana. Demers, Fancher, and Powell went to the local lumber yard and chose the trim for it. Demers and Fancher delivered the trim, lacquered it, and installed it. They also installed several doors in that house. When they were finished, Powell decided that he did not like the trim that had been chosen. He sent Demers and Fancher back to Alberton and asked them to finish the house on lot 32.

13. Demers and Fancher returned to Alberton to finish the work on the house on lot 32. By January 4, 2007, they had run out of materials. They asked Powell for a sprayer to put lacquer on the trim. He asked them to be finished with the house by January 15, 2007.

14. On or about January 5, 2007, Powell's wife called Demers and told her that she and Fancher should not do any more work for MCHC. Demers and Fancher then added up their hours. Their records showed that MCHC had paid them a total of \$3,500.00 and that they had worked a total of 232 hours. Powell agrees that he paid them \$3,500.00 in draws between October 24, 2006 and January 4, 2007. He also believes their time was worth \$25.00 per hour, each.

15. The documentation shows that Demers and Fancher worked the following:

Date	Project	Hours Worked
October 24, 2006 through November 1, 2006	Garage on lot 32	46.50
November 2 and 3	Set houses on lots 35 and 44 and set trusses on house and sheathed roof on the house on lot 35	17.50
November 4 and 7	Installed windows and doors in the garage on lot 32	9.00
November 8 and 10	Set trusses, fascia and sheathing on the roof of a house on lot 44	17.50
November 15 and 16	Worked on the stairway in the house on lot 32	12.00
November 17	Installed fascia and felt on the roofs of the houses on lots 36 and 44	7.50
November 20 through 24	Worked on trusses and roof of the house on lot 36	28.00
November 27 through December 1	Repaired trusses that blew down on houses on lots 35, 36 and 44 and delivered trim packages to house in Stevensville	24.00
December 4 through 8	Installed and lacquered trim in the house in Stevensville	22.00
December 11 through 15	Installed and lacquered trim in the house in Stevensville	8.00
December 18 through 22	Installed and lacquered trim in the house in Stevensville, ordered trim package for house on lot 32	29.00

December 26 through 29	Working on the house on lot 32, waiting for Powell to deliver a sprayer	18.00
January 4	Installed trim on doors in the house on lot 32	2.00
TOTAL HOURS:		241.00

16. The documentation establishes that Demers and Fancher worked a total of 241 hours for MCHC. The total hours spent on the garage on lot 32 must be deducted from this total on the basis that Demers and Fancher agreed to build the garage for \$1,500.00. MCHC has agreed that they did so and has not indicated that any amount of wages should be deducted from Demers' and Fancher's pay for not completing the project. The documentation shows that Demers and Fancher spent 55.50 hours working on the garage on lot 32. As a result, the balance of hours, spent on other projects, amounts to 185.50 hours.

17. In February of 2007, Demers and Fancher returned the pickup truck to Powell when he sent an employee to get the license plates from it. He had not transferred the title to them and they had not obtained insurance on it. The insurance was still in Powell's name. While the truck was in their possession, they put a new starter in it, in addition to gas and oil.

IV. DISCUSSION AND ANALYSIS¹

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.

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 the 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).

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.

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.

MCHC did not keep comprehensive records of Demers’ and Fancher’s hours. However, Demers and Fancher did. The parties agree that MCHC paid Demers and Fancher a total of \$3,500.00 during their employment, without making appropriate deductions for taxes. Fifteen hundred of this amount was for the construction of the garage on lot 32. The remaining \$2,000.00 was paid to them for the additional work they did on other projects.

It must be established that MCHC is liable for the work which Demers and Fancher did on the houses on lots 35 and 44. It is clear that MCHC contracted with Title Services to do the work on those houses. Therefore, MCHC was paid for the work on those houses and Title Services is liable under the contract with MCHC for the work done on those houses. There has been no showing of any fact to the contrary. The work done by Demers and Fancher on those houses was under the direction and control of MCHC. They used MCHC equipment and were not employed in an independently established business while doing so. They worked on those houses when instructed by Powell, a principal of MCHC, to do so.

The claimants in this matter seek to recover wages which they claim were not paid.

They have shown by just and reasonable inference that they were not paid for their total hours of work. Having met that burden, the burden then shifts to MCHC to negate the reasonableness of the inference to be drawn. MCHC has failed to do so. MCHC maintains that Demers and Fancher should seek payment from Title Services for the work they did on the houses on lots 35 and 44. However, they were employees of MCHC at the time they were doing that work and were under the direction and control of MCHC at that time.

As a result, the claimants have met their initial burden of proof to show that they were not paid for the total amount of work they did at the agreed upon rates of pay.

Wages Due to Demers and Fancher

Since Demers and Fancher worked the same hours for the same rate of pay, the wages due to each is the same.

As indicated above, \$2,000.00 in wages must be applied toward wages due for 185.5 hours of work. The parties agree that Demers and Fancher are each entitled to \$25.00 per hour for their work. Consequently, the wages due for 185.50 hours, at \$50.00 per hour, equals \$9,275.00. From

this, \$2,000.00 is deducted as having been paid. The balance to be paid equals \$7,275.00, or \$3,637.50 each to Demers and Fancher.

The pickup truck cannot be considered as a payment of wages, and cannot be deducted from the wages due because the title was never transferred to Demers and Fancher and it was returned to Powell shortly after their employment ended.

In the absence of any other documentation or substantial evidence, it is clear that MCHC owes Demers \$3,637.50 in unpaid wages and Fancher \$3,637.50 in unpaid wages.

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 is guilty of a misdemeanor and must be assessed a penalty not to exceed 110% of the wages due. *Id.* None of the special circumstances defined in Admin. R. Mont. 24.16.7556, requiring the imposition of the maximum penalty, exist in this matter. For determinations in which those special circumstances are not extant, a penalty of 55% of the wages due is required as defined in Admin. R. Mont. 24.16.7566.

Applying these regulations, MCHC owes Demers a 55% penalty on \$3,637.50, or \$2,000.62, for a total of \$5,638.12. MCHC owes Fancher a 55% penalty on \$3,637.50, or \$2,000.62, for a total of \$5,638.12.

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. MCHC owes Demers \$3,637.50 in unpaid wages, and \$2,000.62 in penalty, or \$5,638.12 in total.

3. MCHC owes Fancher \$3,637.50 in unpaid wages, and \$2,000.62 in penalty, or \$5,638.12 in total.

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

VI. ORDER

MCHC is hereby ORDERED to tender the following cashier's checks or money orders: (1) a cashier's check or money order, representing \$3,637.50 in wages, minus appropriate withholding of taxes, and \$2,000.62 in penalty, made payable to Melissa L. Demers, and (2) a cashier's check or money order representing \$3,637.50 in wages, minus appropriate withholding

of taxes, and \$2,000.62 in penalty, made payable to Martin R. Fancher. 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. MCHC may deduct applicable withholding from the wage portion but not from the penalty portion of the amounts due.

DATED this 16th day of July, 2007.

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.