

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM)	Case Nos. 1447-2007
OF KENNETH L. JACKSON, JR.,)	
)	
Claimant,)	
)	FINDINGS OF FACT;
)	CONCLUSIONS OF LAW;
)	AND ORDER
vs.)	
)	
HANK'S FIRE SERVICE, INC.,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

Respondent Hank's Fire Service, Inc., appeals from determinations of the Wage and Hour Unit of the Department of Labor and Industry upholding the claims of Kenneth L. Jackson, Jr. Hearing Officer David A. Scrimm held a contested case hearing in this matter on October 31, 2006. At the hearing, the claimant was represented by Gregory J. Hatley, Hatley, Haffeman & Tighe, P.C. Respondent was represented by Allen P. Lanning of Conklin, Nybo & Lanning, P.C.

Bruce Price, Chris Isaak, Hank Booth, Kenneth Jackson, Bruce Johnson, Allen Buckholz, Jeff Buckholz, Brian Smith and Dennis Dadej testified. Claimant's Exhibits 1 through 4 and department documents 56, 57, 62 through 98, 101, 103, 108 through 111, 125 through 138 and 145 through 147 were admitted into the hearing record. The parties submitted post-hearing briefs on January 15, 2007.

Based on the evidence and argument presented at the hearing, the hearing officer makes the following findings of fact, conclusions of law, and final agency decision.

II. ISSUE

Is Jackson due additional wages and penalty as provided by law?

III. FINDINGS OF FACT

1. Kenneth Jackson (Jackson) began his employment with Hank's Fire Service, Inc., in November 2002. He worked until November 9, 2004 when he went on disability leave due to a work-related knee injury. Jackson returned to work on June 29, 2005. Jackson worked as an

hourly employee until August 14, 2005. Jackson left Hank's employment on November 16, 2005.

2. Hank Booth is the current owner of Hank's Fire Service, Inc. (Hank's). Bruce Johnson was a co-owner and the general manager of Hank's until his departure in late June 2005.

3. Jackson filed his wage claim with the Wage & Hour Division of the Montana Department of Labor & Industry on January 12, 2006.

4. Jackson seeks additional wages for time spent working and traveling prior to clocking in at the Hank's Fire Service office located in Booth's residence. Specifically, Jackson seeks additional wages for time spent opening the gates to the company vehicle parking lot; starting company vehicles to allow them to warm up; checking fluid levels; inspecting belts, tire pressure, for scraping windows and removing snow from the vehicles; planning the work day with other employees; and then driving to Hank's offices on 428 Beaverhead Court. Jackson also seeks additional wages for the time spent driving to the lot after punching out at Hank's office; opening the gates, cleaning out and inventorying the vans; disposing of trash and old extinguishers and then resealing the gates upon his departure in his personal vehicle.

5. Jackson was required to pick up a company vehicle located at a gated and locked facility adjacent to a business known as Doors and Hardware prior to clocking in at the offices of Hank's Fire Service. Jackson, as a lead worker, was frequently the first employee there and arrived at 7:30 a.m., or earlier, every day.

6. Company policy required Jackson to inspect the fluids of the vehicle; check tires; to start up the vehicles to let them warm up; to scrape any ice that may have accumulated; and to meet with other employees to plan their work days.

7. Jackson was required to punch out at the end of the day and return the vehicle to the lot and prepare the vehicle to be ready to "rock 'n roll" the next day or later that evening if an emergency arose.

8. At the end of the day, Jackson was required to clean out the vehicle. This included removing accumulated garbage and old fire extinguishers and to resecure the gate on his way out. The lock on the gate was sometimes difficult to unlock and relock.

9. Hank's employees were expected to have their day planned when they reported to work in the morning.

10. It took approximately one-half hour in the morning and one-half hour in the evening for Jackson to conduct the activities listed in Finding of Facts 4-9.

11. Exhibits 65 through 138 accurately reflect the time Jackson spent on the clock, but do not include time spent by Jackson working off the clock.

12. Hank's ownership and management expected Jackson and its other employees to take care of the vehicles by warming them up as necessary, checking the oil, radiator levels and brake fluids. Hank's also expected employees to keep their vans clean and organized, including tools. These activities were vital to Hank's business and good company policy. If an employee failed to properly maintain his work vehicle, management would not be happy.

13. Jackson was supposed to clock in at or before 8:00 a.m. which would require him to drive to the lot, unlock and secure the gate, pull his vehicle into the lot, start up the work van, check fluids and tires, and scrape any ice. Jackson further testified that the gate was usually locked when he got there. He was a lead employee and arrived somewhat earlier than other employees at the lot. If it was above 70° the vehicles would only require a minute or two of warming up, but if it was below 30° it might require 15 to 20 minutes. After the vehicle checks, Jackson would discuss who had serviced what accounts the day before and what each employee was going to be doing that day.

14. Jackson's route to the office included a number of reduced speed areas including a school crossing. He was required to put used fire extinguishers in the secure dumpster so that they could not be removed by those interested in making methamphetamine. Jackson found it more practical to conduct inventory at the end of the day so that he could service as many customers as possible during the day.

15. Jackson further testified that it took eight to 12 minutes to get from the lot to Booth's house and it took less time on the return. It took him about five minutes on average to clean up the vehicle and about 10 minutes to inventory and organize the van. Jackson was an organized, meticulous, and hard-working employee.

16. Bruce Johnson, co-owner of Hank's, testified that there was no policy for working off the clock, that it was not permitted and that "it didn't exist." However, he further testified that he knew employees were working before and after clocking in at the office. Johnson further admitted that the change to the lunch policy to require employees to punch in and out for lunch would not have been in Hank's best interest.

17. Alan Buckholtz testified that he started working at Hank's on March 15, 2005 on the fire side of Hank's business. Jeff Buckholtz began his employment with Hank's on July 18, 2005. The Buckholz brothers' testimony about Kenneth Jackson's work habits at Hank's was based on a total of only eight weeks during which they worked with him as an hourly employee.

18. Brian Smith would arrive at the lot between 7:30 to 7:40 and Jackson would arrive at approximately the same time or earlier. Kenneth Jackson was generally one of the first ones there. Hank's paid Smith for his preparatory and concluding time. He did not have to punch in. He simply wrote the additional time on his card.

19. Dennis Dadej started working at Hank's in March 2002 and he has been the acting general manager since June 28, 2005. He did not work on the fire side of Hank's business with Jackson.

20. Except as provided below, Jackson proved he is owed unpaid wages in the amount of one hour per day from November 19, 2003 to November 19, 2005 and from June 29, 2005 to August 14, 2005. The attached Table 1 details the amount of regular and overtime wages owed.

21. The time Jackson spent warming up the vehicles, scraping ice, clearing windshields and traveling to and from the lot and office each day would be 15 minutes less when school was not in session and temperatures were warmer. Accordingly, from June 1, 2004 to September 1, 2004 and from June 29, 2005 to August 14, 2005 Jackson is due only 45 minutes of unpaid wages per work day. The attached Table 1 accounts for this seasonal adjustment.

TABLE 1.

Week Ending	Hours listed	Reg. Hours	Hourly Rate	Amount	OT Hours	OT Rate	Amount	Total
11/22/2003	40.25	0	12	\$0.00	5	18	\$90.00	\$90.00
11/29/2003	19.25	3	12	\$36.00	0	18	\$0.00	\$36.00
12/6/2003	40.75	0	12	\$0.00	5	18	\$90.00	\$90.00
12/13/2003	48	0	12	\$0.00	5	18	\$90.00	\$90.00
12/20/2003	36.5	3.5	12	\$42.00	1.5	18	\$27.00	\$69.00
12/27/2003	20.75	3	12	\$36.00	0	18	\$0.00	\$36.00
1/3/2004	31.25	4	12	\$48.00	0	18	\$0.00	\$48.00
1/10/2004	41.75	0	12	\$0.00	5	18	\$90.00	\$90.00
1/17/2004	30.75	4	12	\$48.00	0	18	\$0.00	\$48.00
1/24/2004	43.75	0	12	\$0.00	5	18	\$90.00	\$90.00
1/31/2004	40.25	0	12	\$0.00	5	18	\$90.00	\$90.00
2/7/2004	42.5	0	12	\$0.00	5	18	\$90.00	\$90.00
2/14/2004	36.75	3.25	12	\$39.00	1.75	18	\$31.50	\$70.50
2/21/2004	32	4	12	\$48.00	0	18	\$0.00	\$48.00
2/28/2004	40	0	12	\$0.00	5	18	\$90.00	\$90.00
3/6/2004	39.5	0.5	12	\$6.00	4.5	18	\$81.00	\$87.00
3/13/2004	47.5	0	12	\$0.00	5	18	\$90.00	\$90.00
3/20/2004	36.75	3.25	12	\$39.00	1.75	18	\$31.50	\$70.50
3/27/2004	45.25	0	12	\$0.00	5	18	\$90.00	\$90.00
4/3/2004	38.75	1.25	12	\$15.00	3.75	18	\$67.50	\$82.50
4/10/2004	51.5	0	12	\$0.00	5	18	\$90.00	\$90.00
4/17/2004	49	0	12	\$0.00	5	18	\$90.00	\$90.00
4/24/2004	41.75	0	12	\$0.00	5	18	\$90.00	\$90.00
5/1/2004	41.5	0	12	\$0.00	5	18	\$90.00	\$90.00
5/8/2004	39	1	12	\$12.00	4	18	\$72.00	\$84.00
5/15/2004	43.25	0	12	\$0.00	5	18	\$90.00	\$90.00
5/22/2004	47	0	12	\$0.00	5	18	\$90.00	\$90.00
5/29/2004	41.5	0	12	\$0.00	5	18	\$90.00	\$90.00
6/5/2004	36.5	3.5	14	\$49.00	0.25	21	\$5.25	\$54.25
6/12/2004	47.75	0	14	\$0.00	3.75	21	\$78.75	\$78.75
6/19/2004	50.75	0	14	\$0.00	3.75	21	\$78.75	\$78.75
6/26/2004	42	0	14	\$0.00	3.75	21	\$78.75	\$78.75
7/3/2004	39.25	0.75	14	\$10.50	3	21	\$63.00	\$73.50
7/10/2004	41.25	0	14	\$0.00	3.75	21	\$78.75	\$78.75
7/17/2004	54	0	14	\$0.00	3.75	21	\$78.75	\$78.75
7/24/2004	42.75	0	14	\$0.00	3.75	21	\$78.75	\$78.75
7/31/2004	48.5	0	14	\$0.00	4.5	21	\$94.50	\$94.50
8/7/2004	43.5	0	14	\$0.00	3.75	21	\$78.75	\$78.75
8/14/2004	37	3	14	\$42.00	0.75	21	\$15.75	\$57.75
8/21/2004	40.75	0	14	\$0.00	3.75	21	\$78.75	\$78.75
8/28/2004	39.75	0.25	14	\$3.50	3.5	21	\$73.50	\$77.00
9/4/2004	43.25	0	14	\$0.00	5	21	\$105.00	\$105.00
9/11/2004	35	5	14	\$70.00	0	21	\$0.00	\$70.00
9/18/2004	39.5	0.5	14	\$7.00	4.5	21	\$94.50	\$101.50
9/25/2004	43.5	0	14	\$0.00	5	21	\$105.00	\$105.00
10/2/2004	45.25	0	14	\$0.00	5	21	\$105.00	\$105.00
10/9/2004	41	0	14	\$0.00	5	21	\$105.00	\$105.00
10/16/2004	36	4	14	\$56.00	1	21	\$21.00	\$77.00
10/23/2004	39	1	14	\$14.00	4	21	\$84.00	\$98.00
10/30/2004	38	2	14	\$28.00	3	21	\$63.00	\$91.00
11/6/2004	34.25	5	14	\$70.00	0	21	\$0.00	\$70.00
11/13/2004	16.5	2	14	\$28.00	0	21	\$0.00	\$28.00
7/3/2005	27.1	2.25	14	\$31.50	0	21	\$0.00	\$31.50
7/10/2005	31.35	3	14	\$42.00	0	21	\$0.00	\$42.00
7/17/2005	46	0	14	\$0.00	3	21	\$63.00	\$63.00
7/24/2005	34.45	3	14	\$42.00	0	21	\$0.00	\$42.00
7/31/2005	41.3	0	14	\$0.00	3.75	21	\$78.75	\$78.75
8/7/2005	34	3.75	14	\$52.50	0	21	\$0.00	\$52.50
8/14/2005	22.45	2.25	14	\$31.50	0	21	\$0.00	\$31.50
Wages Due				\$946.50			\$3,546.75	\$4,493.25
Penalty				\$520.58			\$3,901.43	\$4,422.00
Total								\$8,915.25

IV. DISCUSSION¹

The appellant challenges the claimant's contention that he is owed additional wages. The substantial evidence in this matter demonstrates that Jackson is due both additional overtime and regular wages as well as 110% penalty on the overtime and 55% penalty on the regular wages as required by the applicable rules.

Montana law requires employers to pay wages when due, and in no event later than 15 days following termination of employment. Mont. Code Ann. §§ 39-3-204 and 39-3-205. Montana law also requires employers to 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.

The two issues in this case are whether Jackson timely filed his claim and whether he worked the additional number of overtime and regular hours that he claims. 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 v. Keegan, supra*, 359 Mich. at 576, 103 N.W. 2d at 497.

Jackson's testimony and that of other witnesses called at hearing is sufficient to meet his burden to show that he was not paid for the overtime and regular hours of work that he is claiming. Hank's records do not refute Jackson's position as the records themselves reflect only the pay Jackson received and the hours he actually worked. Those records do not adequately refute Jackson's prima facie showing and thus the hearing officer finds that Jackson has proven by a preponderance of the evidence that he is owed the additional overtime and regular wages as stated in Finding of Fact 20 and 21.

A. *Jackson's claim was timely filed.*

¹ 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.

Montana law requires an employee seeking recovery of unpaid wages to file a complaint within 180 days of delay or default. Mont. Code. Ann. § 39-3-207(1). Jackson filed his claim on January 12, 2006, therefore he must be owed wages on or after July 16, 2005 to meet the statutory limitation.

Jackson stated he hadn't heard of new policies regarding work off the clock prior to the date of the hearing. Dadej testified Jackson may not have been present when he informed other employees of the new policies that would ensure employees were paid for the types of work activities Jackson is seeking payment for here. Dadej testified further that not all of the changes to the time policy were expressed at the very beginning of his tenure as acting general manager. There is insufficient evidence to show that Jackson was made aware of any changes to work policies that would eliminate any claim for unpaid wages during the week he returned to work after having knee replacement surgery resulting from an on-the-job injury. Jackson returned to work on June 29, 2005. His pay stub for work that week shows he was paid on July 6, 2006. Mont. Code Ann. § 39-3-206 requires employers to pay their employee wages earned within 10 days of when they are due and payable. Thus any unpaid wages for the week ending July 3, 2005 and due and payable on July 6, 2005 would have to have been paid no later than July 16, 2006. Thus Jackson's claim was timely filed.

Accordingly, Jackson may seek unpaid wages for the time period November 19, 2003 through November 19, 2005. Mont. Code Ann. § 39-3-207(2).

B. *Jackson's travel, preliminary and postliminary time is compensable.*

The parties' dispute boils down to two questions: whether or not Jackson should have been compensated for the time between when he stopped to open the gate at the company parking lot and when he punched in and for the time between when he punched out and when he closed and locked the gate behind him; and how much time those activities took each day. Jackson contends that his time was work for which he must be compensated.

1. *Jackson's travel time is compensable.*

Admin. R. Mont. 24.16.1010(5) provides:

Travel that is all in a day's work. Time spent by the employee in travel as part of his principal activity, such as travel from job site to job site during the work day must be counted as hours worked. Where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked regardless of contract, custom, or practice. If an employee normally finishes his work on the premises at 5:00 p.m., and is sent to another job which he finishes at 8:00 p.m., and is required to return to his employer's premises arriving at 9:00 p.m., all of the time is working time. However, if the employee goes home instead of returning to his employer's premises, the travel after 8:00 p.m. is home-to-work travel and is not hours worked.

Testimony at hearing proved that the travel time done by Jackson and other Hank's employees off the clock was part of the work day. Employees were required to go to the lot to pick up a company vehicle and perform a number of work-related functions before driving to Hank's offices located in Booth's home at 428 Beaverhead Court. Jackson testified that it took eight to 12 minutes to drive to the office and less time on the return. Other witnesses testified that it could take more or less time. Jackson's estimate of time is reasonable. For purposes of calculating wages owed, the hearing officer will use 10 minutes for the morning drive to the office and five minutes for the return drive in the evening.

2. *Jackson's preparatory and concluding activities are compensable.*

Jackson's time spent warming up, maintaining, cleaning and restocking the vans together with his work planning activities is compensable work. Montana law requires employers to pay their employees for wages earned. Mont. Code Ann. § 39-3-204. The term employ is defined as "to permit or suffer to work." Mont. Code. Ann. 39-3-201(3).

Admin. R. Mont. 24.16.1005 provides:

(1) General. Work not requested but suffered or permitted is work time. For example, an employee may voluntarily continue to work at the end of a shift. He may be a pieceworker, he may desire to finish an assigned task or he may wish to correct errors, paste work tickets, prepare time reports or other records. The reason is immaterial. The employer knows or has reason to believe that he is continuing to work and the time is working time.

(2) Work performed away from the premises or job site. The rule is also applicable to work performed away from the premises or the job site, or even at home. If the employer knows or has reason to believe that the work is being performed, he must count the time as hours worked.

(3) Duty of management. In all such cases it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed.

It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so.

...

Admin. R. Mont. 24.16.1008 provides:

Preparatory and concluding activities (1) Principal Activities.

(a) The term “principal activities” includes all activities which are an integral part of a principal activity. Two examples of what is meant by an integral part of a principal activity are:

(1) In connection with the operation of a lathe, an employee will frequently at the commencement of his workday, oil, grease, or clean his machine, or install a new cutting tool. Such activities are an integral part of the principal activity, and are included within such term . . .

(2) Illustrative U.S. Supreme Court Decisions. These principles have guided the Administrator in the enforcement of the law. Two cases decided by the U.S. Supreme Court further illustrate the types of activities which are considered an integral part of the employee’s jobs. In one, employees changed their clothes and took showers in a battery plant where the manufacturing process involved the extensive use of caustic and toxic materials. Steiner v. Mitchell, 350 U.S. 247 (1956). In another case Knifemen in a meatpacking plant sharpened their knives before and after their scheduled workday. Mitchell v. King Packing Co., 350 U.S. (1956). In both cases the Supreme Court held that these activities are an integral and indispensable part of the employee’s principal activities.

While this is not an FLSA case, Montana, as stated in Admin. R. Mont. 24.16.1008, looks to Federal and Supreme Court interpretations of the FLSA and the Portal-to-Portal Act for guidance. Preliminary and postliminary activities, however, are compensable if they are “an integral and indispensable part of the [employee’s] principal activities.” Steiner v. Mitchell, 350 U.S. 247, 256, 76 S. Ct. 330, 100 L. Ed. 267 (1956); Dunlop v. City Electric, Inc., 527 F.2d 394, 399 (5th Cir. 1976). By contrast, an employer is not required to pay employees for otherwise compensable activities if the time spent performing those activities is *de minimis*. See Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 692, 66 S. Ct. 1187, 90 L. Ed. 1515 (1946), *superseded by statute on other grounds as stated in Carter v. Panama Canal Co.*, 150 U.S. App. D.C. 198, 463 F.2d 1289, 1293 (D.C. Cir. 1972); Dunlop v. City Electric, Inc., 527 F.2d 394 (5th Cir. 1976).

In Dunlop, *supra*, the 5th Circuit explained that “the excepting language of [§ 254] was intended to exclude from FLSA coverage only those activities predominantly spent in the employees’ own interests.” *Id.* (internal citations and quotation marks omitted). In other words, where the activities at issue are “undertaken for the employees’ own convenience,” “not being required by the employer,” and “not being necessary for the performance of the [employees’] duties” to the employer, they are fairly construed as non-compensable. *Id.* However, when an employer derives “significant benefit” from the activity at issue, that activity

is principal to the performance of the work for which the plaintiffs are employed, and is therefore compensable. *Id.* at 399. Put simply, where the activity is “an integral and indispensable part of the principal activities for which [the employees] are employed,” the Portal-to-Portal exemption does not apply. *Id.* (quoting *Steiner v. Mitchell*, 350 U.S. 247, 256, 76 S. Ct. 330, 100 L. Ed. 267 (1956)).

Testimony at hearing showed that Hank’s expected the company vans to be ready to “rock n’ roll.” Jackson interpreted this to mean that the vans had to be warmed up, fluid levels checked, tires checked, inventory maintained and vans emptied of garbage and old fire extinguishers. Testimony at hearing proved that Hank’s wanted clean vans and that a failure to maintain a company vehicle could have repercussions from management.

Almost unanimous testimony proved that Hank’s expected its employees to have their days planned when they arrived at the office in the morning and that once again a failure to make such plans would result in “repercussions.”

Testimony at hearing also proved that the preliminary and postliminary activities provided a significant benefit for the employer and were integral to its principal activities. Having the vans ready to “rock n’ roll” and well-maintained meant Hank’s could respond to a customer’s needs without fear that they would have mechanical problems or would lack the right tools or inventory. This is critical to any type of business. Clearly, the preliminary and postliminary activities conducted by Jackson and other Hank’s employees was integral to the employer’s principal activities.

Hank’s policy of having its employees drive the company vehicles from the lot to the office was essential to its business. Hank’s home-based business license simply would not allow it to park either its vehicles or those of its employees at the residence on Beaverhead Court. Checking the fluid levels, scraping ice, warming up vehicle engines, preparing a plan for the day, emptying out refuse and old extinguishers and securing the parking lot were all activities for which Hank’s received significant benefit.

Testimony at hearing also made clear that the time spent warming up the vehicles and travel time to and from the lot and office would be less when school was not in session and temperatures were warmer. Accordingly, from June 1, 2004 to September 1, 2004 and June 1, 2005 to September 1, 2005 only 45 minutes of time per day was necessary for those activities.

3. *The de minimis exemptions provided by the Portal-to-Portal Act are inapplicable.*

Montana law provides no exemption for *de minimis* activities. However, the Montana Department of Labor and Industry has looked to Supreme Court decisions involving wage claim issues under the Fair Labor Standards Act (FLSA) that have also discussed the *de minimis* exception. See *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).

The Supreme Court in *Anderson* explained the *de minimis* rule as follows:

When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act. It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved.

Anderson, 328 U.S. at 692. When applying the *de minimis* rule to otherwise compensable time, the following considerations are appropriate: “(1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional work.” *Lindow v. United States*, 738 F.2d 1057, 1063 (9th Cir. 1984).

Jackson’s activities are clearly not *de minimis* because there would have been no administrative difficulty in recording the additional time. The changes made to Hank’s time recording policies following Dadej’s assumption of the general manager position make clear that no difficulty was inherent. Smith’s testimony that he was compensated for the same time that Jackson claims provides further evidence of a lack of any administrative difficulty in recording the additional time.

The aggregate amount of compensable time here is not a trifle. The *Burton* Court considered the amount over a work week and found 7.5 to 15 hours of time not *de minimis*. Here Jackson asserts up to five hours per week of unpaid work time, again not a trifling amount and not *de minimis*.

Jackson’s time spent traveling and conducting preliminary and postliminary activities was a regular part of his everyday work schedule. Thus, even if Montana recognized a *de minimis* rule, Jackson’s time spent in these activities is compensable under the test in *Lindow*.

C. *Jackson Is Due Additional Regular And Overtime Wages.*

Having determined that Jackson’s travel, preliminary and postliminary activities are compensable, the question remains as to whether the extra time claimed is overtime due to Jackson or merely regular wages. Montana law requires employers to 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. Table 1 attached hereto and by this reference made a part hereof shows that Jackson is due \$946.50 in regular wages and \$3,546.75 in overtime wages.

D. *Hank’s must pay a penalty on the unpaid wages due Jackson.*

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, Hank's owes penalty in the amount of \$3,901.43 (110% of \$3,546.75) for the unpaid overtime wages due to Jackson. Hank's also owes penalty in the amount of \$520.57 (55% of \$946.50) for the unpaid regular wages due to Jackson.

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. Hank's owes Jackson additional overtime wages in the amount of \$3,546.75 and additional regular wages in the amount of \$946.50. In addition, Hank's owes Jackson penalty of \$3,901.43 on the unpaid overtime wages and \$520.57 on the unpaid regular wages.

VI. ORDER

Hank's Fire Service is hereby ORDERED to tender a cashier's check or money order in the amount of \$8,915.25, representing \$4,493.25 in wages (less appropriate withholding of taxes from those wages) and \$4,422.00 in penalty, made payable to Kenneth J. Jackson, Jr. 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 24th day of May, 2007.

DEPARTMENT OF LABOR AND INDUSTRY

By: /s/ DAVID A. SCRIMM
David A. Scrimm, Chief
Hearings Bureau

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.

JACKSON.FOF.DSV