

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM)	Case No. 1992-2007
OF RICHARD D. MERENESS,)	
)	
Claimant,)	
)	FINDINGS OF FACT;
vs.)	CONCLUSIONS OF LAW;
)	AND ORDER
KENNY BAUMANN, INDIVIDUALLY)	
AND/OR D/B/A A+ ELECTRIC MOTOR)	
REPAIR, A BUSINESS NOT REGISTERED)	
IN THE STATE OF MONTANA,)	
)	
Respondent.)	

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I. INTRODUCTION

In this case, Respondent Kenny Baumann d/b/a A+ Electric appeals from a determination of the Montana Department of Labor and Industry’s Wage and Hour Unit which found that the respondent owed Claimant Richard Mereness wages for the work he did over his lunch period.

Hearing Officer Gregory L. Hanchett convened a contested case hearing in this matter on January 4, 2008 in Billings, Montana. Mereness represented himself. Patricia Peterman, attorney at law, represented the respondent. Mereness, Wade Drewery, Paul Footit, Trudy Chester, Rose Baumann, Bob Medley, Melanie Emmitt, and Kenny Baumann all testified under oath. The parties stipulated to the admission of Documents 28, 535 through 664, and 666 through 956. In addition, Exhibits A and B were admitted into evidence. Based on the testimony and argument adduced at hearing, the following findings of fact, conclusions of law, and final agency decision are made.

II. ISSUE

Is Mereness due additional wages and penalty as prescribed by law?

III. FINDINGS OF FACT

1. A+ Electric employed Mereness as a journeyman salesman in February, 2004. The time period for which Mereness seeks wages covers from January, 2006 until May 17, 2007. Mereness resigned his position on June 1, 2007.

2. A+ Electric initially paid Mereness on a salary basis, that equated to an hourly wage of \$12.50 per hour, plus commissions. In January, 2006, Baumann placed Mereness on an hourly basis of remuneration, paying him \$14.00 per hour.

3. Baumann required Mereness to keep track of his time each day. He would record his daily time on a daily time card that he would turn in each day. At the end of each two week time period, Baumann would review the daily time cards and then prepare a weekly time card showing the hours worked each week. Baumann would then pay Mereness based on these weekly time cards.

4. Mereness did not take time for his lunch between January, 2006 and March 13, 2006. Rather, he would eat his lunch on his truck while driving his route.

5. In January, 2006, Baumann began deducting ½ hour for each day off of each weekly time card that Mereness turned in. Baumann conceded that he deducted the amounts off of the time cards by writing “½ lunch” at the top of each card. Baumann did this because he mistakenly believed that the wage and hour law required him to do so. Baumann personally deducted these amounts off of Mereness’ cards until March 13, 2006

6. Beginning on March 13, 2006, Mereness himself began deducting out time for lunch on his daily work sheets. Every time card beginning on that date and continuing up until May 17, 2007 shows that Mereness took at least one-half hour for lunch.

7. Baumann kept track of both regular and overtime hours owed to Mereness. With the exception of the disputed amounts regarding the lunch periods, Mereness does not dispute that Baumann paid him all regular and overtime wages claimed.

8. Between January 1 and March 13, 2006, Mereness worked 10 weeks and Baumann deducted at least 2 ½ hours from each week out of the hours Mereness claimed. Mereness in fact worked through his lunch during this time period. This totals 25 hours which he worked but for which he was not paid. Each of these hours was overtime hours as demonstrated by Document 661 (which shows that during each of these weeks Mereness worked over 40 hours each week). At his rate of \$14.00 per hour, he should have been paid \$21.00 per hour for each of the over time hours he worked ($\$14.00 \times 1.5 = \21.00). At this rate, he should have been paid a total of \$525.00 ($\$21.00 \times 25 = \525.00).

9. After March 13, 2006, Mereness took time each day for his lunch, as demonstrated by the time cards which he filled out and turned in showing that he took time off for lunch beginning on that date and continuing on through May 17, 2007. Mereness is not due any unpaid wages for the time period between March 13, 2006 through May 17, 2007.

10. 110% penalty on the unpaid overtime wages equals \$577.50 (\$525.00 x 1.1=\$577.50).

IV. DISCUSSION¹

A. *Mereness is Due Some of the Additional Wages he Seeks.*

In his claim, Mereness argues that his employer refused to pay him for work he did during what should have been lunch breaks. His employer counters that Mereness in fact took lunch breaks and is not due any additional wages. The credible evidence shows that Mereness is due additional wages for his work between January 1, 2006 and March 13, 2006. The hearing officer is not convinced, however, that he is due any additional wages for work after March 13, 2006.

Montana law requires that employers pay wages when due, in accordance with the employment agreement, pursuant to Mont. Code Ann. § 39-3-204. “Wages” are any money due an employee by the employer. Mont. Code Ann. § 39-3-201(6).

Mereness bears the burden of proof in this matter to show by a preponderance of the evidence that he is due the additional wages he claims. *Berry v. KRTV Communications* (1993), 262 Mont. 415, 426, 865 P.2d 1104, 1112. *See also, Marias Health Care Services 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 the plaintiff failed to meet her burden of proof to show that she was not compensated in accordance with her employment contract). An employee seeking unpaid wages has the burden of proving work performed without proper compensation. 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 v. Dept. of Labor and Industry* (1977), 172 Mont. 182, 189, 562 P.2d 473, 476-77, *citing Anderson v. Mt. Clemens Pottery Co.* (1946), 328 U.S. 680, 687, and *Purcell v. Keegan* (1960), 359 Mich. 571, 103 N.W. 2d 494, 497.

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.

¹Statements 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.

Mereness has shown by a preponderance of the evidence that he is due additional wages for his work between January 1 and March 13, 2006. The hearing officer is convinced by the combination of Mereness' testimony and the fact that his employer changed his time cards that Mereness in fact did work through his lunch break during this time period as he claims. During this time period, Mereness worked the additional hours as shown in Finding of Fact number 9.

The hearing officer is unconvinced, however, that after March 13, 2006, Mereness worked through his lunch break. There are two reasons for this. First, and most importantly, Mereness himself filled in his time cards showing that he took a lunch break each day he worked. Given Mereness' obvious familiarity with the requirements of Montana wage and hour laws (as demonstrated through the testimony at hearing), it is unlikely he would have done this had he actually been working through lunch between March 13, 2006 and the date he left his employment. Almost certainly, once Mereness became aware that his employer was not going to pay him for working over his lunch time, Mereness began to take his lunch break. Second, Bob Medley saw Mereness on two occasions stopped at the roadside eating his lunch. Medley, who had nothing to gain or lose in this litigation, is a credible witness. His testimony substantiates that after March 13, 2006, Mereness began to take lunch breaks.

B. *Baumann Owes Penalty On the Unpaid Overtime Wages.*

Montana administrative rules applicable to wage and hour cases require imposition of penalty when wages are found to be due and unpaid. Where overtime wages are found to be due, the applicable administrative rules require the imposition of a 110% penalty. Admin. R. Mont. 24.16.7561. The thrust of the respondent's argument was that Mereness did not work the extra hours he claimed to have worked. There was no dispute about whether those claimed hours, if found to be worked, were overtime hours as Mereness claims. Because the evidence in this case shows that the additional hours worked between January 1, and March 13, 2006 were overtime hours, Mereness is due 110% penalty on those unpaid 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. Baumann d/b/a A+ Electric Motor owes Mereness additional overtime wages in the amount of \$525.00. Baumann d/b/a A+ Electric Motor owes Mereness 110% penalty on the unpaid overtime wages amounting to \$577.50.

3. Mereness has failed to show by a preponderance of the evidence that he is due any wages after March 13, 2006.

VI. ORDER

Kenny Baumann d/b/a A+ Electric Motor is hereby ORDERED to tender a cashier's check or money order in the amount of \$1,102.50, representing \$525.00 in unpaid overtime wages, and \$577.50 in penalty, made payable to Richard D. Mereness, 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. Baumann d/b/a A+ Electric Motor may deduct applicable withholding from the wage portion but not the penalty portion of the amount due.

DATED this 19th day of February, 2008.

DEPARTMENT OF LABOR AND INDUSTRY

By: /s/ GREGORY L. HANCHETT
Gregory L. Hanchett, Hearing Officer
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.

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