



## II. ISSUE

Is Campbell entitled to additional overtime wages and penalty as prescribed by administrative rule?

## III. FINDINGS OF FACT

1. Cronin employed Campbell as a painter working on various projects in Montana during 2007. At issue in this case are overtime hours which Campbell worked between March 2007 and May 17, 2007. Cronin agreed to pay Campbell \$18.25 per hour in regular wages. For hours worked in excess of 40 hours per week, the rate of pay should have been \$27.37 per hour ( $\$18.25 \times 1.5 = \$27.37$ ).<sup>1</sup>

2. Campbell and Cronin entered into an agreement whereby Campbell would “bank” hours he worked in excess of 40 hours during the week. That is, in any week where Campbell worked in excess of 40 hours during the week, he would write down the hours worked in excess of 40 hours and turn those into Cronin. Later on, during weeks where Campbell worked less than 40 hours per week, the banked hours would be added to his paycheck. The banked hours, however, would be paid at Campbell’s regular hourly wage even though by law they should have been paid at 1.5 times his regular hourly rate because they were overtime hours.

3. Until April 15, 2007, Campbell would write down his banked hours on his time card (See, e.g., Exhibit 53, Campbell’s pay card for the week ending April 15, 2008). Beginning with the next pay period, however, Cronin told Campbell not to write down hours worked in excess of 40 during the week. Instead, Campbell was to simply call in his banked hours to Cronin and Cronin would keep a running total of those hours and then add them into Campbell’s paycheck during the weeks when Campbell worked less than 40 hours each week.

4. During the week ending March 15, 2007, Campbell worked 40 hours of regular work. He also worked 4.5 hours of overtime. At his overtime rate, he should have been paid \$123.19 in overtime wages ( $\$18.25 \times 1.5 \times 4.5 \text{ hours} = \$123.19$ ). These hours were banked and paid at a later time at the regular hourly rate of \$18.25 per hour in the total amount of \$82.13 ( $\$18.25 \times 4.5 \text{ hours} = \$82.13$ ). Campbell was thus underpaid for his overtime work during the week ending March 15, 2007 in the amount of \$41.06 ( $\$123.19 - \$82.13 = \$41.06$ ).

5. During the week ending March 31, 2007, 4 hours of previously banked hours of overtime work were paid to Campbell to make a 40 hour work week for him even though he only worked 36 hours. These previously banked hours, however, were again paid at regular hourly rate even though they were overtime hours that should have been paid at 1.5 times the

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<sup>1</sup> Cronin’s own records confirm this overtime rate of pay as demonstrated by Document 14, Cronin’s “Schedule of Wages and Hours for Bill Campbell,” a document produced by Cronin to the Wage and Hour Unit during Cronin’s request for Redetermination.

regular hourly wage. Campbell should have been paid \$109.50 for these 4 overtime hours ( $\$18.25 \times 1.5 \times 4 \text{ hours} = \$109.50$ ). He was only paid a total of \$73.00 for these hours. Cronin thus owes Campbell an additional \$36.50 ( $\$109.50 - \$73.00 = \$36.50$ ) for these unpaid overtime wages.

6. During the week ending April 8, 2007, Campbell worked 25 hours of regular work. Cronin applied 15 additional hours of previously banked overtime hours to his pay to give Campbell a 40 hour work week. These previously banked hours, however, were paid at the regular hourly wage and not the overtime rate that they should have been paid at. Campbell should have been paid \$410.63 ( $\$18.25 \times 1.5 \times 15 = \$410.63$ ) for these overtime hours. He was only paid \$273.75. Campbell is thus due an additional \$136.88 ( $\$410.63 - \$273.75 = \$136.88$ ) for these overtime hours.

7. During the week ending April 15, 2007, Campbell worked 1.5 hours of overtime for which he was not paid. At his overtime rate, this equates to an underpayment of \$41.06 ( $\$18.25 \times 1.5 \times 1.5 \text{ hours} = \$41.06$ ) in overtime wages.

8. During the week ending April 22, 2007, Campbell worked 2.5 hours of overtime for which he was not paid. At his overtime rate, this equates to an underpayment of \$68.44 ( $\$18.25 \times 1.5 \times 2.5 \text{ hours} = \$68.44$ ) in overtime wages.

9. During the week ending May 4, 2007, Campbell worked 5 hours of overtime for which he was not paid. At his overtime rate, this equates to an underpayment of \$136.88 ( $\$18.25 \times 1.5 \times 5 \text{ hours} = \$136.88$ ) in overtime wages.

10. For the week ending May 11, 2007, Campbell worked 36 hours and then added 4 hours of banked overtime to make 40 hours of work. Campbell was paid regular wages of \$73.00 for those hours when he should have been paid \$109.50 ( $\$18.25 \times 1.5 \times 4 \text{ hours} = \$109.50$ ) for those banked overtime hours. He was thus underpaid by \$36.50 ( $\$109.50 - \$73.00 = \$36.50$ ) for these 4 hours and is also owed this amount.

11. For the week ending May 17, 2007, Campbell was not paid all regular wages he was due for the hours he worked. In addition, he was still due 8 banked hours of overtime which he was not paid. Campbell worked 8 hours on May 14, 2007, 6 hours on May 15, 2007, 7 hours on May 16, 2007, and 7 hours on May 17, 2007. He thus worked a total of 28 hours for which he should have been compensated a total of \$511.00 ( $\$18.25 \times 28 \text{ hours} = \$511.00$ ). He should also have been compensated \$219.00 ( $\$18.25 \times 1.5 \times 8 \text{ hours} = \$219.00$ ) for these unpaid overtime hours. Campbell was given a draw of \$365.00 ( $\$18.25 \times 20 \text{ hours} = \$365.00$ ) for 20 hours of work. Campbell was thus underpaid by \$365.00 in his last paycheck, \$146.00 of which is unpaid regular wages and \$219.00 of which is unpaid overtime wages.

12. In total, Campbell was underpaid \$862.31, representing \$146.00 in unpaid regular wages and \$716.31 in unpaid overtime wages. The amount of penalty due on the unpaid regular

wages (\$146.00) is \$80.30 ( $\$146.00 \times .55 = \$80.30$ ). The amount of penalty due on the unpaid overtime wages (\$716.31) is \$787.94 ( $\$716.31 \times 1.10 = \$787.94$ ). Cronin owes total penalty of \$868.24 ( $\$80.30 + \$787.94 = \$868.24$ ) on the unpaid amounts.

#### IV. DISCUSSION<sup>2</sup>

##### A. *Campbell is Due Additional Overtime and Regular Wages.*

In this appeal, Cronin does not challenge that Campbell's hourly rate was \$18.25 nor does it challenge that the overtime rate which he should have been paid is one and one half times the \$18.25 hourly rate. Rather, Cronin contends that Campbell has been paid all wages he is due. It is clear from the credible evidence adduced at the hearing, however, that Campbell is due additional regular and overtime wages and penalty as provided by law.

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). Where there is no issue of prevailing wage, the law does not set the amount of wages to be paid provided that the wages paid meet the minimum hourly requirements and provided that overtime hours are paid at 1.5 times the agreed upon hourly rate. Mont. Code Ann. § 39-3-404, Mont. Code Ann. § 39-3-405(1). The law does not permit an employer to evade the requirements of Mont. Code Ann. § 39-3-405(1) by banking overtime hours.

An employee seeking unpaid wages has the burden of proving work performed without proper compensation. *Anderson v. Mt. Clemens Pottery Co.* (1946), 328 U.S. 680; *Garsjo v. Dept. 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." *Garsjo* 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; *Marias Health Care Srv. v. Turenne*, 2001 MT 127, ¶¶13, 14, 305 Mont. 419, 28 P.3d 494.

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.

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<sup>2</sup>Statements 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 officer finds credible Campbell's testimony that he banked hours and that Cronin eventually had him phone in the banked hours and then Cronin failed to pay him his banked hours as overtime hours. In addition, the claimant's testimony establishes that Cronin failed to pay him as he claimed in his complaint during the week ending May 17, 2007. Because he has established the amounts owed in his prima facie case, the burden shifts to Cronin to show that it in fact paid Campbell in accordance with the law.

Cronin has failed to persuade the hearing officer that it paid the amounts Campbell claims are due to him. Some of the time cards which Cronin had the responsibility to keep are missing. Moreover, the proof that the claimant was directed to bank hours and then was not paid for the banked hours is found in the time cards themselves. Even in the face of recorded banked overtime, Cronin failed to pay Campbell overtime rates for overtime hours worked. Instead, Cronin repeatedly paid Campbell at regular hours for overtime hours. In addition, Ted Decelles' testimony corroborates Campbell's argument that he worked the hours he claimed to have worked for Cronin. Thus, the facts of this matter as demonstrated through Campbell's testimony, the time cards themselves, and the testimony of Decelles establish that Cronin failed to pay Campbell \$146.00 in regular wages and \$716.31 in overtime wages which he was due.

#### B. *Penalty Is Due 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, Cronin owes penalty in the amount of \$868.24 on the unpaid amounts, amounting to \$80.30 on the unpaid regular wages and \$787.94 on the unpaid overtime wages as discussed in the Findings of Fact above.

### 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. Cronin owes Campbell additional unpaid regular wages in the amount of \$146.00 and additional unpaid overtime wages in the amount of \$716.31.

3. Cronin must pay \$80.30 in penalty on the unpaid regular wages and \$787.94 in penalty on the overtime wages.

**VI. ORDER**

Cronin Paint & Decor, LLC, is hereby ORDERED to tender a cashier's check or money order in the amount of \$1,730.55, representing \$862.31 in unpaid regular and overtime wages and \$868.24 in penalty, made payable to William J. Campbell, 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. Cronin may deduct applicable withholding from the wage portion but not the penalty portion of the amount due.

DATED this 27th day of June, 2008.

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.