

II. ISSUE

Are Alma, Fidencio and Daisy Luna due additional wages and penalty as prescribed by law?

III. FINDINGS OF FACT

1. Alma and Fidencio are husband and wife and Daisy is their daughter. At all times material to this case, the Lunas have spent part of the year residing in Sidney, Montana. They usually arrive in Sidney around the 1st day of June and return to their home state of Texas at the end of October.

2. At all time pertinent to this case, Jeff and Laurie Ketterling have owned and run the Wagon Wheel Café located in Sidney.

3. The Lunas and Ketterlings became friends after the Lunas began working for Jeff's father on Jeff's father's ranch.

4. After starting the café, Laurie became smitten with Alma's ability to cook Mexican food. Because of their friendship and Alma's cooking skills, Laurie asked Alma, Fidencio and Daisy to work in the restaurant. Laurie agreed to pay Alma and Fidencio an hourly wage for their work. They also agreed to pay Daisy \$6.00 per hour to work as a waitress at the restaurant. The agreement was memorialized by Laurie in writing. Laurie entered into the agreement with the Lunas in order to induce the Lunas to work at Wagon Wheel Café and forgo working as harvesters in the beet harvesting industry in the Sidney area.

5. Alma, Fidencio and Daisy maintained calendars showing the hours they worked for the Ketterlings at the café. See ERD Documents 21, 88, and 136. During the work week of August 14 to August 18, 2007, Alma worked during the following times:

| <u>Date</u> | <u>Times</u> | Hours |
|-----------------|-------------------------|------------|
| August 14, 2007 | 7:00 p.m. to 11:00 p.m. | 4.0 |
| August 15, 2007 | 8:00 a.m. to 8:00 p.m. | 12.0 |
| August 16, 2007 | 9:00 a.m. to 10:00 p.m. | 13.0 |
| August 17, 2007 | 6:00 a.m. to 2:00 p.m. | 8.0 |
| August 18, 2007 | 6:00 a.m. to 2:00 p.m. | <u>8.0</u> |

TOTAL 45.0

During this week, Alma worked 40 regular hours of work and 5 hours of overtime.

6. During the work week of August 19 to August 25, 2007, Alma worked during the following times:

| <u>Date</u> | <u>Times</u> | <u>Hours</u> |
|-----------------|---|--------------|
| August 19, 2007 | 6:30 a.m. to 9:30 p.m. | 15.0 |
| August 20, 2007 | 7:00 a.m. to 8:30 p.m. | 13.5 |
| August 21, 2007 | 7:00 a.m. to 8:00 p.m. | 13.0 |
| August 22, 2007 | 7:30 a.m. to 9:30 p.m. | 14.0 |
| August 23, 2007 | 7:30 a.m. to 8:30 p.m. | 13.0 |
| August 24, 2007 | 7:30 a.m. to 7:30 p.m. | 12.0 |
| August 25, 2007 | 8:00 a.m. to 1:00 p.m., 6:00 p.m. to 8:00 p.m. | <u>7.0</u> |
| TOTAL | | 87.5 |

During this week, Alma worked 40 regular hours of work and 47.5 hours of overtime.

7. On August 26 and August 27, 2007, Alma worked during the following times:

| <u>Date</u> | <u>Times</u> | <u>Hours</u> |
|-----------------|---|--------------|
| August 26, 2007 | 6:00 a.m. to 2:00 p.m. | 8.0 |
| August 27, 2007 | 7:45 a.m. to 2:45 p.m., 4:00 p.m. to 5:30 p.m. | <u>8.5</u> |
| TOTAL | | 16.5 |

During this week, Alma worked 16.5 regular hours of work and no hours of overtime.

8. Alma seeks only to have the determination of the Wage and Hour Unit upheld in this matter. The hearing officer takes this to mean that she does not dispute the findings of the wage and hour investigator with respect to the hourly amounts due to her. As the investigator found, Alma was due \$6.15 per hour for regular wages and 1 ½ times that amount, \$9.23, for each overtime hour she worked. The facts show that during the time period in question, Alma worked a total of 96.5 regular hours and 52.5 overtime hours.¹ She should have been paid \$593.48 for her regular hours of work (96.5 hours x \$6.15=\$593.48). For her overtime hours, she should have been paid a total of \$484.57 (52.5 hours x \$9.23=\$484.57).

9. During the work week of August 14 to August 18, 2007, Fidencio worked during the following times:

| <u>Date</u> | <u>Times</u> | <u>Hours</u> |
|-------------|--------------|--------------|
|-------------|--------------|--------------|

¹This hearing officer's finding regarding Alma's overtime hours differs from the finding of the Wage and Hour Unit Investigator who found that Alma had worked only 50.5 overtime hours. See, ERD Document 86. The discrepancy lies in the fact that Alma's calendar clearly shows that on Saturday, August 25, 2007, Alma worked a split shift, beginning at 8:00 a.m. and leaving at 1:00 p.m., and then returning and working from 6 p.m. to 8:00 p.m., for a total of seven hours worked that day. Document 21. The ERD investigator mistakenly found that Alma only worked five hours on August 25, 2007.

| | | |
|-----------------|-------------------------|------------|
| August 14, 2007 | 7:00 p.m. to 11:00 p.m. | 4.0 |
| August 15, 2007 | 8:00 a.m. to 8:00 p.m. | 12.0 |
| August 16, 2007 | 9:00 a.m. to 10:00 p.m. | 13.0 |
| August 17, 2007 | 7:00 a.m. to 2:00 p.m. | 7.0 |
| August 18, 2007 | 7:00 a.m. to 2:00 p.m. | <u>7.0</u> |

TOTAL 43.0

During this week, Fidencio worked 40 regular hours of work and 3 hours of overtime.

10. During the seven day work week of August 19 to August 25, 2007, Fidencio worked during the following times:

| <u>Date</u> | <u>Times</u> | <u>Hours</u> |
|-----------------|---|--------------|
| August 19, 2007 | 8:00 a.m. to 9:30 p.m. | 13.5 |
| August 20, 2007 | 8:30 a.m. to 8:30 p.m. | 12.0 |
| August 21, 2007 | 8:00 a.m. to 8:00 p.m. | 12.0 |
| August 22, 2007 | 6:30 a.m. to 9:30 p.m. | 15.0 |
| August 23, 2007 | 6:30 a.m. to 8:30 p.m. | 14.0 |
| August 24, 2007 | 7:30 a.m. to 7:30 p.m. | 12.0 |
| August 25, 2007 | 8:00 a.m. to 1:00 p.m., 6:00 p.m. to 8:00 p.m. | <u>7.0</u> |

TOTAL 85.5

During this week, Fidencio worked 40 regular hours of work and 45.5 hours of overtime.

11. On August 26 and August 27, 2007, Fidencio worked during the following times:

| <u>Date</u> | <u>Times</u> | <u>Hours</u> |
|-----------------|---|--------------|
| August 26, 2007 | 6:00 a.m. to 2:00 p.m. | 8.0 |
| August 27, 2007 | 7:45 a.m. to 2:45 p.m., 4:00 p.m. to 5:30 p.m. | <u>8.5</u> |

TOTAL 16.5

During this week, Fidencio worked 16.5 regular hours of work and no hours of overtime.

12. Fidencio seeks only to have the determination of the Wage and Hour Unit upheld in this matter. The hearing officer takes this to mean that he does not dispute the findings of the wage and hour investigator with respect to the hourly amounts due to him. As the investigator found, Fidencio was due \$6.15 per hour for regular wages and 1 ½ times that amount, \$9.23, for each overtime hour he worked. The facts show that during the time period in question, Fidencio worked a total of 96.5 regular hours and 48.5 overtime hours. He should

have been paid \$593.48 for his regular hours of work (96.5 hours x \$6.15=\$593.48). For his overtime hours, he should have been paid a total of \$447.65 (48.5 hours x \$9.23=\$447.65).

13. During the work week of August 14 to August 18, 2007, Daisy worked during the following times:

| <u>Date</u> | <u>Times</u> | <u>Hours</u> |
|-----------------|------------------------|--------------|
| August 17, 2007 | 6:00 a.m. to 2:00 p.m. | 8.0 |
| August 18, 2007 | 6:00 a.m. to 5:00 p.m. | <u>11.0</u> |
| TOTAL | | 19.0 |

During this week, Daisy worked 19.0 regular hours of work.

14. During the seven day work week of August 19 to August 25, 2007, Daisy worked during the following times:

| <u>Date</u> | <u>Times</u> | <u>Hours</u> |
|-----------------|---|--------------|
| August 19, 2007 | 6:30 a.m. to 4:30 p.m. | 10.0 |
| August 20, 2007 | 7:00 a.m. to 1:00 p.m. | 5.0 |
| August 21, 2007 | 7:00 a.m. to 5:00 p.m. | 10.0 |
| August 22, 2007 | 3:30 p.m. to 7:30 p.m. | 4.0 |
| August 24, 2007 | 7:30 a.m. to 7:30 p.m. | 4.0 |
| August 25, 2007 | 8:00 a.m. to 1:00 p.m., 6:00 p.m. to 8:00 p.m. | <u>7.0</u> |
| TOTAL | | 40.0 |

During this week, Daisy worked 40 regular hours of work.

15. Daisy seeks only to have the determination of the Wage and Hour Unit upheld in this matter. As the investigator found, Daisy was due \$6.15 per hour for her regular wages. The facts show that during the time period in question, Daisy worked a total of 59.0 regular hours. She should have been paid \$362.85 for her regular hours of work (59.0 hours x \$6.15=\$362.85).

16. On August 27, 2007, Alma and Laurie got into an argument about how Alma served up a particular food item to a customer. As a result of this argument, Alma, Fidencio and Daisy left their employment at Wagon Wheel Café.

17. After the Lunas left their employment, Laurie told Daisy that she should provide the hours that the Lunas had worked to Laurie and she would pay them for their hours. After providing the hours to Jeff and Laurie, Laurie told Daisy that she would not be paying the Lunas for their work. Laurie did not pay the Lunas for any of their work.

18. Penalty on the unpaid regular wages due to Alma Luna amounts to \$326.41 (\$593.48 x .55=\$326.41). Penalty on the unpaid overtime wages due to Alma Luna amounts to \$533.03 (\$484.57 x 1.10=\$533.03). Penalty on the unpaid regular wages due to Fidencio Luna amounts to \$326.41 (\$593.48 x .55=\$326.41). Penalty on the unpaid overtime wages due to Fidencio Luna amounts to \$492.41 (\$447.65 x 1.10=\$492.41). Penalty on the unpaid regular wages due to Daisy Luna amounts to \$199.57(\$362.85 x .55=\$199.57).

IV. DISCUSSION²

A. *The Luna's Are Due Additional Overtime and Regular Wages.*

In this appeal, Jeff Ketterling argues that the Lunas agreed to work for free at the Wagon Wheel Café because they were friends with the Ketterlings. The Ketterlings do not challenge the amount of work done by the Lunas nor do they challenge the amounts that were found to be due to the Lunas assuming that they were found to have been in an employment agreement with the Ketterlings.

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). 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).

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.

²Statements 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 Lunas established by credible testimony (their own and that of their witnesses, Mrs. Villareal and Mr. and Mrs. Andrews) that they worked the hours they claimed to have worked and are at least entitled to the wages found to be due them in the Wage and Hour Unit determination. Because they have established the amounts owed in their prima facie case, the burden shifts to the Ketterlings to show that in fact the Lunas were paid in accordance with the law.

The Ketterlings sole defense in this case is that the Lunas were willing to work for free for their friends the Ketterlings. This argument is not credible for two reasons. First, it defies common sense. The Lunas would not likely have given up the opportunity to work in the beet harvesting industry unless they were going to be paid by the Ketterlings. Second, as even Jeff Ketterling acknowledged at hearing, Laurie entered into a written agreement with the Lunas to induce them to work at the café by offering them a specified wage. If indeed the Lunas were willing to work for free, such an agreement would have been unnecessary. In light of the written agreement, which both parties acknowledge existed at one point, it is certain that the Ketterlings hired the Lunas to work for them at the café.

The Lunas' contentions about the amounts due to them were not rebutted by any credible evidence posited at hearing. The hearing officer is thus compelled to find that the Lunas are due the amounts described in the findings of fact.

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, the Ketterlings owe the Lunas penalty as found 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. The Ketterlings d/b/a Wagon Wheel Café owe Alma Luna additional unpaid regular wages in the amount of \$593.48 and additional unpaid overtime wages in the amount of \$484.57. In addition, the Ketterlings must pay Alma Luna \$326.41 in penalty on the unpaid regular wages and \$533.03 in penalty on the unpaid overtime wages.

3. The Ketterlings d/b/a Wagon Wheel Café owe Fidencio Luna additional unpaid regular wages in the amount of \$593.48 and additional unpaid overtime wages in the amount of \$447.65. In addition, the Ketterlings must pay Fidencio Luna \$326.41 in penalty on the unpaid regular wages and \$492.41 in penalty on the unpaid overtime wages.

4. The Ketterlings d/b/a Wagon Wheel Café owe Daisy Luna additional unpaid regular wages in the amount of \$362.85 and penalty on the wages in the amount of \$199.57.

VI. ORDER

Jeff and Laurie Ketterling d/b/a Wagon Wheel Café are hereby ORDERED to tender a cashier's check or money order in the amount of \$1,937.49, representing \$1,078.05 in unpaid regular and overtime wages and \$859.44 in penalty, made payable to Alma Luna 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. The Ketterlings may deduct applicable withholding from the wage portion but not the penalty portion of the amount due.

Jeff and Laurie Ketterling d/b/a Wagon Wheel Café are further ORDERED to tender a cashier's check or money order in the amount of \$1,859.95, representing \$1,041.13 in unpaid regular and overtime wages and \$818.82 in penalty, made payable to Fidencio Luna 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. The Ketterlings may deduct applicable withholding from the wage portion but not the penalty portion of the amount due.

Finally, Jeff and Laurie Ketterling d/b/a Wagon Wheel Café are hereby ORDERED to tender a cashier's check or money order in the amount of \$562.42, representing \$362.85 in unpaid regular wages and \$199.57 in penalty, made payable to Daisy Luna 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. The Ketterlings may deduct applicable withholding from the wage portion but not the penalty portion of the amount due.

DATED this 29th day of August, 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. § 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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