STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIMS OF BRENDA D. SJOSTROM AND LEO L. LONG, JR.,	)	Case Nos. 625-2008 & 626-2008
Claimant,	)	
vs.	)	**FINDINGS OF FACT; CONCLUSIONS OF LAW; AND ORDER**
KKR PROPERTIES LLC, A/K/A NORWEGIAN WOOD GOLF COURSE,	)	
Respondents.	)	

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I. INTRODUCTION

Claimants Brenda Sjostrom and Leo Long appeal from a Wage and Hour Unit Determination which dismissed their respective wage claims against Respondent KKR Properties, LLC. The Wage and Hour Unit found that Sjostrom and Long were farm workers exempted from the coverage of the Montana Wage and Hour Act's overtime compensation protections.

Hearing Officer Gregory L. Hanchett held a contested case hearing in this matter on September 19, 2008. The parties stipulated to holding the hearing by telephone. Brenda Wahler, attorney at law, represented the claimants. Pam Bucy, attorney at law, represented the respondent. Sjostrom, Long, Rene Requa and Colleen Cox, co-owners of KKR Properties, Harold Poulsen, Becky Kelly and Terry Pirtle all testified under oath. Claimants' Exhibits 1 through 12, Respondent's Exhibit 100 and ERD Documents 1-318 were admitted into evidence. Based on the arguments and evidence adduced at hearing, the Hearing Officer makes the following findings of fact, conclusions of law, and recommended decision.

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II. ISSUES

Are Sjostrom and Long due additional wages as alleged in their wage complaints and penalty as provided by law?

III. FINDINGS OF FACT

1. Harold Poulsen owned the Mickey Mouse Plantation until December 2005. In May 2002, he hired Sjostrom and Long to act as caretakers. At that time, the plantation consisted of a 120-acre property comprising separate parcels. One 40-acre parcel is located on one side of Canyon Ferry Road. The other 80-acre parcel is located on the other side of Canyon Ferry Road.

2. Until the summer of 2006, the plantation was comprised of some tree orchards, grass fields, and various buildings (including a residence). The fields were irrigated by farm implements known as wheel lines. The tree orchards were created and maintained in order to produce trees that could be resold. In addition, the property supported a small herd of cattle.

3. Sjostrom and Long spent many more hours working the property in the summer than in the winter. In the summer, their duties included irrigating the fields, caring for the cattle, maintaining the equipment necessary to run the plantation (tractors, etc.) and maintaining the buildings on the property. In the winter time, their duties were reduced to basically maintaining the buildings and caring for the cattle. The hours were so substantially reduced that Long and Sjostrom obtained other employment during the winter months. Long drove trucks and Sjostrom worked as a substitute teacher.

4. As part of their compensation package with Poulsen, Sjostrom and Long received housing on the property rent free and the use of a garden located on the property. In addition, Poulsen provided one beef to Sjostrom and Long for their consumption each year.

5. In August 2005, KKR Properties, partially owned by Rene Requa and Colleen Cox (who are husband and wife), began investigating the possibility of buying the 80-acre parcel of the Mickey Mouse Plantation. As part of the investigation, KKR realized that it would need to have full time caretakers on the property. Poulsen recommended that Sjostrom and Long remain on as caretakers. In August 2005, Requa, Sjostrom and Long discussed the possibility of them remaining on as caretakers. The negotiations to keep Sjostrom and Long on as caretakers continued while the negotiations about the sale of property were ongoing.

6. KKR purchased the 80-acre parcel in December 2005. Requa agreed to continue to employ Sjostrom and Long. The parties did not discuss Sjostrom and Long receiving a beef. Sjostrom and Long asked Requa to agree to reimburse their expenses for utilities. They suggested this in lieu of the free rent that Poulsen had previously provided to them. Requa could no longer provide free rent since the property which KKR bought did not have the house on it that Sjostrom and Long occupied.

7. On January 12, 2006, Sjostrom sent Requa a letter asking that he consider paying them "35000 or 30000 a year for us to stay on." The letter also states that "If you add the cost of propane for one year to that we are looking at $31,000.00." Document 78 and 79. The clear

import of this letter is that no agreement existed with respect to the utilities that Sjostrom claims are due to her under the employment agreement.

8. Requa would not agree to provide reimbursement for utilities, the beef or the use of the garden since he did not want to become involved in that type of reimbursement scheme. Instead, he suggested an increase to $30,000.00 in the annual amount to be paid to Sjostrom and Long. This amount represented a substantial increase over the amount Sjostrom and Long had received while employed by Poulsen on the plantation. In addition, this amount was to be paid to Sjostrom and Long evenly throughout the year and Sjostrom and Long decided between themselves how to split the wages. Sjostrom and Long agreed to this compensation.

9. During the spring of 2006, Requa decided to build a 9-hole golf course on the plantation. He shared this idea with Sjostrom and Long who were excited about the idea. The building of the course took place in 2006.

10. During 2006, KKR paid Sjostrom and Long a total of $31,422.90. Document 80, 2006 1099 forms provided to Sjostrom and Long. The amount paid to Sjostrom and Long included a $2,500.00 "bonus" to compensate Long for work he did to help build the golf course. Requa treated Sjostrom and Long as though they were independent contractors.

11. Requa disagreed with Sjostrom and Long about their employment status during 2006. Requa insisted that they were independent contractors. Sjostrom and Long believed that they were employees of the plantation and were not independent contractors.

12. Because of the disagreement over the employment status of Sjostrom and Long, Requa agreed to pay Sjostrom and Long as employees during 2007. In order to accomplish this, the parties agreed that Sjostrom and Long would be paid through a third-party payroll system in 2007. Moss Financial provided the payroll system for KKR, preparing the checks for Sjostrom and Long and withholding payroll taxes. In addition, KKR agreed to pay Sjostrom and Long $35,000.00 in annual compensation for the year of 2007.

13. Requa and Cox lived full-time on the plantation during the summer months. During both 2006 and 2007, they arrived in May and left in September.

14. Between May and September in both 2006 and 2007, Requa worked "side by side" with Long. Testimony of Requa. Although he did not keep hourly records on Long's work, Requa observed that during 2006, Long worked approximately 50 hours per week. During the summer of 2007, Long worked approximately 55 hours per week. Applying this weekly amount of hours to the number of overtime hours in the instant case, it is apparent from Requa's own testimony that during 2006, Long worked 220 hours (10 hours per week times 22 weeks) of overtime and during 2007, Long worked 225 hours of overtime (15 hours per week times 15 weeks). For 2006, Long earned $2,030.60 in overtime wages ($9.23 x 220 hours=$2,030.60). In 2007, Long earned $2,076.75 ($9.23 x 225 hours=$2,076.75) in overtime wages. The total overtime compensation due to Long but not paid is $4,107.35.

15. During the winter months, Long drove trucks and school buses. Sjostrom engaged in substitute teaching activities. They carried out the tasks necessary to maintain the plantation at its reduced winter capacity. Sjostrom and Long had the time, the incentive and the desire to seek employment outside the plantation during the winter months, because they worked no overtime hours during the winter months (between October and April).

16. During 2006, Sjostrom and Long had a house in Townsend that they were fixing up and attempting to sell. They would on occasion leave the plantation to go and work on the Townsend house. They sold the Townsend house in November 2006.

17. In May or June 2007, Sjostrom and Long approached Requa about obtaining a beef. Requa agreed and the parties agreed to split the beef. Pursuant to the agreement, Requa paid to have the beef slaughtered. One half went to Sjostrom and Long and one-half went to Requa.

18. During both 2006 and 2007, Sjostrom and Long directed Requa as to how to apportion their joint salary between them.

19. During the summers of 2006 and 2007, Long spent approximately 80% of his time working on the golf course project at the plantation. The balance of the time was spent working on non-golf course projects around the plantation such as watering grass and trees and caring for the small herd of cattle kept on the property.

20. On August 18, 2007, Sjostrom and Long left their employment at the plantation. On September 19, 2007, they filed this wage complaint.

21. For 2007, Long was paid a total of $8,578.14 in wages. Document 114. Sjostrom received $13,661.41 in wages. Document 314. In addition to the above amounts, KKR paid Sjostrom and Long 7 bonus checks in 2007 for golf course work. In May 2007, KKR paid Sjostrom check number 2763 for $500.00 and check number 2777 for $500.00. In June 2007, KKR paid Long check number 2782 for $512.00. In July 2007, KKR paid Long check number 2810 for $500.00 and check number 2820 for $500.00. Lastly, in September 2007, KKR paid Long check number 2851 for $500.00 and check number 2886 for $166.70. The total amount of bonus checks paid to Sjostrom and Long during 2007 was $2,678.70. These payments were not part of the wage agreement. They were paid to Sjostrom and Long in the sole discretion of KKR.

22. Long is owed $4,518.08 in penalty on the unpaid wages due to him ($4,107.35 in paid wages x 1.1=$4,518.08).

IV. DISCUSSION[1]

[1]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.

A. *The statute of limitations does not bar recovery for 2006 wages sought.*

As an initial matter, the respondent contends that Sjostrom and Long are precluded from recovering wages sought for 2006 because the complaints for those wages were not timely filed. It is clear from the facts, however, that the statute of limitations does not preclude recovery in this case.

An employee seeking unpaid wages must file a complaint within 180 days of the employer's failure to pay the wages. Mont. Code Ann. §39-3-207 (1). If the complaint is timely filed, the employee may recover wages and penalties for a period of two years prior to the date on which the claim is filed or, if the employee is no longer employed by the employer, for a period of up to two years prior to the employee's last date of employment. Mont. Code Ann. §39-3-207(2).

The respondent does not dispute that the claimants' claims for 2007 wages were timely filed. Because the complaints were timely filed, the claimants may seek to recover wages for a period of up to two years prior to the date of separation from their employment, August 18, 2007. Mont. Code Ann. §39-3-207(2). Two years prior to August 18, 2007 is August 18, 2005, a date that precedes the date from which the claimants seek recovery of wages. As Sjostrom and Long seek only wages from 2006 and 2007, and because their complaint is timely filed, they are not precluded from seeking the wages claimed in 2006.

B. *Sjostrom and Long were not farm workers.*

KKR also argues that Sjostrom and Long were farm workers and, therefore, are not entitled to overtime wages. The facts that came out at hearing do not support this proposition. Sjostrom and Long were not farm workers as defined by Montana statute.

The burden of proving an exemption rests on the employer who asserts the exemption. *Holbeck v. Stevi-West, Inc.* (1989), 240 Mont. 121, 125, 783 P.2d 391, 393 ; *Rosebud County v. Roan* (1981), 192 Mont. 252, 627 P.2d 1222. Questions involving exemption from overtime are to be narrowly construed in order to carry out the purposes of the wage and hour act. Cf., *Reich v. Wyoming* (10th Cir., 1993), 993 F.2d 739, 741.

The Montana Wage and Hour Act provides that the overtime protections of the Act do not apply to farm workers. Mont. Code Ann. § 39-3-405 (2). A "farm" is defined as "an endeavor ***primarily*** engaged in cultivating the soil or in connection with raising or harvesting an agricultural . . . commodity . . ." Mont. Code Ann. § 39-3-402(4)(a)(emphasis added).

While the Hearing Officer has not found any case directly on point, it is clear that activities such as mowing grass, general gardening type activities, house cleaning and building maintenance which would be undertaken even if the employer were not engaged in agricultural activity are not exempt either as primarily agricultural activities or secondarily related to agricultural activities. *See, e.g., Adkins v. Mid-America Growers, Inc.* 167 F.3d 355, 359 (7th Cir.

1998) (employee whose primary job was to mow the lawn and do other gardening activities around the company president's home which was located on the company's agricultural producing property was not exempt by virtue of the FLSA agricultural exemption).

The testimony in this case, including that of Requa, shows that the plantation was not "primarily engaged in" cultivating the soil or in producing a horticultural commodity. The primary purpose of the plantation was to develop a nine-hole golf course, not to produce a horticultural commodity. There is no factual basis, therefore, for finding that the plantation was a farm or ranch within the meaning of Mont. Code Ann. § 39-3-402(4)(a).

C. *Long's Overtime Wage Claim Is Not Limited to $6.00 per hour.*

The respondent argues that the overtime wages are limited to $6.00 per hour, citing Mont. Code Ann. §39-3-409 (3). That provision provides that where a business' annual gross sales do not exceed $110,000 per year, it need only pay a minimum wage of $4.00 per hour. The Hearing Officer rejects this argument because the parties' agreement provided that Sjostrom and Long would receive more than the minimum wage required under Mont. Code Ann. §39-3-409 (3).

The Wage and Hour Act specifically provides that, unless exempted from the overtime provisions, an employer may not employ an employee for more than 40 hours per week unless the employee receives a rate of "not less than 1 ½ times the hourly rate ***at which the employee is employed***." Mont. Code Ann. §39-3-405 (3)(Emphasis added). The administrative rules reinforce this requirement by providing that "if the employee's regular rate of pay is higher than the statutory minimum, his overtime rate of pay must be computed at a rate of not less than one and one-half times such higher rate." Admin R. Mont. 24.16.2511.

The parties' agreement did not specify an actual amount per hour to be paid. Rather, during 2006, they simply agreed on an annual salary amount ($30,000.00) for Sjostrom and Long and then agreed that amount would be paid jointly to Sjostrom and Long. In 2007, KKR agreed to pay Sjostrom and Long $35,000.00 in annual salary. That amount, was split up in a manner directed by Sjostrom and Long and then Sjostrom and Long were each paid with separate checks.

Dividing these annualized salary amounts in half as the parties themselves agreed to do, it is apparent that in 2006 and 2007 Long's salary broken down per hour exceeds the minimum wage required by Mont. Code Ann. §39-3-405 (3). Because KKR chose to employ Long at a higher minimum wage than that required by Mont. Code Ann. §39-3-409 (3), the Hearing Officer is constrained to calculate overtime by reference to the hourly rate paid to Long, not the statutorily prescribed minimum.

D. *Sjostrom is Not Entitled to Relief.*

The entirety of Sjostrom's claim in this case relates to her contention that KKR agreed to provide her and Long with a beef, utilities and use of the garden as part of her compensation during both 2006 and 2007. She does not contend in her complaint that she was not paid adequate overtime wages or that she was not paid minimum wages. Rather, she contends that the in-kind compensation she was to receive – a beef, use of the garden and utility compensation – was not given to her and therefore she is due their monetary equivalent. She has failed to demonstrate that any employment agreement existed which would require KKR to compensate her with a beef, utilities and the use of the garden.

Sjostrom bears the burden of persuasion to show by a preponderance of the evidence that she actually earned the additional wages that she claimed in this case. *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). As part of this burden of proof, Sjostrom must show that in fact an actual or implied employment agreement for the compensation sought existed between her and KKR.

The evidence fails to persuade the Hearing Officer that an agreement between the parties with respect to the annual beef, the utilities and the use of the garden existed in this case. Requa's testimony, including his testimony that he increased the annual compensation to Sjostrom and Long in lieu of providing utilities, is credible and demonstrates that no agreement as to the beef, the garden and utilities was reached in this case. Sjostrom's letter of January 12, 2006, further buttresses the lack of agreement. It clearly shows that Sjostrom's and Long's contention that KKR was aware and basically agreed to provide the beef and the garden through KKR's negotiations with Poulsen is false. If Sjostrom's and Long's position were correct, there would have been no need for Sjostrom to write the January 12, 2006, letter. Under the circumstances of this case, the existence of the letter simply corroborates KKR's contention that there was no agreement about the beef, the utilities and the use of the garden.

E. *Long Is Due Additional Overtime Wages*.

As previously indicated, a claimant in a wage and hour case bears the burden of persuasion to show by a preponderance of the evidence that he is entitled to the additional wages he claims. 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 v. Department of Labor and Industry* (1977), 172 Mont. 182, 562 P.2d 473, 477. To meet his initial 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 v. Mt. Clemens Pottery Co.* (1946), 328 U.S. 680, and *Purcell v. Keegan* (1960), 359 Mich. 571, 103 N.W. 2d 494, 497.

Having found that the farm worker exemption has not been proven in this case, if the Hearing Officer finds that Long in fact worked overtime hours, Long must be compensated at 1 ½ times Long's regular rate for the overtime he worked.

Requa's testimony proves that Long worked in excess of 40 hours per week during the work weeks in May through September 2006 and May through August 18, 2007. Long must be compensated at the proper overtime rate for this overtime work.

The preponderant evidence does not establish, however, that Long worked overtime hours between April and October of 2006 and between April and August 18, 2007. During these times, Long pursued other employment which undercuts the force of his testimony that he worked overtime during those time periods and leads the Hearing Officer to believe that he had no overtime hours during those months.

Long has posited in his complaint that his regular hourly rate is $6.50. Long's complaint, Documents 301 and 303. He derived this rate by dividing his annualized salary by 2080 hours. The respondent has not refuted this and the methodology is consistent with the requirements contained in Admin. R. Mont. 24.16.2512. Accordingly, the Hearing Officer has utilized the $6.50 hourly rate to determine the overtime that should have been paid to Long.

It is also clear that the bonus checks paid to Long cannot be credited against the overtime wages due to Long. The evidence presented at hearing demonstrates that these checks were discretionary bonuses as contemplated by the administrative regulations. Requa was not required to pay them pursuant to the employment agreement but, commendably, chose to pay them to Long and Sjostrom for their good work in helping to develop the golf course. Because these bonuses were truly discretionary, they cannot be credited against the unpaid overtime wages due to Long. Admin. R. Mont. 24.2517(4)(a).

F. *Long Is Due the Penalty on the Unpaid Overtime 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. In this case, the amount due in penalty is $4,518.08.

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. Sjostrom has failed to demonstrate by a preponderance of the evidence that she had any agreement with KKR for compensation that would include utilities, a beef or the use of the garden. Her claim must, therefore, be dismissed.

3. Long has demonstrated by a preponderance of the evidence that he is due additional unpaid overtime wages. Those unpaid wages amount to $4,107.35. In addition, KKR owes Long $4,518.08 in penalty.

VI. ORDER

The claim of Brenda Sjostrom, having not been proved by a preponderance of the evidence, is dismissed. KKR Properties, LCC, is hereby ORDERED to tender a cashier's check or money order in the amount of $8,625.43, representing $4,107.35 in unpaid overtime wages and $4,518.08 in penalty, made payable to Leo L. Long, 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. KKR, LLC., may deduct applicable withholding from the wage portion but not the penalty portion of the amounts due.

DATED this 3rd day of November, 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.