

STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM	)	Case No. 1011-2009
OF JOHN P. FOWLER,	)	
	)	
Claimant,	)	<b>FINDINGS OF FACT;</b>
	)	<b>CONCLUSIONS OF LAW;</b>
vs.	)	<b>AND ORDER</b>
	)	
DUANE MEIDINGER, d/b/a	)	
MEIDINGER AND SONS,	)	
	)	
Respondent.	)	

\* \* \* \* \*

**I. INTRODUCTION**

Respondent Duane Meidinger (Meidinger) appeals from a Wage and Hour Unit Determination which found he owed additional wages and penalty to Claimant John Fowler. Hearing Officer Gregory L. Hanchett held a contested case hearing in this matter on May 20, 2009. Fowler represented himself. James Rector, attorney at law, represented Meidinger. Wage and Hour Unit Documents 1 through 12 and Respondent’s Exhibits A, B, D, E, F and G were admitted into evidence. Fowler, Meidinger, Andy Meidinger, Jeff Kuba and Larry Melton all testified under oath. The parties were provided an opportunity to provide post hearing briefs. The record in this matter closed on July 17, 2009 at which time the matter was deemed submitted for determination. Based on the arguments and evidence adduced at hearing, the Hearing Officer makes the following findings of fact, conclusions of law, and recommended decision.

**II. ISSUES**

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

### III. FINDINGS OF FACT

1. Meidinger is in the business of moving homes. In February, 2008, Meidinger hired Fowler to assist him in moving and setting up homes. The employment agreement called for Meidinger to pay Fowler \$7.00 per hour. Fowler quit working for Meidinger on November 5, 2008.

2. At issue in this case is payment that Fowler alleges he is due for work during the months of September, October and November, 2008. During this time period, Fowler helped Meidinger move and set up houses and engage in other construction work.

3. During October and November, 2008, Meidinger undertook various jobs outside of Glasgow, some as far away as Glendive. During this time period, Meidinger would give Fowler a ride to the remote job work site. Meidinger did not require Fowler to travel with him. Rather, Meidinger offered to take Fowler to the job site if Fowler wished to ride with him. Fowler's employment agreement with Meidinger required only that Fowler work while he was on the job site. Fowler was not required to do any work while he was being transported to the job site.

4. During the months of September, October and November 2008, Fowler worked the following hours on the following days using a Sunday through Saturday schedule as the basis for the 40 hour work week:

<u>Week</u>	<u>Date</u>	<u>Hours</u>
1	9/5	8 hours
	9/6	<u>8 hours</u>
		Total: <b>16 hours</b>
2	9/8	8 hours
	9/9	8 hours
	9/10	8 hours
	9/12	<u>7 hours</u>
		Total: <b>31 hours</b>
3	9/15	8 hours
	9/16	8 hours
	9/17	8 hours
	9/18	8 hours
	9/19	<u>8 hours</u>
		Total: <b>40 hours</b>
4	9/22	8 hours
	9/23	8 hours
	9/24	8 hours
	9/25	8 hours

	9/26	<u>8 hours</u>
		Total: <b>40 hours</b>
5	9/29	8 hours
	9/30	8 hours
	10/1	8 hours
	10/2	8 hours
	10/3	<u>8 hours</u>
		Total: <b>40 hours</b>
6	10/6	8 hours
	10/7	8 hours
	10/8	8 hours
	10/9	8 hours
	10/10	3.5 hours
	10/11	8 hours
	10/12	<u>8 hours</u>
		Total: <b>51.5 hours</b>
7	10/13	8 hours
	10/14	8 hours
	10/15	8 hours
	10/16	8 hours
	10/17	5 hours
	10/18	8 hours
	10/19	<u>8 hours</u>
		Total: <b>53 hours</b>
8	10/20	8 hours
	10/21	8 hours
	10/22	8 hours
	10/23	8 hours
	10/24	<u>8 hours</u>
		Total: <b>40 hours</b>

9	10/27	8 hours
	10/28	8 hours
	10/29	8 hours
	10/30	8 hours
	11/1	<u>8 hours</u>

Total: **40 hours**

10	11/2	8 hours
	11/3	8 hours
	11/4	8 hours
	11/5	<u>5 hours</u>

Total: **29 hours**

5. During Week 6, Fowler worked 11.5 overtime hours. During Week 7, Fowler had 13 hours of overtime. With the exception of these two weeks, Fowler had no compensable overtime hours as all hours in excess of 40 hours per week were spent in travel from home to work and from work to home. This travel time is not compensable as stated below in the Discussion section of this order.

6. From September 5, 2008 until November 5, 2008, Fowler worked a total of 356 regular hours. At his regular rate, he should have been paid a total of \$2,492.00 (356 hours x \$7.00 per hour = \$2,492.00).

7. From September 5, 2008 through November 5, 2008, Fowler worked a total of 24.5 overtime hours. At a regular rate of \$7.00 per hour, Fowler's hourly overtime rate was \$10.50 ( $\$7.00 \times 1.5 = \$10.50$ ). For his overtime work, Fowler should have been paid a total of \$257.25 (24.5 hours x \$10.50 = \$257.25).

8. On November 13, 2009, Meidinger paid Fowler \$2,000.00 in cash for the work he had completed between September 5, 2008 and November 5, 2008. Meidinger also paid utilities for Fowler in the amount of \$266.00. Meidinger paid Fowler a total of \$2,266.00 between September 5, 2008 and November 5, 2008.

9. Meidinger failed to pay Fowler \$226.00 in regular wages (\$2,492.00 owed less \$2,266.00 paid leaves \$226.00 remaining in unpaid regular wages) for his September, October and November, 2008 work. Meidinger did not pay Fowler any overtime wages during that period. Meidinger thus owes Fowler an additional \$226.00 in regular wages and an additional \$257.25 in overtime wages.

10. Penalty on the unpaid regular wages is \$124.30 ( $\$226.00 \times .55 = \$124.30$ ). Penalty on the unpaid overtime wages is \$282.97 ( $\$257.25 \times 1.10 = \$282.97$ ).

#### IV. DISCUSSION<sup>1</sup>

##### A. *Fowler Is Not Entitled to compensation For His Travel Time to The Remote Work Sites.*

An issue has arisen as to whether Fowler's travel time during October and November, 2008, which comprises all but 24.5 hours of his claimed overtime, is compensable. Meidinger argues that Fowler's travel time is not compensable as it is essentially "home to work" and "work to home" travel that is not compensable under the Montana administrative rules. See Admin R. Mont. 24.16.1010(2). The hearing officer has found no Montana case on point that helps to resolve this issue. There are, however, federal cases which interpret the Fair Labor Standards Act (FLSA) implementing regulations which are useful to resolving this issue. The FLSA regulations are identical in language to the Montana regulations regarding travel time. Compare Admin. R. Mont. 24.16.1010 to 29 C.F.R. §785. Cases interpreting the federal regulations, therefore, are useful to resolving the issue of the travel time in this case.

The Tenth Circuit court of appeals has held, under facts similar to those found in this case, that travel time to and from various oil rigs, some of which were several hours away from the pick up site, was not compensable where the claimants were not required to engage in work while traveling and the employees were not engaged in the transporting of essential equipment. *Smith v. Aztec Well Servicing Co.*, 462 F.3d 1274, 1288-89 (10<sup>th</sup> Cir. 2006). In that case, the court began its analysis by noting that under the FLSA, employers are not required to compensate employees for their travel to and from their place of principal activity. *Id.* the court went on to hold that even though the employees were required to car pool to the location of work, nothing in the arrangement changed the nature of the travel to make it compensable. *Id.*

Like the workers in *Smith*, the evidence in this case shows no more than that Meidinger gave Fowler a ride to the work sites in the Glendive area. Fowler was not required to travel with Meidinger nor is there evidence that Fowler was required to drive any equipment required for the house moving jobs. Fowler rode with Meidinger to the job sites because it was convenient for Fowler to do so and entailed no cost to him. There is no evidence that Fowler engaged in any work while en route to the job sites. And Fowler did not challenge Meidinger's testimony that the place of the employment's principal activity was wherever the location of the particular house that was being set up. Under these circumstances, Fowler's travel to the job site was travel from home to work and work to home and not compensable under Admin.. R. Mont. 24.16.1010(2).

##### B. *Meidinger Owes Fowler Regular and Overtime Wages.*

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<sup>1</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.

Montana law requires employers to pay wages when due in conformity with the employment agreement but no later than 15 days following termination of employment. Mont. Code Ann. §§ 39-3-204 and 39-3-205. Except to set a minimum wage, the law does not set the amount of wages to be paid.

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.

Once an employee has shown as a matter of just and reasonable inference that he 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.

Having carefully considered the testimony of all the witnesses, the hearing officer finds that Fowler’s testimony of the hours he worked is credible. Meidinger has failed to negate Fowler’s proof. Meidinger’s daily log is not credible. It is almost certain that the log was written after the fact, probably in response to Fowler’s wage complaint. The wording of the log leaves no doubt that it was not contemporaneously written as Meidinger claims. Because of his efforts to pass the log off as a contemporaneously written document, the hearing officer finds that none of Meidinger’s testimony is credible.

The testimony of Melton and Kuba, while credible, does not overcome the force of Fowler’s testimony and evidence. Melton was only in a position on two occasions to know the number of hours that Fowler worked, those occasions being November 5, 2008 and October 17, 2008. Kuba’s testimony is also similarly limited. For this reason, the hearing officer finds that Fowler has prevailed in his claim with respect to those amounts of work that are compensable.

The hearing officer does find, however, that Andy Meidinger’s testimony that Fowler was paid \$2,000.00 on November 13, 2008 is credible. Fowler does not dispute that Meidinger paid a \$266.00 utility bill on his behalf. Taking the evidence as a whole, Fowler has proven that Meidinger failed to pay him \$226.00 in regular wages and \$257.25 in overtime wages.

### C. Meidinger Owes Penalty 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 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. 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. Where a claim is comprised of both regular and overtime wages, the penalty is calculated by applying the appropriate administrative penalty rule to each component of the claim. Admin. R. Mont. 24.16.7569. Applying these three regulations, Meidinger owes penalty in the amounts noted in Findings of Facts, Paragraph 10, 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. Meidinger Owes Fowler \$226.00 in unpaid regular wages and \$257.25 in unpaid overtime wages. Meidinger owes \$124.30 in penalty on the unpaid regular wages and \$282.97 on the unpaid overtime wages.

3. Fowler's travel time to work sites outside of Glasgow is not compensable under the applicable administrative rules .

## VI. ORDER

Duane Meidinger, d/b/a Meidinger and Sons, is hereby ORDERED to tender a cashier's check or money order in the amount of \$890.52, representing \$226.00 in unpaid regular wages, \$124.30 in penalty on those unpaid wages, \$257.25 in unpaid overtime wages and \$282.97 in penalty on the unpaid overtime wages, made payable to John Fowler, and mailed to the Employment Relations Division, P.O. Box 201503, Helena, Montana 59620-201503, no later than 30 days after service of this decision. Meidinger may deduct applicable withholding from the wage portion but not the penalty portion of the amounts due.

DATED this 27th day of August, 2009.

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.

FOWLER.FOF.GHP