

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM)	Case No. 1089-2009
OF KALEB FISHER,)	
)	
Claimant,)	
)	
vs.)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
)	AND ORDER
BARMAX, LLC d/b/a BEAVER CREEK)	
GOLF COURSE AND BEAVER CREEK)	
DESIGNS,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

Respondent BARMAX, LLC (BARMAX) appeals from determinations of the Wage and Hour Unit of the Department of Labor and Industry upholding the claim of Kaleb Fisher. Hearing Officer David A. Scrimm held a contested case hearing in this matter on July 21, 2009. At the hearing, the respondent was represented by Stephen H. Brown, attorney at law, and the claimant was represented by Stephanie Oblander, attorney at law.

Paul Teel, Lauren Wombold, Mike Campbell, Kaleb Fisher, Karla Fisher, Doug Fisher, Cheryl Erickson, and Max Erickson testified. Claimant’s Exhibits 2a, 3, 4, 5b, 7, and 8 were admitted into the hearing record. The hearing officer now determines that Respondent’s Exhibit A is not admitted as not relevant to the issues in this matter. Based on the evidence and argument presented at the hearing, the hearing officer makes the following findings of fact, conclusions of law, and final agency decision.

II. ISSUE

Is the claimant due additional wages and penalty as provided by law?

III. FINDINGS OF FACT

1. Kaleb Fisher began his employment at Beaver Creek Golf Course on April 6, 2008. He worked until October 5, 2008.

2. Kaleb Fisher filed his wage claim with the Wage and Hour Unit of the Montana Department of Labor and Industry on December 31, 2008.

3. Kaleb Fisher seeks unpaid regular and overtime wages in the amount of \$5,632.96 for the time period of April 6, 2008 to October 5, 2008.

4. Kaleb Fisher's work hours were regulated by his mother, Karla Fisher, who dropped him off at the golf course on her way to work on week days and picked him up on her way home, and by his father, Doug Fisher, who drove him to and from the course on weekends.

5. The Beaver Creek Golf Course (BCGC) is a 9-hole golf course owned and operated by BARMAX, LCC and is located in Hill County, Montana. The course has a driving range where golfers can practice hitting golf balls and a pro shop where golfers can sign up to use the course, buy equipment, and purchase refreshments. Each hole has a small tee area where the golfer starts by hitting the ball off a tee toward the green where the hole is located. In between is the fairway which is mowed a medium length. Surrounding the fairways and the greens is the rough where the grass is mowed to a much greater height.

6. The BCGC employed six other employees during the summer of 2008: Gary Lippert, whose primary job was to mow the greens and the fairways; Doug Fisher, who worked evenings and weekends mowing the fairways and the rough and watered the same and worked on the sprinklers; Max Erickson, the owner, who mowed and watered; the "college kid" who did what Kaleb did before he quit; S'Janette D'Hooge, who worked in the pro shop until mid-August; and Cheryl Erickson, who ran the pro shop in the afternoons and evenings.

7. Kaleb Fisher's regular job duties included trimming the tee box areas with a weed eater and hover mower, picking the driving range golf balls, washing the driving range balls, emptying the garbage cans on the course, putting fresh drinking water out on the course (three locations), stocking the coolers in the pro shop, and for a short period of time in August helping out with sales in the pro shop. He would also put out pin prizes for the Thursday league. It took approximately one hour to replace the drinking water in the three 5-gallon jugs placed around the golf course, one hour to pick up the trash, and trimming the tee boxes was done a couple of times a week and took approximately two hours. When there was a tournament, Kaleb would gas up the golf carts the night before, help register participants, and help with the tournament dinner, if any. There were two or three tournaments during the time period at issue. During the tournaments no weed trimming or mowing would take place. In sum, Kaleb Fisher's daily job duties would take on average a maximum of six hours to complete.

8. Kaleb Fisher's hours of work were determined by when his parents picked him up and dropped him off.

9. The following table shows the hours Kaleb Fisher claimed to have worked, the hours he actually worked, a summary of the weekly regular hours worked, any overtime earned, as well as totals for both types of hours.

Date		Claimed Hours	Hours Actually Worked	Weekly Hours	Overtime Hours
4-6-2008	Sat	13	6	6	
5-10-2008	Sat	13	6	6	
5-11-2008	Sun	9	6		
5-17-2008	Sat	13	6	12	
5-18-2008	Sun	9	6		
5-31-2008	Sat	13	6	12	
6-01-2008	Sun	9	6	6	
6-09-2008	Mon	9.5	6		
6-10-2008	Tue	9.5	6		
6-11-2008	Wed	9.5	6		
6-12-2008	Th	9.5	6		
6-13-2008	Fri	9.5	6		
6-14-2008	Sat	13	6	36	
6-15-2008	Sun	9	6		
6-16-2008	Mon	9.5	6		
6-17-2008	Tues	9.5	6		
6-18-2008	Wed	9.5	6		
6-19-2008	Th	9.5	6		
6-20-2008	Fri	9.5	6		
6-21-2008	Sat	13	6	40	2
6-22-2008	Sun	9	6		
6-23-2008	Mon	9.5	6		
6-28-2008	Sat	13	6	18	
6-29-2008	Sun	8	6		
6-30-2008	Mon	9.5	6		
7-1-2008	Tue	5.25	5.25		
7-2-2008	Wed	8.25	6		
7-3-2008	Thu	8.25	6	29.25	
7-7-2008	Mon	5.25	5.25		
7-8-2008	Tue	8.25	6		
7-9-2008	Wed	8.25	6	17.25	

Date		Claimed Hours	Hours Actually Worked	Weekly Hours	Overtime Hours
7-15-2008	Tue	5.25	5.25		
7-16-2008	Wed	8.25	6		
7-17-2008	Thu	8.25	6		
7-18-2008	Fri	5.25	5.25		
7-19-2008	Sat	13	6	28.5	
7-20-2008	Sun	9	6		
7-21-2008	Mon	5.25	5.25		
7-22-2008	Tue	8.25	6		
7-23-2008	Wed	8.25	6		
7-24-2008	Thu	8.25	6		
7-25-2008	Fri	5.25	5.25		
7-26-2008	Sat	13	6	40	0.5
7-27-2008	Sun	9	6		
7-28-2008	Mon	9.5	6		
7-29-2008	Tue	9.5	6		
7-30-2008	Wed	9.5	6		
7-31-2008	Thu	9.5	6		
8-1-2008	Fri	9.5	6		
8-2-2008	Sat	13	6	40	2
8-3-2008	Sun	9	6		
8-4-2008	Mon	9.5	6		
8-5-2008	Tues	9.5	6		
8-6-2008	Wed	9.5	6		
8-7-2008	Thu	9.5	6		
8-8-2008	Fri	9.5	6		
8-9-2008	Sat	13	6	40	2
8-10-2008	Sun	9	6		
8-11-2008	Mon	9.5	6		
8-12-2008	Tue	9.5	6		
8-13-2008	Wed	9.5	6		
8-14-2008	Thu	9.5	6		
8-15-2008	Fri	9.5	6		
8-16-2008	Sat	13	6	40	2
8-17-2008	Sun	9	6		

Date		Claimed Hours	Hours Actually Worked	Weekly Hours	Overtime Hours
8-18-2008	Mon	9.5	6		
8-19-2008	Tue	9.5	6		
8-20-2008	Wed	9.5	6		
8-21-2008	Thu	9.5	6		
8-22-2008	Fri	9.5	6	36	
8-24-2008	Sun	9	6		
8-25-2008	Mon	9.5	6		
8-26-2008	Tue	9.5	6		
8-30-2008	Sat	13	6	24	
8-31-2008	Sun	9	6		
9-1-2008	Mon	13	6	12	
9-14-2008	Sun	9	6		
9-20-2008	Sat	13	6	12	
9-21-2008	Sun	9	6	6	
9-28-2008	Sun	9	6		
10-4-2008	Sat	13	6	12	
10-5-2008	Sun	9	6	6	
Totals		788.75	487.5	479	8.5
\$6.25 Min. Wage				236.25	
\$6.55 Min. Wage				242.75	
\$9.375 OT Wage					0.5
\$9.825 OT Wage					8.0

10. BARMAX owes Kaleb Fisher unpaid regular wages in the amount of \$3,149.86 (\$3,066.57 in regular wages and \$83.29 in overtime wages).

11. Pursuant to Admin. R. Mont. 24.16.7556, BARMAX owes Kaleb Fisher a 110% penalty on the unpaid wages in the amount of \$3,464.85.

IV. DISCUSSION¹

A. Wages Owed

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 (holding that the lower court properly concluded that the plaintiff’s wage claim failed because she failed to meet her burden of proof to show that she was not compensated in accordance with her employment contract).

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 v. Keegan*, *supra*, 359 Mich. at 576, 103 N.W. 2d at 497.

Kaleb Fisher’s claim for wages hinges on the idea that he is entitled to be paid for every hour that he was present on the Beaver Creek Golf Course – that he was suffered or permitted to work as much as 9.5 hours during the week and 13 hours a day on the weekends. *See* Admin R. Mont. 24.16.1002. However, Kaleb was not required to be on duty for those hours.² He testified that his arrival and departure at the Beaver Creek Golf Course (BCGC) was regulated not by his employer, BARMAX, but by his parents’ work schedule at other employers. Generally Kaleb would be dropped off during the week by his mother at 8:00 a.m. on her way to work and picked up at 5:30 p.m. on her way home from work. This would mean that Kaleb was at the BCGC for 9.5 hours, but did not mean that he worked for BCGC for that same amount of time. Similarly, his father would drop him off at the course and then tend to his own tasks and then drive him home later that day. Kaleb’s own testimony and that of his father and the

¹ Statements 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.

² If one is not required to be on duty on the employer’s premises, the time spent may not be compensable. Admin. R. Mont. 24.16.1002(3).

Ericksons indicated that the tasks Kaleb performed would take nowhere near the time claimed. That same testimony indicated that the work could generally be performed in six hours or less.

Kaleb Fisher bears the burden of proof in this matter to show by a preponderance of the evidence that he is entitled to the wages he claims to be due. *Berry v. KRTV Communications* (1993), 262 Mont. 415, 426, 865 P.2d 1104, 1112. In this matter, Kaleb Fisher failed to carry his burden to show he actually worked more than the 487.5 hours shown in the table above.

B. Penalty

Montana law assesses a penalty when an employer fails to pay wages at a rate of at least the minimum wage when they are due. Mont. Code Ann. § 39-3-206. The law requires that BARMAX pay a 110% penalty on the unpaid wages it owes Kaleb Fisher. Admin R. Mont. 24.16.7561. The hearing officer finds that Kaleb Fisher is owed a 110% penalty on the wages owed in the amount of \$3,464.85.

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. BARMAX, LLC d/b/a Beaver Creek Golf Course owes Kaleb Fisher unpaid wages in the amount of \$3,149.86 and a penalty in the amount of \$3,464.85.

VI. ORDER

BARMAX, LLC is hereby ORDERED to tender a cashier's check or money order in the amount of \$6,614.71, representing \$3,149.86 in wages and \$3,464.85 in penalty, made payable to Kaleb Fisher. BARMAX, LLC may deduct applicable withholding from the wage portion but not the penalty portion.

All payments required above shall be mailed to the Employment Relations Division, P.O. Box 201503, Helena, MT 59620-1503, no later than 30 days after service of this decision.

DATED this 5th day of August, 2009.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ DAVID A. SCRIMM
DAVID A. SCRIMM
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.