

STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM )	Case No. 1148-2007
OF GREGORY D. HOLM, )	
)	
Claimant, )	<b>FINDINGS OF FACT;</b>
)	<b>CONCLUSIONS OF LAW;</b>
vs. )	<b>AND ORDER</b>
RICK BOWLER, d/b/a RICK'S FLOORING, )	
)	
Respondent. )	

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**I. INTRODUCTION**

Rick Bowler, d/b/a Rick's Flooring, appealed from a determination of the Department's Wage and Hour Unit that found wages and penalty/liquidated damages were due Gregory D. Holm. After this case was initially scheduled for a contested case hearing, the parties agreed to hold contested case proceedings in abeyance until the decision of the Workers' Compensation Court on the issue of whether the department's ICCU incorrectly decided that Holm was an employee and not an independent contractor.

On August 14, 2008, the Workers' Compensation Court affirmed the decision of the department's ICCU that Holm was an employee of Bowler. *Bowler v. ICCU*, 2008 MTWCC 42, WCC No. 2007-1880 (Nov. 29, 2007). On September 8, 2008, the Hearing Officer issued a new scheduling order, setting the prehearing schedule and contested case hearing in this matter.

On December 16, 2008, the Hearing Officer conducted the contested case hearing in Missoula, Montana, as scheduled. Claimant Gregory D. Holm attended and participated on his own behalf. Respondent Rick Bowler, d/b/a Rick's Flooring, attended and was represented by his attorney, Douglas G Skjelset, Skjelset and Geer. Holm and Bowler testified.

The Hearing Officer, by agreement of the parties, included in the record as part of the evidence the transcript of proceedings before the Workers' Compensation Court in *Bowler v. ICCU*. The exhibits from that hearing, No. 1 through No. 4 and A through N, admitted during that hearing, were also received in the present hearing. Exhibit O, the original composition book from which the photocopies in evidence as Exhibit N were made, was given into the possession of the Hearing Officer, to be returned to Holm after

closure of this case, remaining until then in the file, for use as needed in any judicial review. In addition, Exhibits P, Q and R were admitted into evidence.

The Hearings Bureau received Bowler's proposed decision February 2, 2009, mailed on January 30, 2009. The Hearings Bureau received Holm's post hearing submission on February 4, 2009, by fax at 9:38 p.m. Holm served a different version of his post hearing submission upon Bowler with a certificate of service post marked February 10, 2009. Bowler filed a copy of this different version (with a copy of the post marked envelope) on February 11, 2009. Although Holm's filings were late, the Hearing Officer accepts them and has considered them in reaching this decision.

## II. ISSUES

The determinative issue here is whether Bowler owes Holm earned and unpaid wages.

## III. FINDINGS OF FACT

1. Bowler hired Holm to work as an employee on various construction and remodeling projects.

2. Holm needed a place to live. Bowler offered him a trailer, which needed a substantial amount of work before it would be habitable. Holm and Bowler agreed that Holm would do much of the work, and that his wages for that work would be applied to the purchase price of the trailer. Initially, Holm lived in Bowler's basement, agreeing to pay rent (which was deducted from his wages), and then Holm moved into the trailer after doing some of the work on it. He continued to work on the trailer in anticipation of owning it, and agreed to pay lot rent for the location on which the trailer was situated. At some point a female companion moved into the trailer with him.

3. Holm paid Bowler some amounts for lot rent, but ceased making payments while still living there.

4. To complicate matters further, Holm borrowed money from Bowler, as advances against his wages, for necessities Holm could not afford. Bowler took some offset against wages earned for the advances.

5. In total, Holm worked for Bowler from some time in late October 2005 until December 2006, when Bowler terminated his employment. His hourly rate was \$7.00 per hour until sometime in November 2006, when it was increased to \$10.00 per hour. He received at least \$3,400.00 in wages paid which he retained.

6. Holm never received title to the trailer, in which he continued to live after he was no longer working for Bowler. After he moved out of the trailer, his female companion continued to live in it. When Bowler eventually did obtain possession of

the trailer, at least eight months after terminating Holm's employment, it was badly damaged and the water heater had been removed.

7. Holm submitted in evidence an original notebook containing pages of notations of dates and hours worked, with some identification of what he did and where. His testimony regarding how and when he created this record was inconsistent and confusing. The content and meaning of the cryptic notations remain uncertain. The notebook pages are not credible as an accurate and contemporaneous record of Holm's work for Bowler. The pertinent pages were detached from the notebook, perhaps for copying, and have handwritten page numbering upon them. Holm's testimony was likewise confusing, inconsistent and unreliable to establish the amount of work he did for which he earned wages.

8. Bowler was unable credibly to document the hours that Holm worked for wages or the precise amount he paid Holm, although it was clear that he paid Holm more than \$3,400.00.

#### IV. 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. Holm had the initial burden of proving he did work for which he did not receive proper pay. *Anderson v. Mt. Clemens Pottery Co.* (1946), 328 U.S. 680; *Berry v. KRTV Communications* (1993), 262 Mont. 415, 426, 865 P.2d 1104, 1112; *Garsjo v. Department of Labor and Industry* (1977), 172 Mont. 182, 562 P.2d 473. Holm had to 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* **at** 687, **and** *Purcell v. Keegan* (1960), 359 Mich. 571, 103 N.W. 2d 494, 497; **and see also** *Marias Health Care Service v. Turenne*, ¶¶13-14, 2001 MT 127, 305 Mont. 419, 28 P.3d 494 (the lower court properly concluded that the plaintiff's failure to meet her burden of proof to show that she was not compensated in accordance with her employment contract defeated her wage claim). Because he was not able credibly to explain the creation or the accuracy of his notebook pages or otherwise establish by his testimony the amount of work he did for which he earned wages, Holm failed to carry his burden of proof.

3. If and only if the employee shows as a matter of just and reasonable inference that wages are owing, "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. Bowler's failure to keep records regarding Holm's work and pay is appalling, but Holm's failure to establish that he did work for which he was unpaid, even as a matter of just and reasonable inference, defeated his claim. Even if Holm's evidence had supported a just and reasonable inference, Bowler's counsel ably demonstrated uncertainties and inconsistencies in that evidence, negating the reasonableness of inferring wages due based solely upon Holm's testimony and his notebook entries.

**V. ORDER**

1. The wage claim of Gregory D. Holm against Rick Bowler, d.b.a. Rick's Flooring, having not been proved by a preponderance of the evidence, is dismissed.

DATED this 4th day of March, 2009.

DEPARTMENT OF LABOR & INDUSTRY  
HEARINGS BUREAU

By: /s/ TERRY SPEAR  
Terry Spear  
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.

Holm FOF tsp