

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM)	Case No. 1148-2010
OF JAMES A. SWANSON,)	
)	
Claimant,)	
)	
vs.)	FINDINGS OF FACT;
)	CONCLUSIONS OF LAW;
)	AND ORDER
A & C CONCRETE SPECIALTIES, LLC,)	
a Montana Limited Liability Company,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

James A. Swanson filed a claim for unpaid wages on January 13, 2010, alleging that A & C Concrete Specialties, LLC, owed him \$1,500.00 in unpaid wages. On January 28, 2010, the Wage and Hour Unit determined that A & C Concrete Specialties, LLC, owed Swanson \$1,500.00 in unpaid wages plus a 15% penalty, totaling \$225.00, if the unpaid wages were paid by February 16, 2010, or a 55% penalty, totaling \$825.00, if the wages and penalty were not paid by February 16, 2010. The respondent appeals, maintaining that all wages due were paid.

Hearing Officer David H. Frazier convened a contested case hearing in this matter on June 22, 2010. Claimant James A. Swanson appeared on his own behalf. A & C Concrete Specialties, LLC, was represented by Andrew Harlow, former member/manager. Chad Frank, former member/manager, appeared as a witness for the respondent.

Documents 1 through 20, provided to the parties with the Notice of Hearing and Telephone Conference, dated April 1, 2010, were admitted into the record.

II. ISSUE

To determine if James Swanson is entitled to unpaid wages and penalty as provided by law.

III. FINDINGS OF FACT

1. A & C Concrete Specialties, LLC, employed Swanson as a foreman and concrete finisher from March 2, 2009 through November 27, 2009.

2. The employer paid Swanson \$12.00 per hour, every two weeks. Swanson worked eight to ten hour days, five or six days per week, depending upon the work which had to be done. At the end of every two week period, Swanson gave Andrew Harlow, member/manager, a note with the total number of hours he had worked during the previous two weeks. The employer paid Swanson two weeks in arrears. The pay he received was for the two weeks prior to the two weeks he was paid for. Swanson did not keep a copy or a record of the number of hours he worked because, until his last two weeks of work, the employer always paid him.

3. On November 27, 2009, Swanson was replaced on the job by another contractor. Harlow told him the company had been dissolved. Since the employer paid him two weeks in arrears, Swanson had not been paid for 90 hours of work at that time, and requested it. Harlow argued with him, advising that he didn't owe him anything. Swanson did not receive payment for the two weeks that had been withheld throughout his employment.

4. During the following month, Swanson called Harlow and asked for his pay, two or three times. Harlow consistently argued with him, advising that he didn't owe him anything.

5. On January 11, 2010, Swanson filed a claim for unpaid wages, alleging that \$1,500.00, based upon 90 hours of work at \$13.00 per hour, had not been paid, and that \$2,400.00 had been withheld for the payment of taxes, but that the taxes were not paid.

6. By letter dated January 15, 2010 (Document 18), the Wage and Hour Unit advised the employer that Swanson had filed a claim for unpaid wages and improper withholdings, totaling \$3,900.00. The letter enclosed a copy of Swanson's claim form and asked the employer for a response postmarked no later than January 25, 2010. The letter advised that if the employer disagreed with the claim, it should

provide a copy of Swanson's time cards and his payroll ledger showing the gross amount earned, withholdings, and net pay. The letter further advised the employer that if it did not reply by January 25, 2010, it would be assumed that Swanson's claim is correct, that a determination would be issued finding that the wages claimed are due, and that a penalty of 110% of the wages claimed would be assessed and awarded to Swanson.

7. On January 20, 2010, Harlow responded but did not provide copies of Swanson's time cards or payroll ledger showing the gross amount earned, withholdings, and net pay, to verify the position that Swanson had been paid all wages due.

8. On January 28, 2010, the Wage and Hour Unit issued a determination that \$1,500.00 in unpaid wages are due, that the employer did not submit evidence to verify that the wages were paid, that the department has no jurisdiction over taxes withheld and not paid, and that a 15% penalty, totaling \$225.00, would be assessed if the unpaid wages were paid by February 16, 2010, or a 55% penalty, totaling \$825.00, if the wages and penalty were not paid by February 16, 2010.

9. By June 22, 2010, the date of the hearing, the employer had still not provided evidence to verify that the wages were paid.

10. At \$13.00 per hour, 90 hours of unpaid wages amounts to \$1,170.00.

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. The appellant has failed, without good cause, to provide documentation to verify that the wages were paid.

3. A & C Concrete Specialties, LLC, owes Swanson wages totaling \$1,170.00 and \$643.50 in penalty.

V. ORDER

Based upon the foregoing, the determination of the Wage and Hour Unit that A & C Concrete Specialties, LLC, owes wages and penalty to Swanson is AFFIRMED.

A & C Concrete Specialties, LLC, is hereby ORDERED to tender a cashier's check or money order in the amount of \$1,813.50, representing \$1,170.00 in gross unpaid wages and \$643.50 in penalty, made payable to James A. Swanson, and mailed to the Employment Relations Division, P.O. Box 201503, Helena, Montana 59620-1503, no later than 30 days after service of this decision.

DATED this 25th day of June, 2010.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ DAVID H. FRAZIER
DAVID H. FRAZIER
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.