STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM OF MIKEL A. CORNELL, Claimant, vs. MEDICAL LOGISTIC SOLUTIONS, INC., a Colorado corporation registered with the Montana Secretary of State, Respondent.	)	Case No. 1392-2011 **FINAL AGENCY DECISION**

* * * * * * * * * *

I. INTRODUCTION

Claimant Mikel Cornell appeals from a Wage and Hour Unit determination and redetermination that dismissed his claims seeking wages from respondent Medical Logistic Solutions, Inc. During the investigation stage, the employer agreed to pay Cornell additional vacation benefits and deadhead pay but denied owing him additional overtime wages, incentive pay, and prevailing wages. The employer paid Cornell's vacation and deadhead pay to the Wage and Hour Unit. The Wage and Hour Unit found that the employer did not owe Cornell overtime wages, incentive pay, or prevailing wages and dismissed that portion of his claim.

Hearing Officer Gregory L. Hanchett convened a contested case hearing in this matter on September 2 and September 20, 2011. Cornell represented himself. Teri Walter, attorney at law, represented the respondent. At hearing, Documents 1 through 55, Respondent's E, F, G, H, I, J, K, L, M, N, O, R, S, U, Cornell's 2008 check history report, Cornell's 2008 time sheets, and Cornell's pay stubs from February 2008 through February 2009 were admitted. Cornell, Kathleen Stenberg, Rhonda Grosz, Andrea Hawley, Jason Nye, and Heather Stonner all testified under oath. Based on the testimony and argument made at hearing, the following findings of fact, conclusions of law, and final agency decision are made.

II. ISSUES

Is Cornell due additional overtime wages, additional incentive pay, and additional prevailing wages?

III. FINDINGS OF FACT

1. The parties stipulated at the outset of this case that the matter meets the jurisdictional requirements for being a Fair Labor Standards Act (FLSA) case and is, therefore, controlled by the FLSA.

2. Medical Logistics provides delivery and pick-up service for medical entities (hospitals, laboratories, etc.) in many states including Montana. Their corporate headquarters is located in Colorado. Cornell worked as a delivery driver for Medical Logistics in Montana. His employment began in February 2003. Cornell was discharged from his employment on February 10, 2011. Cornell was based out of Billings, Montana. On February 23, 2011, Cornell filed his claim alleging that he was owed unpaid wages dating back to February 2007. See Cornell's Wage and Hour complaint filed February 23, 2011.

3. From the pay period ending February 15, 2008 through the pay period ending March 31, 2008, Cornell's regular hourly wage was $6.15 per hour. His overtime rate at 1.5 times his hourly rate during this period was $9.225 per hour ($6.15 x 1.5 = $9.225). During this time period, Cornell recorded 116 hours of overtime and was compensated a total of $1,070.10 for those overtime hours. The total amount he was due for his overtime during that period was $1,070.10 (116 hours x $9.225 per hour = $1,070.10).

4. During the pay period ending April 15, 2008 and continuing through the pay period ending July 15, 2008, Cornell's regular hourly wage was raised to $6.25 per hour. His overtime rate at 1.5 times his hourly rate during this period was $9.375 per hour ($6.25 x 1.5 = $9.3750). During this time period, Cornell recorded 98 hours of overtime and was compensated a total of $918.76 for those overtime hours. The total amount he was due for his overtime during that period was $918.75 (98 hours x $9.375 per hour = $918.75).

5. During the pay period ending July 30, 2008 and continuing through the pay period ending December 30, 2008, Cornell's regular hourly wage was raised to $6.55 per hour. His overtime rate at 1.5 times his hourly rate during this period was $9.825 per hour ($6.55 x 1.5 = $9.825). During this time period, Cornell recorded

22.5 hours of overtime and was compensated a total of $221.07 for those overtime hours. The total amount he was due for his overtime during that period was $221.06 (22.5 hours x $9.875 per hour = $221.06).

6. During the pay period ending January 15, 2009 and continuing through the pay period ending February 15, 2009, Cornell's regular hourly wage was raised to $6.90 per hour. His overtime rate at 1.5 times his hourly rate during this period was $10.35 per hour ($6.90 x 1.5 = $10.35). During this time period, Cornell recorded one hour of overtime and was compensated a total of $10.35. As during the other time periods during 2008, Cornell was fully compensated for his overtime work. He was paid $918.76 for those overtime hours. The total amount he was due for his overtime during that period was $918.75 (98 hours x $9.375 per hour = $918.75).

7. From February 2008 through the pay period ending February 15, 2009, Cornell did not have scheduled routes during weekends.

8. Cornell became a lead driver in Montana prior to October 2009. Beginning in October 2009, Medical Logistics and Cornell agreed that Cornell would be paid a guaranteed $2.00 per hour for 100 hours each two-week pay period (10 hours per day Monday through Friday) as incentive pay when he was not working. This amount was over and above his hourly wage for his regular shifts and over and above the $5.00 per pick-up which he received if he had to do a weekend delivery. Cornell was not paid any on-call pay (as other Medical Logistics drivers in other states were) prior to October 2009 because that was not part of the employment agreement between Medical Logistics and Cornell.

9. The requirements of the lead driver position require a lead driver to answer their company-provided phone if it rang, to resolve issues with drivers and customers, and work with dispatch to ensure that gaps in driver coverage are covered. In the event a lead driver was required to cover a delivery, Cornell had one hour after receiving the call to pick up the item to be delivered and to complete the delivery. There was no requirement that the driver actually stay at or near the place he would have to pick up from. As he had at least one hour to pick up a package and deliver it, Cornell needed only to stay in the Billings vicinity when he was on-call. Other than during the ten hours each day Monday through Friday for which he was given the incentive pay, Cornell was not required to answer the phone.

10. On one occasion, Cornell was at a football game with his son when he was paged to make a pick-up and delivery. He was able to complete the pick-up and delivery with no delay and he was paid an appropriate hourly wage while making that

delivery. As another example, Cornell would be on-call for a hospital in Billings. He did not have to stay at or near the hospital in order to perform his duties for the employer. As long as he could complete the pick-up and delivery within the one hour time frame prescribed by the employer, he was free to remain anywhere in the Greater Billings metropolitan area. Whenever he was paged out, he would be paid an appropriate hourly wage for his work.

11. Whenever Cornell was paged out to make a delivery while on-call, he was paid his regular hourly wage. The $2.00 that he would otherwise have received if he were not working would be credited against the amount of hourly wage he was receiving. In other words, he was not paid both his hourly wage and the $2.00 per hour incentive pay during times that he was actually making deliveries.

12. In May 2010, Medical Logistics contracted with the State of Montana to deliver library books to and from a public library in Billings under a pilot project known as the Montana Library Courier Pilot project. Exhibit R. The agreement between the State of Montana and Medical Logistics lasted for approximately three months after which time it ended as the project was discontinued.

13. Under the provisions of the public library delivery agreement, Medical Logistics was required to pay prevailing wage rates to its drivers, including Cornell, for deliveries conducted for the project. The prevailing wage rate at that time for the Billings area (District 8) required drivers to be paid $8.00 per hour and fringe benefits of $2.80 per hour for a total wage and benefit remuneration amount of $10.80 per hour. Cornell's check log and available wage stubs, as well as his library route hours shown in Exhibit U, show that he was paid at least $10.80 per hour for the hours worked on the library project during the time period that Medical Logistics was obligated to pay prevailing wages.

14. Until August 2010, Cornell's immediate supervisor in the Billings area was Kathleen Stenberg. Cornell and Stenberg lived together at the time Stenberg was Cornell's supervisor. Cornell filled out his time sheets on a weekly basis and provided them to Stenberg. Stenberg would, in turn, input the hours off the time sheets into Medical Logistic's payroll database which would then be provided to the corporate office in Colorado. The corporate office in Colorado never received the drivers' actual time sheets. These were maintained by Stenberg in Billings.

15. Beginning in August 2010, after Stenberg resigned from Medical Logistics, Cornell collected the drivers' times sheets and faxed them directly to the corporate office in Colorado. At that time also, Jason Nye became Cornell's route supervisor.

Cornell was paid all overtime that he requested after he assumed the duty of collecting drivers' time sheets and providing them to corporate headquarters in Colorado.

16. In August 2010, Cornell asked his employer if he could be paid for only six hours per day instead of 12 hours per day which he was working during that time period. He would then submit the additional six hours he worked during any given day in a different pay period. When the employer received this request, it believed that Cornell was working closer to 12 hours per day. Cornell made this inquiry because he was concerned about the amount of money being garnisheed from his paycheck as a result of a child support order and he wanted to see if he could lessen the amount of the garnishment by taking less hours each pay period. Exhibit E. Because the employer felt that Cornell was working closer to 12 hours per day, it first investigated the lawfulness of paying Cornell in the manner he suggested by consulting with its human resources consultant, Rhonda Grosz. *Id.*

17. In response to the employer's inquiry regarding Cornell's request, the human resources consultant advised the employer:

> "'We ABSOLUTELY need to pay Mike for exactly the number of hours he actually works. We need to let Mike know that if he records less hours than he actually works we will correct and he will be considered to have committed time card fraud. We must be very firm here. There is no room for negotiations. (Capitalization in original).

Exhibit F. The employer informed Cornell that the employer must pay him for all hours worked during the pay period they were worked and that it would not permit him to underreport his time. *Id.*

IV. DISCUSSION[1]

In his complaint, Cornell raises three issues. First, he contends that he was not paid overtime during 2008 which he is due. Second, he argues that he was not paid the $2.00 per hour incentive pay over and above his regularly hour wage prior to October 9, 2009 and that he should have been even though he concedes that his employment agreement did not include any agreement that he would be paid the $2.00 per hour incentive pay prior to October 2009. Finally, he contends that he

[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.

was not paid prevailing wages when making deliveries under the Montana Library Courier Pilot project. Each of these claims will be considered in turn.

A. *The 2008 Overtime Claim.*

Montana law allows employees owed overtime wages, including wages due under the FLSA, to file a claim with the Department of Labor and Industry to recover wages due. Mont. Code Ann. § 39-3-207; *Hoehne v. Sherrodd, Inc.* (1983), 205 Mont. 365, 668 P.2d 232.

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; s*ee 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 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.

The testimony that Cornell presented (his own and that of Stenberg's) showed only that on some occasions the Bozeman run would take 11 hours. Cornell did not describe with specificity the number of days during that one-year period where he actually worked that number of hours per day. There is insufficient evidence to show that Cornell was working that route everyday. In contrast, the employer presented payroll records that showed that each and every time that Cornell claimed overtime during February 2008 through February 2009, he was paid the correct hourly overtime rate. *See, e.g.*, Cornell's February 2008 through February 2009 pay stubs. Cornell has failed to present evidence that creates a just and reasonable inference that he was not paid all overtime wages he was owed during that period. Even if he had, however, the employer has presented compelling evidence in the form of the payroll check history (as shown by the payroll check stubs) for that entire year that shows

that each and every time Cornell submitted hours to his employer showing overtime worked he was paid for that overtime. Cornell has failed to demonstrate that he is owed any additional overtime wages for his work in during February 2008 through February 2009.

Even if, however, there existed an overtime wage violation, Cornell has failed to demonstrate that the employer's conduct was willful such that he could recover wages claimed to be owed more than two years prior to the date he filed his wage claim. Cornell bears the burden of proving that Medical Logistic's violations were willful. *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (U.S. 1988).

The FLSA limitation provision states:

> Any action commenced on or after the date of the enactment of this Act [enacted May 14, 1947] to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act--
> (a) if the cause of action accrues on or after the date of the enactment of this Act [enacted May 14, 1947]--may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, *except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued.*

29 U.S.C. § 255 (emphasis added).

In interpreting the willfulness requirement necessary to impose a three-year statute of limitations, the Supreme Court held, in *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (U.S. 1988):

> The standard of willfulness that was adopted in *Thurston* – that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute – is surely a fair reading of the plain language of the Act.

The Court also further clarified the standard when it stated that the "word willful . . . is generally understood to refer to conduct that is not merely negligent." *Id*.

In applying the *Richland Shoe* test, the Circuit Courts of Appeal, in finding an employer to have committed a willful violation, have considered evidence where the employer knew that its conduct could result in a FLSA violation; where it undertook affirmative acts to cover up violations; where it knew that there could be a violation and was indifferent to the possibility; and where prior violations or Department of Labor investigations put it on notice of potential violations and the employer continued the suspect practices. See *Baystate Alternative Staffing v. Herman*, 163 F.3d 668 (1st Cir. Mass. 1998); *Chao v. Hotel Oasis, Inc.*, 493 F.3d 26 (1st Cir. P.R. 2007); *Reich v. Waldbaum, Inc.*, 52 F.3d 35 (2d Cir. N.Y. 1995); *Herman v. RSR Sec. Servs.*, 172 F.3d 132 (2d Cir. N.Y. 1999); *Martin v. Selker Bros., Inc.*, 949 F.2d 1286 (3d Cir. Pa. 1991); *Reich v. Bay, Inc.*, 23 F.3d 110 (5th Cir. Tex. 1994); *Herman v. Palo Group Foster Home, Inc.*, 183 F.3d 468 (6th Cir. Mich. 1999); *Jarrett v. ERC Props.*, 211 F.3d 1078 (8th Cir. Ark. 2000); *Chao v. A-One Med. Servs.*, 346 F.3d 908 (9th Cir. Wash. 2003); *Alvarez v. IBP, Inc.*, 339 F.3d 894, 909 (9th Cir. 2003); *Reich v. Monfort, Inc.*,144 F.3d 1329 (10th Cir. 1998).

None of the circumstances described in the preceding paragraph have been demonstrated in this case. It is clear that the employer paid all overtime hours reported by Cornell. The employer had no inkling of any failure to pay overtime wages in this case. Moreover, when Cornell in 2010 attempted to get the employer to pay him his overtime in a different manner in order to avoid paying child support, the employer, after checking with its human resources consultant, refused to do so because the employer feared such conduct could result in a violation of the overtime standards prescribed by the FLSA. Exhibit E. Cornell has failed to show that any alleged failure to pay overtime during the February 2008 to February 2009 time period was willful such that the FLSA statute of limitations could be extended from two years out to three years. Accordingly, even if Cornell had proven an overtime violation during this time period, his action would be barred as untimely.

B. *The Incentive Pay*.

Cornell's argument regarding his claim about the $2.00 per hour incentive pay has been a bit of a moving target. In his complaint and at hearing, he appeared to argue that he was so tied to the hospital that he should be paid incentive pay for 24 hours per day, not just 10 hours per day. At hearing, he appeared to advance the additional argument that he should have been paid incentive pay prior to October 2009 because other drivers working for the employer in other states received incentive pay for quite some time prior to October 2009. Cornell does not dispute that he was paid all regular and overtime wages for the time he worked during 2009, 2010, and 2011. Likewise, he does not dispute that he and his employer never

contracted to pay him $2.00 per hour incentive pay prior to October 2009. Neither argument provides a basis for finding that Cornell is due additional on-call pay.

Montana law requires that employers pay wages when due, in accordance with the employment agreement, pursuant to Mont. Code Ann. § 39-3-204. Except to set a minimum wage, the law does not set the amount of wages to be paid. That determination is left to the agreement between the parties. "Wages" are any money due an employee by the employer. Mont. Code Ann. § 39-3-201(6).

As is true of the minimum wage claim, an employee seeking unpaid wages has the burden of proving work performed without proper compensation. *Marias Health Care Srv. v. Turenne*,¶¶13, 14.

As the issue of the incentive pay does not involve a minimum wage or overtime issue, it is simply a matter of contract. Because of this, Cornell's argument that he should have been paid $2.00 per hour incentive as were the employer's drivers in other states cannot stand. Cornell does not dispute that his employment agreement did not contemplate such compensation until October 2009. Because no contract existed, he cannot prove that he was entitled to the incentive pay prior to October 2009 when the employer agreed to start giving him this pay.

Likewise, his argument that was he required to stay so close to a location (he used as an example a hospital that the employer serviced in Billings) is factually unsupported. An employee who is required to remain on his employer's premises or so close to his work that he cannot use his time effectively for his own purposes is considered to be working while on-call. An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on-call. 29 CFR § 785.17. It is clear from the facts that Cornell was not required to remain at the hospital or so close to the hospital that he was required to be paid his regular hourly wage (see, e.g., Cornell's testimony that he was able to attend a football game with his son while he was "on call"). More to the point, however, as astutely noted by the wage investigator in her determination, Cornell has never claimed that he was not paid his regular hourly wage whenever he was making deliveries. Therefore, the matter of the payment of the $2.00 hour incentive pay is purely one of contract. The agreement regarding the incentive pay merely required the employer to pay him a guaranteed 100 hours of incentive pay at $2.00 per hour very two weeks. The employer did so and Cornell's claim regarding the incentive pay cannot stand.

C. *Prevailing Wage Issue.*

Pursuant to Mont. Code Ann. § 18-2-403(4)(b), for all public works contracts for non-construction projects the contractor must pay employees the prevailing wage rates, which include fringe benefits for health, welfare, and pension contributions. Mont. Code Ann. § 18-2-407 requires employers to pay the prevailing wages on public works contracts or be subject to penalties and fees as provided by the law. Admin. R. Mont. 24.16.9006 provides that the employer is obliged to classify each employee who performs labor on a public works project according to the applicable prevailing rate of wages established by the commissioner and to pay each such employee not less than the standard prevailing wage.

Admin. R. Mont. 24.17.311(1) requires employers to pay each employee not less than the prevailing wage rate unconditionally and without deductions for meals. Cornell could not provide any specifics of hours that he claimed to have been working the prevailing wage library delivery job. Even if he could have, however, it is clear from the employer's testimony that at any time he might have been making deliveries for the library project, he was paid in excess of the prevailing wage rate and fringe benefits for that category of worker, a driver, in Yellowstone County. Therefore, there is no evidence that prevailing wage requirements were violated.

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. Cornell has failed to prove that he is due additional overtime wages for the time period from February 2008 through February 2009 and in any event he would be barred from collecting those overtime wages as his complaint was untimely on that issue.

3. Cornell has failed to demonstrate that he was not paid in accordance with his employment agreement for his incentive pay.

4. Cornell has failed to demonstrate that the employer failed to pay him prevailing wages on the Montana Library Courier Pilot project.

VI. ORDER

There being no merit to the complaint on the issues of overtime, incentive pay, and prevailing wages, those portions of Cornell's complaint are dismissed. The Wage and Hour Unit shall forthwith release to Cornell the funds previously paid by the employer for the vacation pay and deadhead pay issues.

DATED this 21st day of October, 2011.

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 the date of mailing of the hearing officer's decision. See also Mont. Code Ann. § 2-4-702.