STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIMS OF MICHAEL HUGHES AND CARLEEN HUGHES, Claimants, vs. DCC TYCOONS, INC., a Washington corporation registered in Montana, in partnership with Whitefish L.P. VI d/b/a OSTERMAN'S MINI WAREHOUSE BELGRADE UNITS, Respondent.	)	Case Nos. 1846-2010 and 1847-2010 **FINAL AGENCY DECISION**

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I. INTRODUCTION

Michael Hughes and Carleen Hughes are former employees of the respondent, DCC Tycoons, Inc., a Washington corporation d/b/a Osterman's Mini Warehouse Belgrade Units (Osterman's), at its Belgrade Mini Warehouse facility who are seeking unpaid minimum wages and overtime wages. The respondent appealed determinations of the Department of Labor, Wage and Hour Unit that found that the claimants were entitled to additional wages as a result of minimum wage and overtime pay violations pursuant to the Fair Labor Standards Act, 29 U.S.C.A. §§201, et. seq. (hereinafter "FLSA"), for work that was not compensated from March 17, 2009 to April 26, 2010. The appeals were consolidated for purposes of hearing. Hearing Officer David A. Scrimm held a contested case hearing in this matter in Bozeman, Montana, on April 12, 2011. The claimants represented themselves. Jami Rebsom, attorney at law, represented Osterman's. Carleen Hughes, Michael Hughes, Thomas Allen, Gary Simonsen, Carla Steiner, and David Osterman provided sworn testimony.

Documents CH 1-130 and 132-200 from the Carleen Hughes case file, Documents MH 1-184 from the Michael Hughes case file, Claimants' Exhibits 301 to

318, and Respondent's Exhibits A (also labeled A to Z by respondent) through A-3 were admitted into the hearing record. The hearing officer reserved ruling on Document CH 131 in the Carleen Hughes file which is now excluded. The parties submitted post-hearing briefs, the last of which was submitted on July 1, 2011.

Based on the evidence and argument presented at the hearing and in the parties' post-hearing briefs, the hearing officer makes the following findings of fact, conclusions of law, and final agency decision.

II. ISSUES

The issues in this matter are whether respondent owes claimants wages and penalties for work performed.

III. FINDINGS OF FACT

1. Osterman's Mini Warehouse Belgrade Units is a rental storage facility in Belgrade, Montana. There are over 1 ,200 rental units located at the Belgrade Unit facility. The Belgrade Units have been operating since 1978. The Belgrade Units operate at approximately 60% occupancy. Approximately six to seven hundred units are rented at any given time. An additional 250 units are rented to house vehicles which are shuttled to and from the airport at various times throughout the year.

2. Michael Hughes and Carleen Hughes were hired by Osterman's Mini Warehouse Belgrade Units on March 17, 2009. Their employment with Osterman's ended on or about May 4, 2010. Carleen Hughes was paid $1,000.00 on the 1st day of the month. Michael Hughes was paid $1,000.00 on the 15th day of the month. The Belgrade Unit office was open from 8:00 a.m. until 6:00 p.m., except for Sunday when it was open 9:00 a.m. to 5:00 p.m. The Hugheses were both told, when hired, that they were to work out the hours with each other to insure that neither of them worked more than eight (8) hours each day. The Hugheses were to work five (5) days each week, with Tuesdays and Wednesdays off.

3. On April 25, 2010, the Hugheses filed wage claims with the Employment Relations Division, Department of Labor and Industry, alleging that Osterman's owed Carleen Hughes and Michael Hughes unpaid wages. The Wage and Hour unit determined that Carleen Hughes was owed $14,703.79 in unpaid wages and that Michael Hughes was owed $12,107.15 in unpaid wages. The Wage and Hour Unit did not assess liquidated damages.

4. Carleen Hughes' primary duty was running the facility's office. Included in that work was taking calls, making payments, billing, and processing the mail. Carleen was primarily responsible for the facility's billing, but others would conduct that activity on her days off. On a daily basis, 3 to 5 customers would come to the office to make a payment and 10 to 25 payments would arrive in the mail. Billing customers would take 1 to 3 hours per day.

At the beginning of each day, Carleen would prepare the paperwork associated with the shuttles that would be done later in the day. She would check messages from customers or from Osterman and Simonsen. Responding to telephone messages and preparing the shuttle paperwork took approximately one hour.

Carleen would then spend the next three hours assisting Michael with the shuttles. At about noon she would return to the office and would assist customers asking about unit rental, about the shuttles, or needing access to their units. From about 2:00 p.m. until 5:00 p.m., Carleen would do the daily billing. From 5:00 p.m. to 6:00 p.m., she would help with the late shuttles, do filing, answer the phones, help customers, and post payments.

At the beginning of their employment, there was no file system in place so the Hugheses, primarily Carleen, went through the records and organized the documents into separate files which contained current and previous lease agreements, billing statements, payment cards, and other documents. This project involved several years worth of documents and took them 3 to 4 months to finish. Carleen also helped the collections manager in Bozeman with the Belgrade collections.

5. Michael Hughes' duties included shuttling cars to and from the Bozeman airport, three miles from the Belgrade Units. He would get the vehicles out of their storage unit, get the keys, hook up the battery, inflate the tires, if necessary, then he or Carleen would take the customer's vehicle to the airport and the other would pick that driver up. Michael painted the units with man doors, repaired damaged sheetrock, and assisted Carleen with filing in the office. One day a month, Michael would inspect every unit and compare what he found to the information in the files to ensure they were consistent.

From April to September, Michael would spray the weeds that were especially thick on the undeveloped fields adjacent to the storage units. Michael would mix up the chemicals according to formulas provided by Osterman to attack different kinds of weeds. Spraying was done using a hand-held sprayer and took 4-5 hours a day to complete. The same areas were mowed twice a week beginning in mid to late April

and continued until mid-May. Mowing took two hours to complete. The months from April to September were Michael's busiest time primarily due to the extra workload associated with the weeds and mowing. The winter season was the busiest for the car shuttles. Michael also would spend time in the winter inspecting units, checking the door springs and sweeping the unit out, if necessary, and otherwise prepare them for subsequent rental. He would also help customers in a variety of ways including removing ice from entry doors that had been frozen shut by pooling water.

Michael also performed maintenance on the house and office, including painting, repairs to windows and doors, and shoveling to keep the area around the house passable. Michael was neither trained in the office duties or particularly well-suited to perform them.

6. Osterman's provided the Hugheses with a 1,200 square foot house plus utilities. The office for the Belgrade Units is seven by ten feet, and located in the front of the house. The office was separated from the living quarters by a door that was keyed the same as the front door and which allowed a fair number of people with access to the office to also have access to the Hughes' apartment.

The Hugheses were not required to pay rent or utilities for the housing provided by Osterman's. The housing was located outside the gates of the facility and also contained the business office and record storage areas. Osterman's estimated the value of the housing at $800.00 per month. During their employment, Osterman did not have the Hugheses sign any agreement about the housing, or inform them that he considered it part of their wages.

In its May 21, 2010 Answer to Wage Claim, Osterman's did not assert that half of the estimated value of the housing wages ($400.00 per month for both Carleen and Michael) was part of their individual wages. Subsequently, on June 25, 2010, Osterman asserted that it was entitled to include half the value of the housing as wages for both Carleen and Michael.[1]

The Hugheses were unaware that Osterman's considered the value of their lodging as part of their wages. Osterman's did not include the cost of housing as wages on the W-2 forms given the Hugheses. Osterman's did not include the value

[1] It appears Osterman added this defense after discussing the matter with Theresa Sroczyk, the Wage & Hour Investigator who made the determination on the Hughes' claims, because he stated "40% for housing according to Theresa."

of the housing as wages in its reports to the Unemployment Division of the Montana Department of Labor and Industry. Having the Hugheses residing on the facility's premises was primarily for Osterman's benefit. The availability of the housing was certainly a benefit to the Hugheses. While the Hugheses were not required to live on the premises, it allowed customers better access to their storage units, provided better security for the facility, made the car shuttling service more efficient, and was a marketing advantage.

7. Carleen Hughes would sometimes begin her workday after 8:00 a.m. because she had to take her daughter to school.

8. After the Hugheses filed their wage claims, Simonsen, with David Osterman's input, prepared monthly calendars indicating the times he believed the Hugheses had worked at the Belgrade Units (Docs. 89-91 and 95-106). Simonsen created these calendars based off of the daily logbooks. Simonsen determined who worked on any given day by the handwriting in the logbook. Simonsen assumed that Michael worked any day that Carleen worked as Michael did not generally make entries into the logbook. These calendars were not prepared contemporaneously, they were estimates based on what Simonsen thought the Hughes' hours should be and not based on any actual direct knowledge of the actual hours worked by the Hugheses.

9. The Hugheses provided timesheets that they testified were contemporaneously made at the end of each workweek (Docs. CH 144-200, MH 128-184). However, they contain numerous mathematical errors (See ex. CH 153, 157, 170, 171, 176, 186, 187, 188, 189, 190, 191, and 196), and indicate that Carleen and Michael worked the same number of hours each and every day they worked although their primary job duties differed considerably. The Hughes' responses to discovery regarding their days off are largely consistent with the timesheets (Respondent's Ex. A, pp. Y and Z). The timesheets indicate that the Hugheses most frequently worked approximately 48 hours per week. The Hugheses did not provide the timesheets to either Osterman or Simonsen during their employment.

10. The Hugheses complained about the number of hours they worked to Simonsen, but he did not convey their concerns to Osterman. The Hugheses were intimidated by Osterman and did not make their concerns about hours known to him prior to filing their complaint with the Department. Simonsen told the Hugheses that neither of them should be working over eight (8) hour shifts each day.

11. The Bozeman Units had approximately 2,500 rental units. It would take Carla Steiner, the Bozeman office manager, 2-3 hours per day to do the billing for the Bozeman Units. Steiner's husband would go to Belgrade three times per week to help the Hugheses with the shuttles. Steiner noticed that Carleen Hughes was behind on the billing for the Belgrade facility and volunteered to take the billing information home to make sure it was caught up. Steiner testified she did not work overtime, but that the hours she spent catching up the books was done to help Osterman. The Bozeman Units facility did not have a shuttle operation as part of its business. The operation of the office at the Belgrade Units and the Bozeman Units was similar, but the shuttles were a significant part of the workload for the Hugheses and for those that assisted them with that part of the business. The outdoor activities associated with the Belgrade Units required far more time than those at the Bozeman facility. Steiner stated that on occasion a customer would contact them after hours to request their assistance. However, she did not live on the premises so customers could not arrive at her door after the office closed. The Belgrade office was outside the gate and could allow customers to knock on the door at any hour.

12. On average, the Belgrade Units would have four (4) to seven (7) vehicles that needed to be shuttled to the airport per day. On 40 to 50 days per year, the shuttles involved the transfer of 12 to 17 vehicles. Winter was the busiest season for shuttles so Michael Hughes would spend more time on shuttles during the winter season. Each shuttle would take approximately 45 minutes. In most cases the vehicles were left in a designated section of the parking lot before 6:00 p.m. so that customers could pick them up later in the day. On occasion, the Hugheses would have to shuttle a vehicle to the airport after 6:00 p.m. When the number of shuttles to be delivered in any day exceeded the average, other employees would assist the Hugheses with the shuttling.

13. Neither Osterman nor Simonsen ever monitored the hours the Hugheses were actually working. The Belgrade and the Bozeman facilities had an answering machine that would record calls that came in after hours. Carleen was also given a cell phone so she could receive calls after hours. Osterman told the Hugheses that if there was a real emergency, they should attend to it. The only way the Hugheses would know if a telephone call after hours was an emergency was to take the call.

14. On September 16, 2008, the Wage and Hour Unit of the Department of Labor and Industry issued two determinations involving Kay and Daniel Leeds wherein it found that Osterman's had violated the overtime and minimum wage provisions of Montana law and ordered Osterman's to pay unpaid wages and penalties to the Leeds (Documents 301 to 309 and 310 to 317). These

determinations were issued six months before the Hugheses were hired and were not appealed by Osterman's. The Leeds were employed by Osterman's from July 1, 2007 to October 25, 2007. They held the same positions and performed the same duties as the Hugheses did in 2009-2010.

15. The table below shows that Michael Hughes and Carleen Hughes are each owed $6,833.36 in unpaid wages ($20,833.36 earned - $14,000 paid) representing $2,265.86 in minimum wages and $4,566.51 in unpaid overtime wages.

Workweek Ending	Total hours	OT	Min. Wage	OT rate	Regular Wages	Overtime Wages	Total Wages	Wages Paid
3/23/09	48	8	6.90	10.35	276.00	82.8	358.8	
3/30/09	48	8	6.90	10.35	276.00	82.80	358.8	1000.00
4/6/09	48	8	6.90	10.35	276.00	82.80	358.8	
4/13/09	48	8	6.90	10.35	276.00	82.80	358.8	
4/20/09	48	8	6.90	10.35	276.00	82.80	358.8	
4/27/09	48	8	6.90	10.35	276.00	82.80	358.8	1000.00
5/4/09	48	8	6.90	10.35	276.00	82.80	358.8	
5/11/09	48	8	6.90	10.35	276.00	82.80	358.8	
5/18/09	48	8	6.90	10.35	276.00	82.80	358.8	
5/25/09	41	1	6.90	10.35	276.00	10.35	286.4	
6/1/09	48	8	6.90	10.35	276.00	82.80	358.8	1000.00
6/8/09	29	0	6.90	10.35	276.00	0	276	
6/15/09	48	8	6.90	10.35	276.00	82.80	358.8	
6/22/09	48	8	6.90	10.35	276.00	82.80	358.8	
6/29/09	48	8	6.90	10.35	276.00	82.80	358.8	1000.00
7/6/09	48	8	6.90	10.35	276.00	82.80	358.8	
7/13/09	48	8	6.90	10.35	276.00	82.80	358.8	
7/20/09	48	8	6.90	10.35	276.00	82.80	358.8	
7/23/09	21.5	0	6.90	10.35	148.35	0	148.4	
7/27/09	26.5	8	7.25	10.88	192.125	87.04	$279.17	1000.00

8/3/09/	48	8	7.25	10.88	290	87.04	377	
8/10/09	48	8	7.25	10.88	290.00	87.04	377	
8/17/09	48	8	7.25	10.88	290.00	87.04	377	
8/24/09	48	8	7.25	10.88	290.00	87.04	377	
8/31/09	48	8	7.25	10.88	290.00	87.04	377	1000.00
9/7/09	48	8	7.25	10.88	290.00	87.04	377	
9/14/09	48	8	7.25	10.88	290.00	87.04	377	
9/21/09	48	8	7.25	10.88	290.00	87.04	377	
9/28/09	48	8	7.25	10.88	290.00	87.04	377	1000.00
10/5/09	48	8	7.25	10.88	290.00	87.04	377	
10/12/09	48	8	7.25	10.88	290.00	87.04	377	
10/19/09	48	8	7.25	10.88	290.00	87.04	377	
10/26/09	48	8	7.25	10.88	290.00	87.04	377	1000.00
11/2/09	48	8	7.25	10.88	290.00	87.04	377	
11/9/09	48	8	7.25	10.88	290.00	87.04	377	
11/16/09	48	8	7.25	10.88	290.00	87.04	377	
11/23/09	48	8	7.25	10.88	290.00	87.04	377	
11/30/09	48	8	7.25	10.88	290.00	87.04	377	1000.00
12/7/09	48	8	7.25	10.88	290.00	87.04	377	
12/14/09	48	8	7.25	10.88	290.00	87.04	377	
12/21/09	48	8	7.25	10.88	290.00	87.04	377	
12/28/09	48	8	7.25	10.88	290.00	87.04	377	1000.00
1/4/10	48	8	7.25	10.88	290.00	87.04	377	
1/11/10	48	8	7.25	10.88	290.00	87.04	377	
1/18/10	48	8	7.25	10.88	290.00	87.04	377	
1/25/10	48	8	7.25	10.88	290.00	87.04	377	
2/1/10	48	8	7.25	10.88	290.00	87.04	377	1000.00

2/8/10	48	8	7.25	10.88	290.00	87.04	377	
2/15/10	48	8	7.25	10.88	290.00	87.04	377	
2/22/10	48	8	7.25	10.88	290.00	87.04	377	
3/1/10	48	8	7.25	10.88	290.00	87.04	377	1000.00
3/8/10	48	8	7.25	10.88	290.00	87.04	377	
3/15/10	41	1	7.25	10.88	290.00	10.88	300.9	
3/22/10	0	0	7.25	10.88	0	0	0	
3/29/10	31.5	0	7.25	10.88	228.37	0	228.4	1000.00
4/5/10	48	8	7.25	10.88	290.00	87.04	377	
4/12/10	48	8	7.25	10.88	290.00	87.04	377	
4/19/10	48	8	7.25	10.88	290.00	87.04	377	
4/26/10	48	8	7.25	10.88	290.00	87.04	377	1000.00
Total					$16,266.85	$4,566.51	$20,833.36	$14,000.00
Unpaid wages					$2,266.85	$4,566.51		$6,833.36

16. Liquidated damages on Carleen Hughes' and Michael Hughes' unpaid wages equals $6,833.36 each.

IV. DISCUSSION[2]

A. *Burden of Proof.*

The claimants contend that Osterman's owes them unpaid minimum wages, overtime wages, and liquidated damages pursuant to the Fair Labor Standards Act (FLSA). Montana law allows employees owed 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.

[2] 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.

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 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.

B. *The Hugheses are owed unpaid wages*.

Osterman's did not maintain any records of the hours worked by the Hugheses. The Hugheses provided timesheets that they testified were contemporaneously made at the end of each workweek. However, they contain numerous mathematical errors and indicate that Carleen and Michael worked the same number of hours each and every day they worked although their primary job duties differed considerably. Document 153 is signed "5/25/10" although the hours are for the week ending May 25, 2009. It is the hearing officer's experience that most folks misdate a document around the beginning of the new year and generally the mistake is using the previous year, not the next year. This error brings into question whether these timesheets were contemporaneously made. The hearing officer is also puzzled as to why the Hugheses would contemporaneously sign each and every timesheet if they were not submitted to someone each week.

Osterman's purported timesheets suffer from even greater problems. They were created only after the Hugheses filed their wage claims, they were based on estimates of what David Osterman and Gary Simonsen thought was the amount of time the Hugheses should have spent performing their jobs and not on any real evidence other than some logbooks that purport to show that the Hugheses were

present at the facility on certain days. These logbooks were not offered into evidence.[3]

Osterman's after-the-fact estimates of the Hughes' time are not credible evidence upon which this hearing officer can rely upon for determining the hours the Hugheses actually worked. However, the testimony of the Hugheses, often corroborated by the respondent's own witnesses or through testimony elicited through respondent's counsel's questions, adds some credibility to the Hughes' timesheets to show that for the most part they worked when the office was open. The Hughes' testimony, again corroborated by respondent's witnesses, showed that the office duties, the vehicle shuttles, the property maintenance work, and other activities required more than an 8-hour day and more than a 40-hour week. From this evidence the hearing officer infers that the Hugheses worked 48 hours during their workweek of Thursday through Monday (the time period that the office was operated, 8:00 a.m. to 6:00 p.m., except for Sunday when it was open 9:00 a.m. to 5:00 p.m). Osterman expected the Hugheses to cover those hours. He may not have expected them to work more than eight hours in any day, but the Hugheses proved that they did indeed work 48 hour weeks.

Osterman's argues that the Hugheses cannot recover overtime wages because it had no knowledge the claimants were working the extra time and that it did not require the work to be done. Osterman's failed to show that claimants did not actually work the hours they claim.

As defined in 29 U.S.C. § 203(g), "'employ' includes to suffer or permit to work." "[T]he words 'suffer' and 'permit' as used in the statute mean 'with the knowledge of the employer.'" *Fox v. Summit King Mines,* 143 F.2d 926 (9th Cir. 1944).

> [A]n employer who knows or should have known that an employee is or was working overtime must comply with the provisions of § 207. An employer who is armed with this knowledge cannot stand idly by and allow an employee to perform overtime work without proper compensation, even if the employee does not make a claim for the overtime compensation. However, where an employer has no knowledge that an employee is engaging in overtime work and that

[3] There are documents in the record that assert that the Hugheses made off with these records and that there was a voice message wherein Carleen Hughes allegedly admitted the theft. There is no evidence that any theft occurred and the alleged recording was never offered into the record.

> employee fails to notify the employer or deliberately prevents the employer from acquiring knowledge of the overtime work, the employer's failure to pay for the overtime hours is not a violation of § 207.

Forrester v. Roth's I.G.A. Foodliner, Inc., 646 F.2d 413, 414-415 (9th Cir. Or. 1981).

See also Chao v. Gotham Registry, Inc., 514 F.3d 280, 288 (2nd Cir. N.Y. 2008), in which the court stated:

> We regard Gotham's knowledge as sufficient to afford it the opportunity to comply with the Act. See *Forrester*, 646 F.2d at 414. An employer who has knowledge that an employee is working, and who does not desire the work be done, has a duty to make every effort to prevent its performance. *Reich v. Stewart*, 121 F.3d 400, 407 (8th Cir. 1997); *Forrester*, 646 F.2d at 414 ("An employer who is armed with this knowledge cannot stand idly by and allow an employee to perform overtime work without proper compensation . . . ."); *Mumbower v. Callicott*, 526 F.2d 1183, 1188 (8th Cir. 1975) ("The employer who wishes no such work to be done has a duty to see it is not performed."); 29 C.F.R. § 785.13. This duty arises even where the employer has not requested the overtime be performed or does not desire the employee to work, or where the employee fails to report his overtime hours. *See Kosakow v. New Rochelle Radiology Assocs.*, 274 F.3d 706, 718 (2d Cir. 2001); *Holzapfel*, 145 F.3d at 524; 29 C.F.R. §§ 785.11-.12.

An employer can show that it did not suffer or permit work to be done if it was not on notice of an employee's overtime work. *Forrester, supra.* However, this is not a case where the employer had no knowledge. Simonsen knew the claimants were complaining about the amount of time it took to do some of their duties, most significantly, the shuttles and the property weeding and mowing. Whether Simonsen reported the Hughes' concerns to Osterman himself is inconsequential, as the general manager, his knowledge is imputed to the business.

Even without direct knowledge that the claimants were working overtime, Osterman's should have known they were. Simonsen as general manager and Osterman as the *de facto* owner should have known that the claimants were not able to restrict their time to eight hours per day as advised at the beginning of their employment. They simply did not adequately supervise them to observe what they were doing on a daily basis or make any serious effort to see that the work was not

done. Osterman's initial admonition against working overtime made before the Hugheses had a full understanding of the duties and the time required to fulfill them is simply insufficient. Simonsen's testimony that he warned them not to work overtime on several occasions left the hearing officer with the impression that any comments he made were ambiguous or half-hearted.

Perhaps most damaging to Osterman's argument that it did not know the Hugheses were working overtime is the fact it was found to have violated the minimum wage and overtime laws in claims filed by a couple who previsiously held the same positions as the Hugheses. A reasonable employer having already been penalized for violating the minimum wage and overtime laws would take affirmative steps to make sure that it did not violate them again. Osterman's provided no evidence that it took any steps to ensure that the Hugheses were not working overtime or that they were paid at least the applicable minimum wage.

Like the employers in *Forrester* and *Chao*, Osterman's should have known that the claimants were working additional hours. Osterman's failed to produce sufficient credible evidence to show that the Hugheses did not work all the hours they claimed or that Osterman's lacked knowledge of the hours the Hugheses were working. Accordingly, they failed to negate the hearing officer's conclusion that the Hugheses worked 48 hours per week.

C. *Osterman's may not include the cost of housing as wages.*

Osterman's argues that it did not violate the minimum wage requirements because the value of housing provided to the Hugheses brings their hourly wages above the applicable minimum wage.

> The reasonable cost of board, lodging, or other facilities may be considered as part of the wage paid an employee only where customarily "furnished" to the employee. Not only must the employee receive the benefits of the facility for which he is charged, but it is essential that his acceptance of the facility be voluntary and uncoerced.
>
> 29 CFR § 531.30

The burden of proving the reasonableness of the [housing] costs claimed is upon the employer. See *Brock v. Carrion, Ltd.*, 332 F. Supp. 2d 1320, 1325 (E.D. Cal. 2004) (citing *Donovan v. Williams Chemical Co.*, 682 F.2d 185, 190 (8th Cir. 1982); *New Floridian*, 676 F.2d at 474 (11th Cir. 1982)).

§ 531.3 General determinations of "reasonable cost."
(a) The term reasonable cost as used in section 3(m) of the Act is hereby determined to be not more than the actual cost to the employer of the board, lodging, or other facilities customarily furnished by him to his employees.

(b) Reasonable cost does not include a profit to the employer or to any affiliated person.

(c) Except whenever any determination made under § 531.4 is applicable, the "reasonable cost" to the employer of furnishing the employee with board, lodging, or other facilities (including housing) is the cost of operation and maintenance including adequate depreciation plus a reasonable allowance (not more than 5 ½ percent) for interest on the depreciated amount of capital invested by the employer: Provided, that if the total so computed is more than the fair rental value (or the fair price of the commodities or facilities offered for sale), the fair rental value (or the fair price of the commodities or facilities offered for sale) shall be the reasonable cost. The cost of operation and maintenance, the rate of depreciation, and the depreciated amount of capital invested by the employer shall be those arrived at under good accounting practices. As used in this paragraph, the term "good accounting practices" does not include accounting practices which have been rejected by the Internal Revenue Service for tax purposes, and the term "depreciation" includes obsolescence.

(d)(1) The cost of furnishing "facilities" found by the Administrator to be primarily for the benefit or convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages.
. . .
29 CFR § 531.3

"An employer who makes deductions from the wages of employees for board, lodging, or other facilities' . . . shall maintain and preserve records substantiating the cost of furnishing each class of facility." 29 C.F.R. § 516.27(a). *Id*.

The only evidence produced to show the cost of the housing provided to the Hugheses was David Osterman's testimony estimating the rental value at about $800.00 per month. This is insufficient under 29 CFR § 531. 3. The evidence adduced at hearing also shows that the benefit of having its employees on-site clearly outweighed the benefits to the Hugheses. The Hugheses could simply have taken the extra $800.00 in wages, if it had ever been offered as an option, and looked for housing available to them in the area. Osterman's wanted, historically had, and

gained business advantage from having on-site managers. Having on-site managers gave its customers more access to their rental units, a sense of or actual enhanced security, and the ability to more readily inquire about the units and pay their bills in person. It also made the car shuttle operation more efficient and made it easier for customers to obtain their vehicles even outside normal business hours.

During the interview process, the Hugheses were made aware of the on-site housing and given the fact that their then current housing situation put them in a position where they desperately needed a place to stay, the issue of whether they were required to live on the premises was not an issue that was discussed.

Osterman's failed to meet its burden of proving the reasonableness of the costs of the housing provided to the Hugheses. *Brock v. Carrion*, Ltd., 332 F. Supp. 2d 1320, 1326 (E.D. Cal. 2004) (citing *Donovan v. New Floridian Hotel. Inc.*, 676 F.2d 468, 475 (11th Cir. 1982) ("An employer's unsubstantiated estimate of his cost, where the employer has failed to comply with the recordkeeping provisions of the FLSA, and where there has been no determination of reasonable cost by the Wage and Hour Division, does not satisfy the employer's burden of proving reasonable cost").

Moreover, Osterman's argument that the housing was included as part of the Hughes' remuneration is not credible. The W-2 forms provided to the Hugheses did not include it as part of their wages, the quarterly UI-5 forms submitted to the Unemployment Division do not include these costs, and Osterman's made no mention of the cost of housing in its May, 21, 2010 Respondent's Answer to Wage Claim (Docs. CH 124-125, MH 118-119). It wasn't until June 25, 2010 that Osterman's mentioned anything about housing costs. However, that inclusion to their defense of the Hughes' claim appears to be an afterthought that arose only after a department employee asked about it. Finally, when asked at hearing why he didn't include the housing costs on the Hughes' W-2s, Osterman responded, "I don't know, I thought it would work out for both of us."

For the reasons cited above, Osterman's cannot include the cost of housing as part of the Hughes' wages.

D. *The de minimis exemptions provided by the Portal-to-Portal Act are applicable.*

The Supreme Court has held that certain *de minimis* employee activities are exempt from the overtime provisions of the Fair Labor Standards Act (FLSA) exception. *See Anderson v. Mt. Clemens Pottery Co., supra*.

The Supreme Court in *Anderson* explained the *de minimis* rule as follows:

> When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act. It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved.

Anderson, 328 U.S. at 692. When applying the *de minimis* rule to otherwise compensable time, the following considerations are appropriate: "(1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional work." *Lindow v. United States, 738 F.2d 1057, 1063 (9th Cir. 1984)*. Periods less than 10 minutes have generally been held to not be compensable. *Lindow* at 1062.

Here the Hugheses had to close the gate to the facility at 9:00 p.m. each day, an activity that would take a minute or less to accomplish. From time-to-time the Hugheses would have to respond to calls outside their normal hours, but each call would take but a few minutes and did not happen every day. They would also have to on occasion shuttle a car to the airport after normal working hours, but there is no substantial evidence regarding the dates or times of any of these events. There is no substantive evidence that these activities worked outside of the normal hours were of such regularity, duration or in aggregate significant enough to make them compensable. Therefore, they are *de minimis* and not compensable.

V. LIQUIDATED DAMAGES

The FLSA entitles employees owed wages to liquidated damages when their employers violate the minimum wage and overtime laws.

> Any employer who violates the provisions of Section 206 or Section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid . . . wages . . . and in an additional equal amount as liquidated damages.

29 U.S.C. § 216.

For a number of years, the Portal to Portal Act has altered the liquidated damages provision of the FLSA, pursuant to 29 U.S.C. § 260:

> In any action commenced prior to or on or after the date of the enactment of this Act to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 16 of such Act.

Therefore, the claimants are entitled to liquidated damages unless the employer demonstrates it acted reasonably and in good faith. The employer bears a substantial burden "in demonstrating good faith and reasonable grounds." *Renfro v. City of Emporia*, 948 F.2d 1529, 1540 (10th Cir. 1991) (citation omitted); *Marshall v. Brunner*, 668 F.2d 748, 753 (3d Cir. 1982). "Good faith" requires an honest intention and a lack of knowledge of circumstances which might have put the employer on notice of FLSA problems. *Id*. See also *Key West, Inc. v. Winkler*, 2004 MT 186, ¶¶ 29-32, 322 Mont. 184, 191, 95 P.3d 666, 671.

"Reasonable grounds" is an objective standard by which to evaluate the employer's behavior. *Renfro*, 948 F.2d at 1540. Prior to a showing of good faith and reasonable grounds, "the district court has no discretion to mitigate an employer's statutory liability for liquidated damages." Marshall, 668 F.2d at 753. Only after the employer carries its burden may a district court "in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title." 29 U.S.C. § 260. *Tacke v. Energy West, Inc.*, 2010 MT 39, P27 (Mont. 2010).

Osterman's offered no evidence to show that its violation of the minimum wage and overtime laws was based on good faith or to prove it had a reasonable basis to believe that its payment of wages to the Hugheses was not violative of the FLSA. Had it attempted to do so, the previous violations of the laws in the two Leeds cases would have been a significant challenge to overcome. Six months before the Hugheses were hired, the Wage and Hour Unit issued two redeterminations involving two former employees of Osterman's, Kay and Daniel Leeds, who held the identical positions as the Hugheses did in 2009 and 2010. The redeterminations in those cases found that Osterman's had violated the minimum wage and overtime laws and therefore owed several thousand dollars in unpaid minimum and overtime wages to the Leeds.

A reasonable employer having already been penalized for violating the minimum wage and overtime laws would take affirmative steps to make sure that it did not violate them again. Osterman's provided no evidence that it took any steps to ensure that the Hugheses were not working overtime or that they were paid at least the applicable minimum wage. It failed to provide any evidence that it made a good faith effort to ensure that it was in compliance with the FLSA's overtime and minimum wage laws. In such situations, employers will consult with skilled counsel to ensure that its employment policies are compliant with the law, will adopt better supervisory techniques, adopt job descriptions, or require regular reporting of hours. Osterman's provided no evidence that it made these or any similar efforts to comply with the FLSA.

For the reasons cited here, the hearing officer finds that the claimants are entitled to liquidated damages in an amount equal to the amount of their unpaid minimum and overtime wages.

VI. CONCLUSIONS OF LAW

1. The State of Montana and the Commissioner of the Department of Labor and Industry have jurisdiction over this complaint under §§ 39-3-216 and 39-3-407, MCA. *State v. Holman Aviation*, 176 Mont. 31, 575 P.2d 925 (1978).

2. The respondent is engaged in interstate commerce and is therefore subject to the Fair Labor Standards Act. 29 U.S.C. § 207(1).

3. Between March 17, 2009 and April 26, 2010, the claimants worked overtime as defined by the Fair Labor Standards Act. Osterman's therefore owes the claimants unpaid overtime premium in the amounts listed in Finding of Fact Number 15.

4. Osterman's failed to establish that the cost of housing was reasonable or a part of the Hughes' wages.

5. Between March 17, 2009 and April 26, 2010, Osterman's failed to ensure that the claimants were paid the applicable minimum wage. Osterman's therefore owes the claimants unpaid minimum wages in the amounts listed in Finding of Fact Number 15.

6. Osterman's failure to pay minimum wages and overtime premium to the claimants was not in good faith or based on reasonable grounds. Osterman's

therefore owes the claimants liquidated damages in the amounts listed in Finding of Fact Number 16.

VII. ORDER

1. Respondent, The DCC Tycoons, Inc., a Washington corporation d/b/a Osterman's Mini Warehouse Belgrade Units, IS HEREBY ORDERED to tender a cashier's check or money order in the amount of $13,666.72 representing $6,833.36 in wages and $6,833.36 in liquidated damages made payable to Carleen Hughes.

2. Respondent, The DCC Tycoons, Inc., a Washington corporation d/b/a Osterman's Mini Warehouse Belgrade Units, IS FURTHER ORDERED to tender a cashier's check or money order in the amount of $13,666.72 representing $6,833.36 in wages and $6,833.36 in liquidated damages made payable to Michael Hughes.

3. Osterman's may deduct applicable withholding taxes from the portion of the payments representing wages, but not from the portions representing liquidated damages.

4. 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 the date of mailing of this decision.

DATED this 31st day of August, 2011.

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 the date of mailing of the hearing officer's 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.