



### III. FINDINGS OF FACT

1. Matthew Wong worked as laborer for Ken Kraft d/b/a Home Equity Builders from June 18, 2010 through June 22, 2010.

2. Wong learned Kraft had work available through a mutual acquaintance, Paul Harston. Harston works at a local gas station and has known both men for several years. Kraft asked Harston if he knew of anyone looking for work and Harston contacted Wong.

3. On or about June 17, 2010, Wong met with Kraft at the gas station where Harston works to discuss the possibility of Wong working for Kraft. Kraft offered Wong work on a residential roofing project, with an hourly wage of \$15.00. Wong did not complete any tax forms prior to beginning work for Kraft.

4. On June 18, 2010, Kraft picked up Wong at his home in Belgrade, Montana, and transported him to the job site at 7th Street and College in Bozeman, Montana. Wong worked seven hours.

5. On June 19, 2010, Kraft picked up Wong and transported him to the same job site. Wong worked 10.25 hours.

6. On June 21, 2010, Wong's roommate, Justin Hunley, transported Wong to Kraft's job site. Wong worked 10.25 hours.

7. On June 21, 2010, Kraft paid other laborers working for him and offered to pay Wong. Wong declined and said he would like to receive the money owed to him the following week so he would be sure to have sufficient funds to pay his rent. Kraft gave Wong \$100.00 and they went drinking at the Bozone Brewery and VFW club. Kraft also gave Wong \$70.00 as a cash draw during this period.

8. On June 22, 2010, Kraft picked up Wong and transported him to the job site. Wong worked five hours and left work early because he was not feeling well enough to work on the roof.

9. On June 23, 2010, Wong called Kraft to see if his services were needed. Kraft told Wong that he would not need his help until the following week.

10. On or about June 26, 2010, Wong called Kraft and requested his paycheck. Kraft asked Wong what he thought he was owed and Wong estimated he was owed \$500.00. Kraft began yelling at Wong and demanded to see Wong's hours. Wong told Kraft he would come to the job site and show Kraft his hours.

Wong arrived at the job site shortly thereafter and offered Kraft his record of the hours he worked on Kraft's roofing project. Kraft began swearing at Wong and denied owing Wong any money. Wong warned Kraft that he would report him to the Department of Labor and Industry if he did not pay him for the work he had performed. Kraft then warned Wong to watch himself, which Wong took as a threat.

11. Wong went to his local Job Service office shortly after speaking with Kraft and obtained the necessary paperwork to file a claim with the Wage and Hour Unit. Hunley and Wong then went to Kraft's residence and Wong made a second request for his paycheck. Kraft became belligerent and began swearing at Wong. Wong told Kraft that he would have to file a claim with the Wage and Hour Unit if Kraft did not pay him for the work he performed.

12. On June 25, 2010, Wong filed a claim for unpaid wages, alleging that \$468.75, based upon 15 hours of work at \$15.00 per hour, had not been paid.

13. Kraft owes Wong for unpaid wages totaling \$298.75 ( $\$15.00 \times 31.25$  hours - \$170.00 cash Kraft gave to Wong).

14. A 55% penalty on the unpaid wages equals \$164.31 ( $\$298.75 \times 55\%$ ).

#### IV. DISCUSSION<sup>1</sup>

##### 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

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<sup>1</sup>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.

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.

Wong argued Kraft owed him for 31.25 hours of work performed beginning June 18, 2010 through June 22, 2010. Wong submitted a list of dates and hours he claims to have worked for Kraft. Wong testified, as did Kraft, that Kraft transported him to the job site on several occasions. Wong's roommate also testified that he took Wong to Kraft's job site. Kraft denied knowing Wong and denied Wong performed any work for Home Equity Builders.

Kraft testified he did not allow Wong to work for him because he did not hold a contractor's license. Kraft alleged Wong lied about working for Kraft in an elaborate attempt to stave away creditors, particularly Harston, who denied Wong owed him any money. It makes little sense that Kraft would continue to pick up Wong for work after learning he did not hold a contractor's license. It also makes little sense that Wong would continue reporting to the job site after being turned away given that he was reliant upon others for transportation to and from the job site. Further, Wong's persistence in pursuing his claim for unpaid wages in the face of Kraft's repeated attempts to delay and disrupt the proceedings supports a finding that Wong's claim is legitimate.

Wong's testimony regarding the hours he worked and the wages Kraft promised was straightforward and reasonable. Wong's testimony is more credible than the evidence presented by Kraft. The evidence shows Wong performed 31.25 hours of work for Kraft from June 18, 2010 through June 22, 2010, for an agreed upon wage of \$15.00 per hour. Kraft owes Wong \$298.75 in unpaid wages (31.25 hours x \$15.00 hourly wage - \$170.00 in cash Kraft gave Wong).

#### B. *Penalty*

Montana law assesses a penalty when an employer fails to pay wages when they are due. Mont. Code Ann. § 39-3-206. The law requires Kraft to pay at least a 55% penalty on the unpaid wages he owes Wong. Admin R. Mont. 24.16.7566. The Hearing Officer finds Wong is owed a 55% penalty on the wages owed in the amount of \$164.31 (\$298.75 x 55%).

## 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. Ken Kraft d/b/a Home Equity Builders owes Matthew Wong for unpaid regular wages in the amount of \$298.75 and a penalty in the amount of \$164.31.

## VI. ORDER

Ken Kraft d/b/a Home Equity Builders is hereby ORDERED to tender a cashier's check or money order in the amount of \$463.06, representing \$298.75 in wages and \$164.31 in penalty, made payable to Matthew Wong, 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. Ken Kraft d/b/a Home Equity Builders may deduct applicable withholding from the wage portion but not the penalty portion of the amounts due.

DATED this 10th day of May, 2011.

DEPARTMENT OF LABOR & INDUSTRY  
HEARINGS BUREAU

By: /s/ CAROLINE A. HOLIEN  
CAROLINE A. HOLIEN  
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.