

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM)	Case No. 1388-2011
OF CURTIS B. BITNEY,)	
)	
Claimant,)	
)	FINAL AGENCY DECISION
vs.)	
)	
KAREN SALLEE,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

On February 18, 2011, Curtis B. Bitney filed a claim with the Wage and Hour Unit of the Department of Labor and Industry contending that DE Gray General Construction (DE Gray) and Karen Sallee owed him \$2,745.00 in unpaid wages for work performed from December 7, 2010 through January 26, 2011. On February 28, 2011, Derek Gray, Sallee's son and owner of DE Gray, contacted the Wage and Hour Unit and informed them that Bitney was not his employee during that period. On March 3, 2011, Sallee filed her response to Bitney's claim. Sallee denied Bitney was her son's employee during the period in question. Sallee also denied that Bitney was her employee and contended that she and Bitney were business partners who had agreed to split the profits from a home improvement project they undertook at the residence of Mike and Lisa Hogan.

On July 19, 2011, the Wage and Hour Unit issued a determination finding Sallee owed Bitney \$2,406.88 in unpaid wages for work performed during the period from December 7, 2010 through January 26, 2011. On August 4, 2011, Sallee appealed the determination.

On September 9, 2011, the Wage and Hour Unit transferred the matter to the Department's Hearings Bureau after attempts at mediation were unsuccessful.

On September 14, 2011, the Hearings Bureau issued a Notice of Hearing and Telephone Conference setting the pre-hearing conference for September 28, 2011. The final pre-hearing conference was subsequently scheduled for November 30, 2011, and December 7, 2011 was set as the date for hearing.

On November 15, 2011, the Respondent submitted a request to reschedule the hearing. Upon finding the Respondent established good cause, the Hearing Officer vacated the previous scheduling order and scheduled a final pre-hearing conference for November 30, 2011. On November 30, 2011, the parties agreed that the hearing would be held on January 26, 2012.

On January 26, 2012, the Hearing Officer held a telephone hearing in this matter. Bitney, Raelynn G. Johnson, Mike Hogan, and Lisa Hogan presented sworn testimony. Sallee, Derek Gray, Danny Kalstrom, Brian Bergstrom, Steven Timroth, Roger Ameline, and Mark Lieglend also presented sworn testimony. The administrative record compiled at the Wage and Hour Unit (Documents 1-99) were admitted into evidence without objection. The record does not include any unsolicited documents submitted by Sallee after the close of hearing. The case was deemed submitted for decision at the conclusion of the hearing.

II. ISSUE

The issue in this case is whether Karen Sallee owes wages for work performed, as alleged in the complaint filed by Curtis B. Bitney, and owes penalties or liquidated damages, as provided by law.

III. FINDINGS OF FACT

1. Curtis B. Bitney performed work for Karen Sallee on a home improvement project at the home of Mike and Lisa Hogan (Hogan project) beginning on or about December 6, 2010 through January 26, 2011.

2. In 2010, the Hogans contracted with Derek Gray, Sallee's son, to remove and replace the roof, windows, and siding at a rental house that they owned in Great Falls, Montana. The contract between Gray and the Hogans provided that the Hogans would pay Gray \$15,440.61 for all work performed including all materials. Bitney was not a party to the contract between the Hogans and Gray, nor did Gray mention his name in the bid that he submitted to the Hogans. Gray has never considered Bitney to be a partner in his business, which he inherited through his father and his mother's family, who have a long tradition of working as contractors in the State of Montana.

3. In October 2010, Gray became increasingly frustrated with the Hogans' "pickiness" in reviewing his work. In mid-November 2010, Gray informed the Hogans that he was cancelling the contract and stopped performing work on the project. Gray informed his mother of the situation. Sallee decided that she would perform the remaining work on the project for the contract price agreed upon

between the Hogans and Gray. The Hogans did not execute a separate contract with either Sallee or Bitney.

4. In late November 2010, Sallee approached Bitney about wanting to complete the work on the Hogan project left uncompleted by her son. Sallee suggested to Bitney that he could make some money working with her on the project. Bitney agreed and assumed Sallee would pay him \$10.00 per hour. Bitney and Sallee had no formal discussions or agreement about what Bitney would receive in exchange for his work on the Hogan project.

5. Bitney was living in Sallee's home during this period in exchange for his performing work around her house. Sallee frequently opened her home to people living in a homeless shelter in Great Falls. Both Sallee and Gray frequently hired day laborers from the homeless shelter to perform work on an intermittent basis, which is how Bitney came to know both Sallee and Gray.

6. Sallee directed Bitney to keep track of all hours he and other workers performed on the Hogan project. Bitney did as directed and kept track of his hours, as well as the hours worked by other workers.

7. Bitney and Sallee were not partners. Bitney and Sallee did not enter into a formal agreement outlining their rights and responsibilities as partners in this business venture. Bitney made no investment in the materials or tools used in the Hogan project. Sallee purchased all materials that had not been purchased by the Hogans. The Hogans communicated any concerns about the quality of work to either Sallee or her son. The Hogans complained to Bitney only when they were unable to locate Sallee or Gray. The Hogans did not consider Sallee or Bitney to be a successor in interest to the contract between themselves and Gray.

8. Bitney worked the following hours during the following weeks in December 2010: 35.5 hours during the week of December 5, 2010; 51.5 hours during the week of December 12, 2010; 28.5 hours during the week of December 19, 2010; and 25.5 hours during the week of December 26, 2010. Bitney worked a total of 141 hours during December 2010.

9. Bitney worked the following hours during the following weeks in January 2011: 50.5 hours during the week of January 2, 2011; 28 hours during the week of January 9, 2011; 42.5 hours during the week of January 16, 2011; and 7.5 hours during the week of January 23, 2011. Bitney worked a total of 128.5 hours during January 2011.

10. On January 26, 2011, Bitney stopped working on the Hogan project after another employee told him that Sallee did not intend to pay anyone for their work. Bitney demanded Sallee pay him for the work he had performed, and she refused. The disagreement escalated and Sallee ordered him to leave her home. Bitney vacated Sallee's home approximately five days later.

11. On March 3, 2011, the Hogans' attorney sent a letter to Gray outlining what the Hogans considered to be the final amount due and owing under their contract with Gray. The attorney noted that the Hogans contracted with Gray and not Sallee. The attorney does not mention Bitney in his letter. Gray accepted the Hogans' final payment of \$2,864.33 and turned the proceeds over to Sallee.

IV. DISCUSSION AND ANALYSIS¹

A. *Bitney was Sallee's employee*

The primary dispute between the parties appears to be whether they were partners or whether an employment relationship existed between Sallee and Bitney.

Montana Code Annotated § 35-10-202 states that “the association of two or more persons to carry on as co-owners [of] a business for profit creates a partnership, whether or not the persons intend to create a partnership.” A person who receives a share of the profits of a business is presumed to be a partner in the business, unless the profits were received in payment for services as an independent contractor or of wages or other compensation to an employee. Mont. Code Ann. § 35-10-202(3)(c)(2).

The Montana Supreme Court has found that the parties must have the intention to carry on some sort of business and to share in the profits for a partnership to exist. *Croft v. Bain* (1914), 49 Mont. 484, 143 P. 960. The purpose and character of the association is a matter of intention. *Id.* 49 Mont. 484 at 487, 143 P. 960 at 961 **quoting** *Hunter v. Conrad*, 18 Mont. 177, 44 P. 523. The contract out of which it arises may be express or implied, and the intention may be inferred from the conduct and dealings of the parties, but all the elements included in the definition must be present to constitute the relation of copartnership. Community of interest in the parties alone is not sufficient. To constitute a partnership, there must be such a community of interest as empowers each party to make contracts, incur liabilities, and dispose of the property. *Id.* 49 Mont. 484 at 487, 143 P. 960 at 961 **quoting** *Weiss v. Hamilton*, 40 Mont. 99, 105 P. 74.

¹Statements of fact in this discussion and analysis are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

Employment is defined as “a contract by which one, who is called the employer, engages another, who is called the employee, to do something for the benefit of the employer or a third person.” Mont. Code. Ann. § 39-3-101.

Bitney testified that Sallee approached him about working on the Hogan project in mid-November 2010. Bitney testified that he agreed to work for Sallee with the assumption that she would pay him \$10.00 per hour. Bitney was unable to explain why he assumed he would be paid \$10.00 per hour. Bitney denied ever agreeing to be Sallee’s partner in the venture or encouraging her to undertake the Hogan project. Bitney also denied paying any other workers on the project or agreeing to be responsible for supervising those workers. Bitney denied paying for any materials or tools used on the Hogan project. Bitney denied working with Sallee on any other projects before or after the Hogan project.

Sallee testified that Gray told her and Bitney of the Hogan project in mid-November 2010. Sallee testified Gray told her and Bitney that he was cancelling the contract due to the Hogans’ “pickiness.” Sallee testified that she and Bitney discussed the possibility of taking over the project from Gray and that she agreed to take over the project after being persuaded by Bitney’s pleas that he needed the money for Christmas. Sallee testified that she and Bitney agreed to be partners and to share equally in the profits after the project was completed.

The parties agree that Bitney invested no money in the materials or tools used on the Hogan project. The parties also agree that Bitney kept track of his hours and other workers’ hours at the direction of Sallee. Sallee testified that the Hogans talked to her or Gray if there were problems. The Hogans testified that they spoke to Bitney when they were unable to locate either Sallee or Gray.

Bitney’s testimony was straightforward and described a more likely series of events. It makes little sense that a man who had most recently been staying at a homeless shelter and working as a day laborer would enter into a partnership with Sallee. Further, given Sallee’s testimony that she and her family have a long history of working as contractors in the area, it makes more sense that she agreed to assume the responsibilities of the contractor on the Hogan project after her son chose not to satisfy his contractual obligation to the Hogans.

Sallee’s testimony was often vague and meandering. Sallee rarely answered a question without engaging in self serving hyperbole about how she was being punished for helping those she considered to be less fortunate than herself. The testimony presented by Sallee’s witnesses was also vague and less detailed than Bitney’s testimony. Bitney’s testimony is deemed more credible than the evidence presented by Sallee. The evidence shows Bitney was Sallee’s employee.

B. 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 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.

Sallee did not dispute the number of hours Bitney reported working on the Hogan project (Document 99). Sallee also did not dispute that Bitney was not paid for any work performed on the Hogan project. Sallee testified that she and Bitney agreed to share in the profits from the Hogan project, which she contends do not exist. Bitney denied entering into an agreement with Sallee to share in the profits and that he assumed Sallee would pay him \$10.00 per hour. Bitney was unable to explain the basis of that assumption. The evidence shows Bitney performed work for Sallee for which he was not paid. The evidence also shows that there was no formal agreement regarding Bitney’s rate of pay.

Montana Code Annotated § 39-3-404(1) states that “. . . An employer shall pay to each employee a wage of not less than the applicable minimum wage as determined by the commissioner in accordance with 39-3-409.” In this case, the parties did not have an agreement regarding Bitney’s wages. In the absence of a specific agreement between the parties, the Hearing Officer lacks the authority to require the employer to pay an employee more than the minimum wage in effect at the time of the employment relationship. Therefore, the applicable minimum wage shall be applied in this case.

For the period of December 7, 2010 through December 31, 2010, the minimum wage was \$7.25. The wage paid for any time worked over 40 hours per week was \$10.88. On January 1, 2011, the state minimum wage was increased to \$7.35. The wage paid for any time worked over 40 hours per week was \$11.03. Minimum wage is applied on a workweek basis. A workweek is defined in Admin. R. Mont. 24.16.501 and states, “A workweek is a regularly recurring period of 168 hours in the form of seven consecutive 24-hour periods. The workweek need not coincide with the calendar week - it may begin any day of the week and any hour of the day. Each workweek stands alone. Employment for two or more workweeks cannot be averaged out for the sake of figuring overtime or minimum wages. . . .”

The parties did not identify a specific workweek. Therefore, the calendar week of Sunday through Saturday shall be applied. The evidence shows Sallee owes Bitney wages for work performed during December 2010 and January 2011 as follows:

Week Of	Hours Worked	Wages Owed (Regular)	Wages Owed (Overtime)	Total Wages Owed
12-05-10	35.50	\$257.38	0	\$257.38
12-12-10	51.50	\$290.00	\$125.12	\$415.12
12-19-10	28.50	\$206.63	0	\$206.63
12-26-10	25.50	\$184.88	0	\$184.88
01-02-11	50.50	\$294.00	\$115.82	\$409.82
01-09-11	28.00	\$205.80	0	\$205.80
01-16-11	42.50	\$294.00	\$27.58	\$321.58
01-23-11	7.50	\$55.13	0	\$55.13

The evidence shows Bitney worked a total of 269.50 hours for Sallee. The evidence also shows Sallee owes Bitney \$2,056.34 for work performed on the Hogan project in December 2010 and January 2011.

C. Penalty

For claims not involving minimum wage or overtime, a 55% penalty must be imposed. Admin. R. Mont. 24.16.7566. Sallee owes a penalty in the amount of \$1,130.99 on the \$2,056.34 in unpaid wages.

V. CONCLUSIONS OF LAW

1. The State of Montana and the Commissioner of the Department of Labor and Industry have jurisdiction over this claim under Mont. Code Ann. § 39-3-201 *et seq.* *State v. Holman Aviation* (1978), 176 Mont. 31, 575 P.2d 925.

2. From December 6, 2010 through January 26, 2011, Curtis B. Bitney performed work for Karen Sallee as an employee for which he has not been paid. Sallee owes Bitney \$2,056.34 in unpaid wages and a penalty of \$1,130.99 on the unpaid wages.

VI. ORDER

Karen Sallee is hereby ORDERED to tender a cashier's check or money order in the amount of \$3,187.33, representing \$2,056.34 in wages and \$1,130.99 in penalty, made payable to Curtis B. Bitney, 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 13th day of March, 2012.

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 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.