

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE PREVAILING)	Case No. 1608-2011
WAGE CLAIM INVOLVING THE)	
DEPARTMENT OF LABOR AND)	
INDUSTRY AND LEIGHTON S. HUGHES,)	
)	
Claimant,)	FINAL AGENCY DECISION
)	
vs.)	
)	
RONALD SORG d/b/a SUN-LITE ELECTRIC,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

On March 23, 2011, Leighton S. Hughes filed a claim with the Wage and Hour Unit of the Montana Department of Labor and Industry contending that Ronald Sorg, doing business as Sun-Lite Electric, owed him \$9,845.82 in wages.

On June 21, 2011, the Wage and Hour Unit issued a determination holding that Sorg owed Hughes \$7,710.24 in unpaid prevailing wages. The Wage and Hour Unit imposed a penalty of \$25.00 for each day Hughes was underpaid, which was estimated to be 73 days, for a total of \$1,825.00. The Wage and Hour Unit also imposed a penalty of \$1,542.05, which represented 20% of the delinquently paid prevailing wages and fringe benefits, and a penalty of \$274.46 for audit costs payable to the Wage and Hour Unit. The Wage and Hour Unit also held that Sorg owed Hughes \$1,160.00 in unpaid wages and a penalty of 55%.

On July 12, 2011, the Wage and Hour Unit received Sorg's request for redetermination. On July 18, 2011, the Wage and Hour Unit referred the matter to Joe Maronick, Employment Law Mediator. On August 29, 2011, the matter was transferred to the Hearings Bureau after attempts at mediation were unsuccessful.

On December 9, 2011, the Hearing Officer issued a Scheduling Order after a final pre-hearing conference on December 5, 2011. Sorg had requested to reschedule the hearing, which was originally scheduled to be held on December 12, 2011. The

Hearing Officer directed Sorg to submit a list of three proposed dates. Sorg submitted a written statement indicating that he would have trouble making himself or his witnesses available due to the holidays. On December 9, 2011, the Hearing Officer issued an order denying Sorg's request that the hearing be rescheduled for some date after the holidays and scheduled the hearing for December 22, 2011. The order was not returned as undeliverable by the United States Postal Service.

On December 22, 2011, Hearing Officer Caroline Holien convened a telephone hearing on this matter. Sorg represented to the Hearing Officer that he did not receive the Scheduling Order but had received the investigative file that the Hearings Bureau sent to him a third time at or about the same time the Scheduling Order was mailed. Sorg indicated to the Hearing Officer that he was willing to proceed to hearing that day.

Ronald Sorg appeared and represented himself. Joseph Nevin, agency legal counsel, represented the Department of Labor and Industry. Leighton S. Hughes appeared and represented himself. Documents 1 through 124 from the Department's investigative file were admitted without an objection. Department's Exhibits 1 through 16 were also admitted without objection.

Sorg, Hughes, and Randy Siemers, Compliance Specialist, appeared by telephone and presented sworn testimony. Following the hearing, the case was deemed submitted for decision.

Nevin renewed his motion that the Department's discovery requests be deemed admitted based upon Sorg's failure to timely respond to its requests. The Hearing Officer reviewed each of the Department's discovery requests with Sorg during the hearing. Sorg admitted each fact the Department requested to be admitted and those facts are now deemed admitted. Accordingly, those facts are included in the Findings of Fact set forth below.

Having considered the evidence and exhibits presented at the hearing and the parties' arguments, the Hearing Officer makes the following findings of fact, conclusions of law, and order.

II. ISSUES

1. Whether Sorg failed to pay prevailing wages to Hughes?
2. If Sorg failed to pay the prevailing wage to Hughes, what percentage of statutorily prescribed penalty should be imposed?

3. If Sorg failed to pay the prevailing wage to Hughes, must it pay the statutorily required \$25.00 per day forfeiture?

4. Whether Sorg owes Hughes for work performed on projects not subject to the standard rate of prevailing wages and owes penalties or liquidated damages, as provided by law?

III. FINDINGS OF FACT

1. Hughes worked as an electrician for Sorg, an average of 48 hours per week, from approximately January 2010 through January 14, 2011. Hughes' hourly wage was approximately \$29.00. Hughes's gross wages, which were paid on a bi-weekly basis, were approximately \$2,185.00, regardless of what type of project he worked on during the pay period. Hughes was allowed to use the employer's credit card when traveling for work.

2. From July 2010 through December 2010, Hughes worked on two prevailing wage jobs. Those jobs included the Baker Fire Hall project in Baker, Montana, and the Northern AG Research Project (Northern AG) in Havre, Montana. Both projects were constructed pursuant to a "public works contract" as defined in Mont. Code Ann. § 18-2-401(11), and are subject to the standard prevailing rate of wages as defined in Mont. Code Ann. § 18-2-401(13). Sorg was required to maintain records as per Admin. R. Mont. 24.17.301 for all public works contracts that his business was awarded.

3. Hughes worked for Sorg on other projects during this period that were not subject to the standard prevailing rate of wages.

4. The prevailing wage at the Baker Fire Hall project was \$37.26 (\$26.83 base + \$10.43 fringe). The prevailing wage at the Northern AG Research Project was \$37.22 (\$27.03 base + \$10.19 fringe). Sorg did not pay Hughes the prevailing wage at either project. Hughes worked between 40 and 48 hours each week as an electrician on each project. Hughes' hourly wage on each project was approximately \$29.00.

5. From March 5, 2010 through April 16, 2010, Hughes worked 260 hours on the Baker Fire Hall project. Hughes received \$6,690.00 in wages for work performed on this project.

Hughes earned \$8,942.40 in prevailing straight time wages and \$804.90 in overtime wages for a total of \$9,747.30. Considering the difference between the amount of wages earned and the amount actually paid, Sorg owes Hughes \$3,057.30 in unpaid prevailing wages for work performed on the Baker Fire Hall project.

6. From July 12, 2010 through September 10, 2010, Hughes worked approximately 432 hours on the Northern AG project. Hughes earned \$14,880.00 in prevailing straight time wages and \$1,297.44 in overtime wages for a total of \$16,185.44. Hughes received approximately \$11,532.50 in wages for work performed on the Northern AG project. Considering the difference between the amount of wages earned and the amount actually paid, Sorg owes Hughes \$4,652.94 in unpaid prevailing wages for work performed on the Northern AG project.

7. Hughes is owed \$7,710.24 in unpaid prevailing wages for work performed on the Baker Fire Hall Project and the Northern AG project. Hughes is also owed a forfeiture in the amount of \$1,825.00 based on the 73 days that wages were unpaid at the statutory rate of \$25.00 per day.

8. Sorg owes a penalty of \$771.03, which represents 10% of the unpaid wages. Sorg also owes audit costs of \$274.46.

9. Sorg owes Hughes \$1,160.00 in unpaid wages for work performed on projects not subject to the standard rate of prevailing wages during the final week of his employment, as well as a penalty of \$638.00 (\$1,160.00 x 55%). Hughes worked approximately 40 hours during the final week of his employment at a pay rate of \$29.00 per hour.

IV. OPINION¹

A. Sorg Owes Additional Wages to Hughes for Work Performed on Projects Subject to the Standard Prevailing Rate of Wages

There is no dispute that Hughes worked on the Baker Fire Hall project and the Northern AG project, both of which were constructed pursuant to a “public works contract” and are subject to the standard prevailing rate of wages. The parties dispute (1) the number of hours Hughes worked on either project during the claim period and (2) the amount owed to Hughes for work performed on these projects.

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. Employers must also pay the prevailing wages on public works contracts or be subject to penalties and fees as provided by the law. Mont. Code Ann. § 18-2-407. The employer is obliged to classify each employee who performs labor on a public works

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

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. 24.16.9006.

The burden of proof regarding hours worked is on the employer, not the employee. *Garsjo v. Department of Labor and Industry* (1977), 172 Mont. 182, 562 P.2d 473. If the employer fails to record the employee's hours, reference is then made to the employee's records. However, the employee is not to be penalized for failing to keep precise time records.

Where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes, a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act. In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.

Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687 (1946).

Sorg and Hughes both testified that Hughes was not required to submit a time sheet or to maintain a record of the number of hours he worked on any project. Both men testified that Sorg paid Hughes a gross amount of approximately \$2,185.00 on a bi-weekly basis on the assumption that Hughes worked 48 hours each week. Sorg admitted not providing Hughes with a pay stub unless specifically requested to do so. Sorg also admitted that he failed to maintain adequate payroll records during the claim period.

The only evidence Sorg submitted regarding Hughes' wages during this period was a spreadsheet outlining Hughes' bi-weekly pay for the period in question (Document 92). Hughes submitted an outline of the hours he worked during each pay period, which he submitted to the Department with his claim (Documents 120 through 124). Sorg was asked to review Hughes' documentation with the Hearing Officer during the hearing. Sorg argued that Hughes' figures were incorrect and failed to account for time Hughes spent working on private construction projects during that period. However, Sorg was unable to state with any certainty the amount of

time Hughes spent on those projects or the amount of time Hughes spent working on the projects subject to the standard prevailing wage rate. Sorg indicated that his testimony regarding the hours Hughes worked during the period was based almost entirely on a spreadsheet prepared by the Department (Document 15). Sorg's vague and inconsistent testimony was insufficient to overcome the evidence submitted by both Hughes and the Department, as well as Hughes' own testimony.

Sorg also testified that he paid Hughes for travel one-way to each project and Hughes was given a credit card to cover food and lodging. Sorg argued that Hughes misused the company credit card and testified that he is pursuing criminal charges against Hughes. Hughes provided the documents given to him by law enforcement officers investigating Sorg's allegations. Those documents are unclear as to which charges were made by Hughes or what amount he received to cover his travel, food, and lodging during the claim period. Further, Sorg was unable to clearly state at the time of hearing which charges were made by Hughes.

Sorg argued that he was not given the opportunity to fully respond to Hughes' allegations. Sorg did not provide any credible explanation as to why he repeatedly failed to fully respond to the Department's requests for information or why he failed to submit payroll records at any time since Hughes filed his claim in March 2011. Under these circumstances, Hughes has proven that he is owed the wages as determined by the Department in its redetermination.

B. *Sorg Owes a Penalty*

Mont. Code Ann. § 18-2-407 provides that a contractor to a public works contract who pays employees at less than the prevailing wage as established under the public works contract "shall forfeit to the department a penalty at a rate of **up to** 20% of the delinquent wages plus fringe benefits . . ." (emphasis added).

Admin. R. Mont. 24.17.851 establishes criteria to determine penalty and cost imposition in cases where a contractor fails to pay the prevailing wage. The regulation utilizes the following criteria:

- (a) the actions of the contractor in response to previous violations;
- (b) prior violations;
- (c) the opportunity and degree of difficulty to comply;
- (d) the magnitude and seriousness of the violation;
- (e) whether the contractor knew or should have known of the violation.

In addition, Admin. R. Mont. 24.17.851(3) permits consideration of the amount of the underpayment of wages in arriving at the penalty to be imposed.

With respect to the 20% penalty, the Department argues that the Hearing Officer should pay deference to the Department's practice of imposing a 20% penalty in a prevailing wage case. The Hearing Officer, however, has only such power as is granted by applicable statutes and regulations and is bound to follow the directives contained in each. *Auto Parts of Bozeman v. Employment Relations Division*, 2001 MT 72, ¶ 38, 305 Mont. 40, 50, 23 P.3d 193, 200. Mont. Code Ann. § 18-2-407, while requiring that a penalty be imposed, does not require that in all instances the penalty must equal 20%. Rather, the statute directs that a penalty of *up to* 20% of the delinquent wages must be imposed. Admin. R. Mont. 24.17.851 provides direction for the balancing process to determine the appropriate amount of penalty to be imposed. Accordingly, the Hearing Officer has engaged in the balancing process articulated in Admin. R. Mont. 24.17.851 to determine the proper amount of the penalty to be imposed in this case.

In mitigation, there is no evidence that Sorg has had any prior violations of any statutes or rules. Based on these factors, the Hearing Officer concludes that a 10% penalty equaling \$771.03 is appropriate in this case.

C. Sorg Must Pay the Statutorily Prescribed \$25.00 Per Day Forfeiture.

Mont. Code Ann. § 18-2-407 also provides that a contractor, subcontractor, or employer who fails to pay prevailing wages shall forfeit to the employee the amount of wages owed plus \$25.00 a day for each day that the employee was underpaid. The Hearing Officer finds that Hughes was underpaid for 73 days. Therefore, Sorg owes a total forfeiture of \$1,825.00.

D. Sorg Owes Hughes Wages for Work Performed on Projects not Subject to the Standard Prevailing Rate of Wages and a Penalty on the Unpaid Wages

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.

There appears to be no dispute that Sorg owes Hughes wages for work performed during the last week of his employment. The information submitted by Sorg prior to hearing does not include any information regarding Hughes' last week of employment. Hughes testified that he worked approximately 40 hours during his final week of employment. Hughes' testimony was more forthright than Sorg's vague and inconsistent testimony. Hughes' testimony regarding his last week of employment is more credible than Sorg's testimony. The evidence shows Sorg owes Hughes \$1,160.00 in unpaid wages for his last week of employment.

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 Sorg to pay at least a 55% penalty on the unpaid wages it owes Hughes. Admin R. Mont. 24.16.7566. The Hearing Officer finds Hughes is owed a 55% penalty on the wages owed in the amount of \$638.00 ($\$1,160.00 \times 55\%$).

V. CONCLUSIONS OF LAW

1. Sorg failed to pay prevailing wages to Hughes at the two prevailing wage job sites he worked at during the claim period as required by Mont. Code. Ann. § 18-2-407.

2. Sorg owes Hughes additional wages of \$3,057.30 for work performed on the Baker Fire Hall project and \$4,652.94 for work performed on the Northern AG project for a total of \$7,710.24 in unpaid prevailing wages on those two projects.

3. Pursuant to Mont. Code. Ann. § 18-2-407 and Admin. R. Mont. 24.17.851, Sorg owes a penalty in the amount \$771.03 ($\$7,710.24 \times 10\%$) based upon the amount of unpaid prevailing wages during the claim period.

4. Pursuant to Mont. Code. Ann. § 18-2-407, Sorg owes \$25.00 per day forfeiture to Hughes in the amount of \$1,825.00 ($\25.00×73 days).

5. Pursuant to Mont. Code. Ann. § 18-2-407, Sorg must pay audit costs in the amount of \$274.46.

6. Sorg owes \$1,160.00 for work performed by Hughes during the final week of his employment. Sorg also owes a penalty of \$638.00 for these unpaid wages (\$1,160.00 x 55%).

VI. ORDER

Ronald Sorg, d/b/a Sun-Lite Electric, is hereby ORDERED to tender a cashier's check or money order in the amount of \$12,378.73. The total amount represents: \$7,710.24 in unpaid prevailing wages; \$771.03 in penalty for the unpaid prevailing wages; \$1,825.00 in forfeiture; \$274.46 in audit costs; \$1,160.00 in unpaid regular wages; and \$638.00 in penalty for the unpaid wages. The cashier's check or money order must be made payable to Leighton S. Hughes 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. Appropriate federal and state taxes should be deducted from the unpaid wages portion only.

DATED this 10th day of February, 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. § 18-2-407(2), 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.