

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM)	Case No. 2004-2011
OF MATTHEW ROESNER,)	
)	
Claimant,)	
)	
vs.)	
)	FINAL AGENCY DECISION
ELM GROUP, LLC, an Idaho limited)	
liability company not registered with the)	
Montana Secretary of State d/b/a EXTREME)	
LAND MANAGEMENT, LLC,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

On May 19, 2011, Matthew Roesner filed a claim with the wage and hour unit of the Department of Labor and industry claiming that his former employer, Extreme Land Management, LLC (ELM), owed him \$960.00 in unpaid wages. ELM responded that Roesner was not an employee of the company, but rather an independent contractor. On September 16, 2011, the Independent Contractor Central Unit determined that Roesner was an employee of ELM during the time period in question.

Subsequently, the wage and hour unit determined on September 28, 2011 that Roesner was owed \$430.00 in unpaid wages based on a rate of pay of \$15.00 per hour. Roesner appealed the wage and hour determination arguing that he was to be paid at the rate of \$20.00 per hour. On December 1, 2011, the matter was transferred to the Hearings Bureau for a contested case hearing. On December 5, 2011, the Bureau issued a notice of hearing and telephone conference. On December 22, 2011, a scheduling conference was held wherein the parties agreed to hold a hearing on January 12, 2012. The parties further agreed that no discovery in the matter was necessary. On January 12, 2012, the Hearing Officer convened the telephone hearing with both parties appearing and representing themselves. At the hearing, the parties stipulated to the admission of Documents 1 through 63 that were included with the notice of hearing. Roesner, Robert Hebb, and Keith Edmundson

provided sworn testimony. Documents 4 and 54 are sealed from public disclosure to protect the privacy interests of the claimant.

II. FINDINGS OF FACT

1. ELM Group, LLC, an Idaho limited liability company not registered with the Montana Secretary of State and doing business as Extreme Land Management, LLC (ELM), employed Matthew Roesner for the time period of November 17, 2010 through November 30, 2010. Roesner worked for ELM in the Libby, Montana, area.

2. Roesner was an equipment operator working on a post timber sale cleanup. His work involved the operation of an ASV skid steer with an Econ head.

3. Montana's prevailing wage for power equipment operators Group 1 (the lowest level of operators) was \$23.47 per hour plus fringe benefits of \$9.50 per hour. Montana Prevailing Wage Rates for Heavy Construction 2010, www.mtwagehourbopa.com.

4. Roesner worked a total of 102 hours for ELM. Roesner was to be paid \$20.00 per hour. Roesner was paid a total of \$1,100.00 in wages for 55 hours of work. Roesner was not paid for 47 hours of work.

5. Roesner is owed \$940.00 in unpaid wages.

6. Penalty on the unpaid wages amounts to \$517.00.

III. DISCUSSION

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 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.

In this matter the employer did not dispute the number of hours that Roesner worked, rather it argued that it did not agree to pay Roesner \$20.00 per hour. ELM also argued that it did not have any assets from which to pay Roesner. Roesner was an equipment operator for ELM. It is clear from the testimony of Roesner, Edmundson, and Hebb that the agreement was equipment operators would be paid \$20.00 per hour. While Hebb argued initially that Roesner was an independent contractor, the Independent Contractor Central Unit (ICCU) determined that Roesner was, in fact, an employee. ELM did not appeal the ICCU determination. Hebb also attempted to show that the \$15.00 per hour rate he claims Roesner agreed to work for is supported by the purported fact that the prevailing wage rate for equipment operators is closer to that rate than \$20.00 per hour. However, Montana’s prevailing wage rates for equipment operators in 2010 shows that they were to be paid at the rate of \$23.47 per hour plus fringe benefits of \$9.90 per hour. This contradiction of Hebb’s testimony about the reasonableness of the \$15.00 hourly rate combined with Roesner’s and Edmundson’s testimony that Roesner was to be paid \$20.00 per hour results in the conclusion that Roesner was to be paid \$20.00 per hour for his work at ELM.

ELM paid Roesner \$1,100.00 in partial payment for the work he performed. This payment equates to 55 hours at \$20.00 per hour. Document 3 shows that Roesner worked 102 hours for ELM during the period for which he seeks payment of unpaid wages. This leaves a balance of 47 hours unpaid for which Roesner is owed \$940.00.

B. Penalty

For claims not involving minimum wage or overtime, a 55% penalty must be imposed. Admin. R. Mont. 24.16.7566. ELM owes a penalty in the amount of \$517.00 on the \$940.00 in unpaid wages ($\$940.00 \times 0.55 = \517.00).

IV. 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. ELM owes Roesner \$940.00 in unpaid wages and a penalty on the unpaid wages of \$517.00.

V. ORDER

ELM Group, LLC, d/b/a as Extreme Land Management, LLC, is hereby ORDERED to tender a cashier's check or money order in the amount of \$1,457.00, representing \$940.00 in wages and \$517.00 in penalty, made payable to Matthew Roesner, 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 24th day of January, 2012.

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.