STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM OF OLIVER W. ARLINGTON,	)	Case No. 788-2010
Claimant,	)	
vs.	)	**ON REMAND: FINAL AGENCY DECISION**
MILLER'S TRUCKING, INC., a Montana Corporation,	)	
Respondent.	)	

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I. INTRODUCTION

Oliver Arlington worked for Miller's Trucking, Inc., as a log truck driver and loader operator from September 2008 through August 2009, delivering logs entirely within Montana in a Miller's truck, and maintaining one or more of Miller's trucks, performing routine maintenance and safety checks on the trucks. Arlington's employment with Miller's stemmed from an oral agreement between Arlington and Miller's owner, Tony Miller. Miller's paid Arlington 25% of the "load rate." Arlington asserted that Tony Miller had agreed to pay ("guaranteed") $60,000.00 annually for Arlington to work 40 hour work weeks, and that Arlington was also entitled to overtime pay for hours more than 40 per week. Miller's denied any guarantee, denied any overtime entitlement, and asserted that it had properly paid 25% of the load rate due Arlington, who had received all the compensation to which he was entitled.

The Department's Wage and Hour Unit, the Hearings Bureau, and the District Court on judicial review all found in favor of Miller's and against Arlington. On appeal, the Montana Supreme Court reversed and remanded for further Hearings Bureau proceedings on two issues, with some additional evidence:

> . . . [W]e reverse the determination that Arlington engaged in the interstate transportation of goods and that his work was within the overtime exemption of the Act. We therefore remand to the District Court for remand to the Department for production and consideration of additional evidence, a determination of whether this evidence bears on Arlington's claim that there was an oral employment agreement for wages of over $60,000 per year, and a

determination of the amount of overtime pay owing from Miller's to Arlington.

Arlington v. Miller's Trucking, Inc., ¶46, 2012 MT 89, 364 Mont. 534, 277 P.3d 1198.

The hearing on remand convened on February 13, 2013, concluding that same day. Exhibits 9-10[1], 20-49[1], 51[1], 78[1], 103[1], 106[1], 107, 108, 109, 111[1], 112, 118-157[1], 168-69[1], 178[1], 179-191, 192, 194[2]-423, 425-523[1], 529-536, 537-538, and 541 were admitted into evidence. Susan Miller, Oliver Arlington, and Tony Miller testified in person. Trent Woldstad, Marshall Aamold, and Bob Berman testified by telephone. On March 27, 2013, the parties filed and served their simultaneous reply briefs and the matter was deemed submitted for decision on remand.

II. ISSUE

The issues herein are whether, on remand, Arlington is entitled to wages that he earned from Miller's and has not been paid, because either he has now established the guarantee of wages he alleged, or because he worked overtime hours for which he was not paid an overtime rate, or both.

III. FINDINGS OF FACT

Any of the findings in the original decision that are inconsistent or in conflict with the following findings are hereby struck or amended to be consistent with the following findings. Otherwise, the original findings are incorporated by reference herein as if set forth at length. To avoid numerical confusion, the remand findings are numbered with "R" (for "Remand") in front of each number.

R1. During September 2008 through August 2009, Oliver Arlington worked for Miller's Trucking, Inc., and was paid by Miller's Trucking, at the agreed upon load rate, the total of $31,901.21.

R2. Miller's Trucking did not guarantee any certain amount to any of its drivers, including Arlington, although it sometimes did indicate to drivers that "typically" earnings, depending upon diligence and efficient use of time, could be $60,000.00 annually from the 25% load rate agreement. The substantial and credible evidence of record does not support Arlington's testimony that he was guaranteed at least $60,000.00 per year from that load rate. There is no credible corroborating evidence supporting that testimony. It is inherently incredible that an experienced business owner and operator would ever make such a promise, given the uncertainties incumbent upon operating a logging truck as a hired driver.

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[1] These exhibits were admitted into evidence in the first hearing also.

[2] Of these exhibits, only Exhibit 194 was admitted into evidence in the first hearing.

R3. Miller's was unable to obtain and maintain records of the hours Arlington worked because, even though Miller's requested, demanded, and required such hours from him, Arlington failed and refused to provide them.

R4. Arlington's records of the hours he worked for Miller's, as he presented them at hearing both times, are internally inconsistent and in conflict with credible testimony from other witnesses about hours they observed Arlington to be resting with his truck parked, even though from his testimony those same hours were among those he spent working. The hours that he presented at hearing both times as the hours he worked are also inconsistent with the credible evidence from other witnesses that they frequently (although perhaps not always) were able to complete intrastate log deliveries, including loading and unloading, in times substantially less than Arlington testified that he always took to perform substantially comparable deliveries.

R5. Miller's failed to keep adequate records of Arlington's working times, because Arlington's conduct frustrated their efforts to keep such records. Arlington has not produced, on the entire record, sufficient evidence to show the amount and extent of the work he alleged that he performed, as a matter of just and reasonable inference. Even if he had provided such otherwise sufficient evidence, Miller's evidence of the time other employees spent performing comparable work would have negated the reasonableness of any just inference that perhaps could otherwise have been drawn regarding the amount of time Arlington actually worked, based upon his own evidence.

R6. Taken as a whole, the evidence adduced does not support a finding of any overtime worked by Arlington, even as an approximation.

IV. DISCUSSION

The "Transcript for Job Order" documents that Arlington produced only established that Miller's did sometimes tell prospective drivers generally that drivers "typically" earned $60,000.00 annually. Arlington earned slightly more than half that amount, in 11 months (Sep. 14, 2008 through Aug. 14, 2009, according to Exhibits 529-536), allegedly working 2,467.2 hours (***id.***). In 47.714 weeks, he allegedly averaged almost 52 hours a week. Yet, by his own evidence, he averaged perhaps two loads a day, which, according to their testimony, other drivers could have completed while working less than, or certainly not more than, 40 hours a week.

Arlington gave conflicting testimony about whether he included truck washing time in his hours. He also claimed that he took no breaks, for meals or otherwise. However, other employees testified that they observed his truck, with him in it, immobile, for hours on end, during what had to be, from his testimony, some of the hours he claimed to be constantly working.

Arlington also testified that he provided consistent and complete time records to the employer, although his evidentiary accounts of his working times were not

entirely consistent or complete. Although he could have made copies of the records he allegedly provided to the employer documenting his working times, he did not.

When the employer does not keep adequate records, the employee can make a case for recovery by producing "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *Garsjo v. DLI* (1977), 172 Mont. 182, 562 P.2d 473. The actual reasoning of the decision and the authority cited follow:

> Here, employer did not keep records required by law and which could have easily supplied the needed information. In *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687, 66 S.Ct. 1187, 1192, 90 L.Ed. 1515, 1523, the United States Supreme Court in a Fair Labor Standards Act case discussed this difficulty:
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> ". . . 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 . . . ."
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> In *Purcell v. Keegan*, 359 Mich. 571, 103 N.W.2d 494, 497, the Michigan Supreme Court discussed this problem and set out exact procedure:
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> ". . . When the employee shows, as he did here, 'that he did in fact perform overtime work for which he was not properly compensated and produces sufficient evidence to show the extent and amount of such work as a matter of just and reasonable inference, 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.' . . . ."
>
> In the instant case Loraine Horner testified she worked 16 hours each day but conceded that she left to take her child to school and do shopping. The time sheet for July indicates that while she was employed on an hourly basis, she was paid for 14 hours per day. No evidence as to the precise amount of work done was offered by the employer and the inference of the hearings examiner is a reasonable one. It is not clearly erroneous in view of the reliable, probative, and substantial evidence on the record as a whole. There is no failure of proof.

Garsjo v. DLI (1977), 172 Mont. 182, 188-90, 562 P.2d 473, 476-77.

Miller's did not keep the records required by law but its credible evidence was that it had to rely upon Arlington for the information, and although Susan Miller tried hard to get that information from him, he, for the most part, did not provide it.

In the normal situation, when the employee is working on the employer's premises and neither employer nor employee offers accurate records or "convincing substitutes," *Anderson*, quoted in *Garsjo* (***above***), the unfairness of penalizing the employee for failure of proof is manifest. In the present situation, on the other hand, both employer and its over-the-road trucker employee had legal duties to keep records. It was the employee who originated and controlled those records and who decided what records he would provide to the employer.

Taken by itself, the contradiction between Susan Miller's testimony and Arlington's testimony about what records he did provide to her might have been resolved in favor of either person. But Miller's provided the testimony of other employees about how long it took them to make log deliveries and how they saw Arlington taking long breaks from his work. This evidence called into question Arlington's explanations about the accuracy of the reports he allegedly provided to Susan Miller regarding his work times. Miller's came forward with other evidence (the other drivers' testimony) that effectively negated the reasonableness of an inference drawn from Arlington's evidence of how many hours he actually worked. With his credibility damaged, his testimony about what records he provided to Susan Miller was weaker than her denials that he did give her such records.

Had Arlington established a credible total number of hours worked, the calculation he used technically would not have been an accurate method of calculating his wages earned (total hours divided into total earnings equals hourly rate, then add one-half the hourly rate times the overtime hours worked to determine the overtime pay). There is a Department rule that requires that calculation be done

for each successive pay period. Admin. R. Mont. 24.16.2514. However, had the evidence, taken as a whole, been sufficient credibly to establish that Arlington's calendar record-keeping was sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference, the Hearing Officer would use his calculation to determine overtime worked and unpaid. However, on the present record, Arlington failed to prove that he in fact performed any work for which he was not compensated, because he has not shown, as a matter of just and reasonable inference, the approximate amount and extent of his work.

In light of the reliable, probative, and substantial evidence on the record as a whole, Miller's compensated Arlington for all of the work that he performed during his employment as a driver.

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. Arlington did not prove that Miller's entered into an agreement with him to pay him at least $60,000.00 annually, or any other set dollar amount, nor that he worked overtime hours for which Miller's owed him earned and unpaid wages.

VI. ORDER

Oliver W. Arlington's claim against Miller's Trucking, Inc. is dismissed.

DATED this 3rd day of April, 2013.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ TERRY SPEAR
TERRY SPEAR
Hearing Officer

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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.