

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM)	Case No. 1095-2012
OF CHARLES E. WEBB,)	
)	
Claimant,)	
)	
vs.)	FINAL AGENCY DECISION
)	
SHAKER’S ROADHOUSE GRILL, LLC,)	
a Montana limited liability company,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

Both parties appealed from an August 10, 2012 Wage and Hour Unit redetermination finding that the respondent, Shaker’s Roadhouse Grill, LLC, (Shaker’s) owed the claimant, Charles E. Webb (Webb), \$1,475.18 in unpaid wages (\$1,220.00 in regular wages and \$255.18 in overtime premium), with a penalty of \$671.00 (a 55% penalty for not paying the wages found due and owing by August 28, 2012), with no liquidated damages under the FLSA. Shaker’s timely appealed on August 28, 2012. Webb appealed on September 25, 2012, asserting that he had not received the redetermination when originally mailed. It appears that not later than August 13, 2012, Webb had received notice that a redetermination had issued, but he continued to assert, when he finally did appeal in writing, that he still had not received the redetermination, but was appealing it to preserve his rights in case the mediation undertaken by the department should fail. Documents 3-5. For purposes of this decision, Webb’s appeal is timely. There is no evidence refuting his repeated statements, in testimony and in documents, that he did not get the redetermination, and the presumption that items properly placed in the U.S. Mail for delivery were delivered in the general course of business was overcome by his affirmative statements.

On April 16, 2013, the contested case hearing convened by telephone and concluded. Claimant Charles E. Webb participated. Claudia Puccio participated on behalf of respondent Shaker’s Roundhouse Grill, LLC. Webb and Puccio each testified under oath. Documents 1-270, as produced to the parties by the Hearings Bureau with the original notice of hearing, were admitted into evidence without objection.

Documents referenced during hearing for the Hearing Officer's consideration include Documents 76, 78, 105-109, 117, 194-216, 224-231, 232-237, 255-258, 261-262 and 263-269. The parties were permitted to submit written closing arguments, including citation to additional documents in the record (by specific number or numbers) that either party wanted the Hearing Officer to read and consider in deciding this case. The employer argued that consideration of "all of the documents number 1-270" was "the only way to follow the correct path of what has happened over the past two years." Claimant referred, in addition to some of the documents referenced during hearing, to Documents 3-6, 12-14, 18-23, 31, 33-43, 57, 59-68, 74-75 and 77, 81-84, 86-104, 115-116, 118-137, 150, 139-193, 216, 218-223, 240-243, 260 and 270. The matter was deemed submitted for decision at close of business on April 26, 2013, the deadline for submission of written closings. "Post-Hearing Order," April 16, 2013.

II. ISSUES

Is Webb due unpaid wages that he earned working for Shaker's?

III. FINDINGS OF FACT

1. Webb worked for Shaker's from April 15, 2011 through July 29, 2011. He initially worked irregular hours, at his own election, preparing the restaurant for opening, from April 15 through mid-May 2011. During this initial period, Webb told Claudia Puccio, one of the participants in the LLC and Webb's primary management contact, that he was employed in another job out of town, to explain his limited availability to meet with her. Shaker's neither kept nor attempted to keep any records of the hours Webb worked during this initial period, because Puccio believed that Webb was only working limited hours to prepare the restaurant for opening. Neither side provided testimony or identified exhibits that would address when (if ever) Webb, before filing his claim, submitted time records to Shaker's and requested payment for the hours he worked before the restaurant opened.

2. From its opening, on either May 13 or 16, 2011, through July 13, 2011, Webb worked, for a \$12.00 per hour wage, as the restaurant's cook, working essentially all hours when the restaurant was open. Shaker's was open from 5:00 p.m. to 9:00 p.m., Tuesdays through Sundays, a total of 24 hours per week. As an hourly employee, he was entitled to overtime wages whenever he earned them under the applicable law. During this period, from opening until Shaker's ceased paying Webb an hourly wage, Shaker's time-keeping system was the source of Shaker's records regarding the hours Webb worked, although Shaker's repeatedly questioned whether Webb was actually working all the hours for which he was "in" on the time-keeping system.

3. Effective July 14, 2011, Shaker's changed Webb from an hourly wage employee to a salaried employee. Webb testified that he was not aware of this

change – that it was made without his knowledge or agreement. However, Webb offered no explanation for why the Shaker’s time-keeping system had no record of his hours, starting on July 14, 2011. He did not affirmatively testify that he had continued to use the time-keeping system after July 13, 2011, and there is no reason for him to stop using it unless he was aware he was now on salary. Based upon the entries in his calendar pages, which contradict his denial of any knowledge in mid-July that he had been converted to a salary, Webb knew about the changes in his method of pay, and continued to work after them, whether he liked them or not.

4. Shaker’s had continued concerns about the cost of Webb’s wages and about the accuracy of Webb’s reported hours. Converting him to a salary addressed both problems.

5. Shaker’s time-keeping system was essentially a “punch-in and punch-out” system. An employee with access to the restaurant when it was closed as well as when it was open (which Webb had) could punch in, and the system would record him as working until he punched back out. Webb had complete control over the number of hours the system recorded him as working. Shaker’s had no effective means of exercising any on-site supervision over Webb’s work or time-keeping.

6. At the end of July 2011, Webb left his employment with Shaker’s. His primary reason for leaving employment was ongoing disagreement with his employer about his role in the restaurant, the amount he had been paid for work thus far, and the salary (which Shaker’s reduced a week after originally imposing it) that replaced his original \$12.00 per hour wage. His last working day was July 29, 2011.

7. After a series of communications with Puccio following his separation from employment, on December 13, 2011 (mailed 12-12-11), Webb filed a written wage complaint with the Wage and Hour Unit, claiming that Shaker’s owed him \$5,760.00 in unpaid regular wages (480 hours at \$12.00 per hour), \$7,425.00 in unpaid overtime wages (412.5 hours at \$18.00 per hour), \$682.44 in unpaid expenses he incurred in his work, and two weeks of salary (\$1,320.00). He asserted he was owed a total of \$15,187.44, but then wrote at the bottom of the same page, “The employer owes \$700.00 in restaurant expenses to me.” Documents 261 and 262. \$15,187.44 is equal to \$5,760.00 plus \$7,425.00 plus \$682.44. The additional \$700.00 claim at the bottom of the first page of Webb’s claim is hereafter ignored.

Webb’s Assertions and Evidence about the Time He Worked

8. In support of his claim, Webb submitted four printed calendar pages, upon which he had made multiple written entries regarding his working time at Shaker’s. Webb claimed that the calendar entries were contemporary records he kept of the time he had worked for Shaker’s. The four pages were for April, May, June, and July of 2011. Documents 263-266.

9. In the box for July 11, 2011, on Document 266, Webb wrote “Shaker’s” and “off” followed by a zero with a circle around it. In each of the boxes for April 15 through July 10, and for July 12 through 15, Webb wrote “Shaker’s” in each box, and then in each box wrote two times with a dash between them. The two times, representing his alleged commencement and cessation of work on each day, were always an exact hour or half hour (*e.g.*, “10 AM – 6 PM” or “6 AM – 1:30 PM”). Next, in each box Webb wrote the total of the elapsed hours between the two times (always in either a round number of hours or a round number followed by the fraction “½”), with the total circled in all but one of these boxes (there is no circle around the total in the box for July 15).

10. On Document 266, in the box for July 16, spilling over outside that box to the right-hand side of the printed calendar (long sides horizontal instead of vertical), Webb wrote, “I WAS CHANGED TO SALARY BY OWNER!” [Original emphasis.] On Document 266, in the boxes for July 16 through July 29, the word “salary” is written in parentheses below the word “Shaker’s,” and there are neither starting and ending times nor a total of the time between them written in those boxes.

11. At the bottom of the page for calendar month April 2011, Document 263, Webb wrote the following, correctly adding up the hours he wrote down for the days he reported working in April 2011. Based upon these numbers, Webb averaged 7 hours of work each day for the last 15 days of April, for a total of 105 hours reportedly spent working for Shaker’s while the restaurant was being prepared to open.

4/15/11 –	105 HOURS TOTAL
	80 HOURS REGULAR @ \$12.00 HR.
4/30/11	25 HOURS OVERTIME @ \$18.00 HR.

12. At the bottom of the page for calendar month May 2011, Document 264, Webb wrote the following. Based upon these numbers, Webb averaged 11.03 hours of work each day for the first 15 days of May, and 12.22 hours of work each day for the last 16 days of May.

5/1/11 – 5/15/11 –	165.5 HOURS TOTAL
	80.0 HOURS REGULAR @ \$12.00 HR.
	85.5 HOURS OVERTIME @ \$18.00 HR.
5/16/11 – 5/31/11 –	195.5 HOURS TOTAL
	80.0 HOURS REGULAR @ \$12.00 HR.
	115.5 HOURS OVERTIME @ \$18.00

13. Webb incorrectly added up the hours he wrote down for the days he reported working in May 1 through May 15. The numbers he wrote down added up to 155.5 hours rather than 165.5 hours. Webb correctly added up the hours he wrote down for the days he reported working in May 16 through May 31. The total

(195.5) for that period included 17 hours for May 20, although the hours identified on the calendar for May 20 appear to be “6 AM – 4 PM” which would be 10 hours, rather than 17 hours. 17 hours would be for 6:00 a.m. to 11:00 p.m. on May 20, which clearly is what Webb wrote down on his calendar. Thus, a more accurate number by Webb’s own report would be 188.5, given Webb’s identified hours spent working that day. With these corrections, Webb averaged 10.37 hours of work each day for the first 15 days of May (155.5 hours total), and 11.78 hours of work each day for the last 16 days of May (188.5 hours total).

14. At the bottom of the page for calendar month June 2011, Document 265, Webb wrote the following.

6/1/11 – 6/15/11 –	150.5 HOURS TOTAL
	80.0 HOURS REGULAR @ \$12.00 HR.
	70.5 HOURS OVERTIME @ \$18.00 HR.
6/16/11 – 6/31[sic]/11 –	133.5 HOURS TOTAL
	80.0 HOURS REGULAR @ \$12.00 HR.
	53.5 HOURS OVERTIME @ \$18.00 HR.

15. Webb correctly added up the hours he wrote down for the days he reported working in June 1 through June 15 (averaging 10.03 hours per day and 150.5 hours total). Webb incorrectly added up the hours he wrote down for the days he reported working in June 16 through June 30. The numbers he wrote down added up to 132.5 hours rather than 135.5 hours. With this correction, Webb averaged 8.83 hours of work each day for the last 15 days of June (132.5 hours total).

16. On the right-hand side of the page for calendar month July 2011, Document 266, Webb wrote the following.

I RESIGNED 7/29/11 FOR NON PAYMENT OF WAGES AND ALSO OWNER
CHANGED MY PAY WITHOUT MY KNOWLEDGE. C.E.WEBB

17. At the bottom of that same page for calendar month July 2011, Document 266, Webb wrote the following.

7/1/11 – 7/15/11	142.5 HOURS TOTAL
	80.0 HOURS REGULAR @ \$12.00
	62.5 HOURS OVERTIME @ \$18.00
7/16/11 – 7/29/11	145.0 HOURS TOTAL (AVERAGE)
	1320.00 SALARY OWED. [Original emphasis.]

18. Webb’s “average” hours of work each day for the first 15 days of July were 9.5 hours, and his “average” hours of work each day for the last 14 days he reportedly worked in July were 10.36 hours. He did not testify about how he determined these “averages,” or why in the middle of July he stopped keeping his own allegedly accurate records of the time he was working.

Shaker's Record-Keeping of Webb's Work Time

19. Shaker's time-keeping records indicated that Webb was "punched in" for the following hours on May 16 through July 16, 2011, according to the detailed time-system reports of his hours. Documents 225, 227, 229 and 231.

Date	Hrs	Date	Hrs	Date	Hrs	Date	Hrs	Date	Hrs
16	8.10	6/1	6.27	6/16	9.48	7/1	7.52	7/16	*
17	12.58	2	10.00	17	5.62	2	7.06	17	*
18	12.38	3	7.52	18	12.52	3	7.92	18	*
19	12.32	4	7.40	19	12.93	4	1.00	19	*
20	14.36	5	9.68	20	*	5	6.73	20	*
21	14.05	6	0.02	21	7.65	6	9.92	21	*
22	14.27	7	3.07	22	8.12	7	6.78	22	*
23	8.80	8	4.90	23	13.45	8	9.28	23	*
24	14.20	9	6.45	24	8.37	9	7.17	24	*
25	14.40	10	6.70	25	8.48	10	0.68	25	*
26	14.67	11	5.18	26	3.05	11	*	26	*
27	15.13	12	6.00	27	*	12	27.55	27	*
28	2.58	13	*	28	8.08	13	4.98	28	*
29	12.06	14	6.95	29	5.22	14	*	29	*
30-31	*	15	7.72	30	9.90	15	*		
<u>5/15-31 169.90</u>		<u>6/1-15 87.86</u>		<u>6/16-30 112.87</u>		<u>7/1-15 109.91[#]</u>		<u>7/15-29 No daily times</u>	

* No hours in Shaker's system for May 30 and 31, June 13, 20 and 27, and July 11 and 14-29.

[#] Total shown on Document 231. Daily times on Document 231 actually total to 96.59 hours.

Lack of Credibility for Webb's Time Reporting

20. Shaker's documented hours of work conflicted substantially with Webb's calendar report of hours at work, for the time from May 16 through July 13, 2011. Some days, the numbers are so close that Webb may have rounded his hours either up or down to the nearest hour or half hour. In most instances, the discrepancies are too great to explain as resulting from such an arguably innocent source. The discrepancies are in both directions – sometimes Webb reported longer hours, sometimes the Shaker's time system reported longer hours.

21. From May 16 through May 31, 2011, Webb reported longer working hours than Shaker's time-keeping reported on May 16, 17, 18, 19, 20, 21, 27 and 28. On May 30 and 31, Shaker's time-keeping reported that Webb did not work at all, and Webb reported working 8 hours each day. Shaker's time-keeping system reported longer working hours than Webb reported on May 22, 23, 24, 25 and 26. For the entire period, Webb reported working a total of 195.5 hours, which should have been 188.5 hours according to his own numbers, while Shaker's reported he worked a total of 169.9 hours.

22. During May 16-31, 2011, there were 3 Mondays, May 16, May 23 and May 30. The restaurant's hours were Tuesday through Sunday, 5:00 to 9:00 p.m.

23. Webb reported, on his calendar (Document 264), that on May 15 (Sunday night) he worked until 9:00 p.m., concluding an 11-hour day at the time the restaurant closed. On Monday, May 16, he reported working from 8:00 a.m. until 4:30 p.m., spending 8.5 hours, apparently on clean-up from the night before, because the restaurant should not have been open that day. Webb reported working from 9:00 a.m. until 10:00 p.m. on Tuesday, May 17, giving him ample prep time on Tuesday for Tuesday's open hours, with no necessity for any clean-up, since the restaurant should not have been open on Monday, May 16.

24. Webb reported on his calendar that on May 22 (Sunday night) he ended a 13-hour day at 10:00 p.m. On Monday, May 23, he reported working from 8:00 a.m. to 4:00 p.m., 8 hours, apparently on more clean-up from the night before. Webb reported working from 9:00 a.m. until 10:00 p.m. on Tuesday, May 24, giving him ample prep time on Tuesday for Tuesday's open hours, with no necessity for any clean-up before opening Tuesday at 5:00 p.m., since the restaurant should not have been open on Monday, May 23.

25. Webb reported on his calendar that on May 29 (Sunday night) he ended an 8-hour day at 10:00 p.m. He reported working from 10:00 a.m. to 2:00 p.m. on Monday, May 30, a day the restaurant was not open, and from 2:00 p.m. until 10:00 p.m. on Tuesday, May 31. That means Webb claims he worked 1 hour on May 29 after he closed the restaurant, then 7 more hours on May 30 and 31, before the restaurant opened on May 31 at 5:00 p.m.

26. Webb's total hours for May 2011 (starting on May 16) were approximately 169.9 hours according to Shaker's time-keeping system's total, or approximately 188.5 according to Webb's own total (corrected for his math error). Either number is inherently incredible. During that 16-day period, the restaurant was open a total of 13 days, for a total of 52 open hours. Using the numbers from the Shaker's time-system, Webb was punched on the restaurant's time-system, treated as at work and working, for approximately 2.27 hours while the restaurant was closed for each hour the restaurant was open, in addition to working all open hours at the restaurant. Even less credible were his own numbers, adjusted to correct for his own math error, by which he claims to have been working for Shaker's for more than 2.6 hours while the restaurant was closed for each hour the restaurant was open, in addition to working all open hours for the restaurant. Webb's claimed numbers of working hours for May 16 through 31, 2011 are unbelievable.

27. From June 1 through June 15, 2011, Webb reported longer working hours than Shaker's time-keeping reported on June 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 14 and 15. June 6 and 13 were Mondays, when the restaurant did not open at all. Shaker's time-system showed Webb working 12 minutes on June 6 (.2 hours) and no time at

all on June 13. Webb reported 5.5 hours worked on June 6 and 6 hours worked on June 13. Shaker's time-keeping system reported longer working hours than Webb reported on June 5. For the entire period, Webb reported working a total of 150.5 hours, while Shaker's reported he worked a total of 87.86 hours.

28. For all of the same reasons discussed at length in Findings 20-26, Webb's numbers for June 1 through 15, 2011 are also unbelievable.

29. From June 16 through June 30, 2011, Webb reported longer working hours than Shaker's time-keeping reported on June 17, 21, 22, 24, 25, 26, 28 and 29. On June 20 and 27, Shaker's time-keeping reported that Webb did not work at all, and Webb reported working 5 hours on the 20th and 5.5 hours on the 27th (both Mondays, when the restaurant was not open at all). Shaker's time-keeping system reported longer working hours than Webb reported for June 16, 18, 19, 23 and 30. For the entire period, Webb reported working a total of 132.5 hours, while Shaker's reported he worked a total of 112.87 hours.

30. For all of the same reasons discussed at length in Findings 20-26, Webb's numbers for June 16 through 30, 2011 are also unbelievable.

31. From July 1 through July 15, 2011, Webb reported longer working hours than Shaker's time-keeping system reported on July 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 13, 14 and 15. July 4 and 11 were Mondays, when the restaurant was not open at all. Shaker's time-keeping system reported that Webb worked 1 hour on July 4, and Webb reported working 8 hours on July 4. Shaker's time-keeping system and Webb reported that he worked no time on July 11. Shaker's time-keeping system reported that Webb worked 27.55 hours on July 12, 2011, and Webb reported that he had worked for 9 hours that day. Shaker's time-keeping system was no longer used for Webb beginning on July 14, 2011 (since Shaker's now considered him to be on salary). Webb showed 10.5 hours for both July 14 and 15. For the entire period, Webb reported working a total of 142.5 hours, and Shaker's time-keeping system reported he actually worked 96.59 hours (correcting the allegedly automated time-system's wrong sum of 109.91 hours worked).

32. For all of the same reasons discussed at length in Findings 20-26, Webb's numbers for June 16 through 30, 2011 are also unbelievable.

33. For July 16-29, Webb set forth an allegedly "average" number of working hours of 145.0 hours. However he may have derived this "average," it was based in some fashion upon the hours he reported on his calendar, which consistently lack credibility. It directly follows that his "average" hours for July 16-29 are also unbelievable.

34. Webb's testimony was that his calendars accurately reflected the time he spent working for Shaker's for the entirety of his employment (from April 15 through July 29, 2011). Since Webb's testimony is not credible regarding the time recorded on his calendars from May 15 through July 15, nor even for July 15 through July 29 (despite the lack of Shaker's time records for those dates), due to the intrinsically incredible number of hours he reported during those dates, the Hearing Officer is entitled to doubt his veracity in reporting his previous times, for many of the same reasons already recited, even though there are no records from Shaker's to compare with his previous times. Webb's reported times from April 15 through May 15 are also unbelievable.

35. It should also be noted that Webb's claim regarding the hours he reported, whether through his calendars or through the hours "on the clock" according to Shaker's time-system, is that he never took any time off whatsoever between his starting and stopping times, whether those times indicated he worked for 6 or 7 hours, or 12 hours, or 17 hours, or even more hours, without any breaks of any kind. He also at least implicitly claims that Shaker's endorsed and approved this "on the clock all of the time" approach to time-keeping. This also is unbelievable. Webb's time records keeping, whether using Shaker's punch-in system, which had so little supervision as to be an "honor system" time clock, or his own paper record keeping, entirely lacks credibility.

Lack of Credibility for Shaker's Time-System Reports on Webb's Hours

36. An automated time system might ordinarily carry greater weight than a handwritten accounting that may or may not have been kept contemporaneously with the times allegedly worked. However, there are some questions about Shaker's numbers, too. The detailed print-outs (Documents 225, 227, 229 and 231) include two adjoining columns, captioned "'Edited" and "Edited By." On Document 225, all 14 of the daily time totals for Webb, May 16-29, 2011, in May have a printed asterisk ("*") in the "Edited" column. The first 8 daily time totals have the name "Joe Martiniello" printed in the adjoining column for "Edited By" and the last 6 daily time totals have "Backoffice" printed in the "Edited By" column. On Document 227, 10 of the 14 daily time totals for Webb in the first half of June have a printed asterisk ("*") in the "Edited" column, and all 10 have the printed name "Joe Martiniello" in the adjoining column for "Edited By." On Document 229, 4 of the 13 daily time totals for Webb have a printed asterisk ("*") in the "Edited" column, and all 4 have the printed name "Joe Martiniello" in the adjoining column for "Edited By." On Document 231, 5 of the 12 daily time totals for Webb have a printed asterisk ("*") in the "Edited" column, and all 5 have the printed name "Joe

Martiniello” in the adjoining column for “Edited By.” There are also some handwritten changes on some of the detail sheets.

37. In addition, May 30-31, 2011 are dates upon which Webb’s calendar shows him working multiple hours. The “automated” Shaker’s time-keeping system has no record of those two days even existing. Document 225 documents time worked through May 29, 2011, identified as the last day in that pay period. Document 227 commences the next pay period with time worked on June 1, 2011. This does not promote confidence and trust in Shaker’s time-keeping system, as edited for use in this case.

38. Document 224, the “paystub” sheet of Webb’s work for May 15-29,¹ shows 92.04 hours of regular time and 77.50 hours of overtime, a total of 169.54 hours. On Document 225, the “detail” sheet, the totals for those same dates appear as 80 hours of regular time and 89.90 hours of overtime, a total of 169.90 hours. There are some handwritten comments on Document 225 regarding reallocation of time between regular time and overtime. However, using simple math, those comments generate 92.04 hours of regular time (“12.04 reg.” instead of overtime for 5/29, plus “40 reg.” for 5/22 through 5/28 and “40 reg.” for 5/16 through 5/21) and 77.84 overtime hours (“44.05 OT” for 5/22 through 5/28 and “33.79 OT” for 5/16 through 5/21), for a total of 169.88 hours of total time. The handwritten adjustments on the “detail” sheet appear to govern the totals on the “paystub” sheet, with a very small variation, resulting in a reduction of overtime by just over 12 hours for the entire half month period. Even small errors in what is purportedly an automated time-keeping system calls its accuracy into doubt.

39. Document 226, the “paystub” sheet of Webb’s work for June 2-15,¹ shows totals of 70.10 of regular time and 17.42 hours of overtime, a total of 87.52 hours. On Document 227, the “detail” sheet, the totals for those same dates appear as 70.16 hours of regular time and 17.70 hours of overtime, a total of 87.86 hours. These discrepancies are very minor, but still troublesome for what is presented as an automated system.

40. There is no summary of hours for June 17-30, which are the inclusive dates shown on Document 228, the “paystub” sheet of Webb’s work during the last half of June 2011. That summary references a “weekly salary” and shows total earnings of \$1,320.00 for the entire period. Handwritten notes on the “detail” sheet,

¹ See Finding 37, above, for further date discrepancies in Shaker’s “automated” time-keeping system regarding the end of May and beginning of June 2011.

Document 229, state, "Going to salary, 40 per week @ \$12.00" and "10 per week @ 18.00." Doing the math, 40 hours times \$12.00 per hour plus 10 hours times \$18.00 per hour totals \$660.00. \$660.00 per week times 2 weeks equals \$1,320.00 for two weeks. The real pay period, according to the "detail" sheet, was June 16-30, a full 2 weeks. The actual hours that the time-system showed that Webb worked during the two week period were 76.52 hours of regular time and 36.35 hours of overtime, but the basis upon which hours of certain days were classified as overtime hours is not readily apparent. He worked more than 100 hours in the two weeks, according to the "detail" sheet, but lack of explanation in testimony leaves the record unclear about how overtime was identified, and about when Webb was given notice that his pay status had been changed from hourly wage to salary. What is clear is that Shaker's considered Webb, effective July 1, 2011, to be working for \$1,320.00 per half-month of working days. The evidence reflects no awareness on Webb's part that his pay basis had been changed until the middle of July.

41. Document 230, the "paystub" sheet of Webb's work for July 1-15, shows a weekly salary for the entire period of \$1,000.00. A handwritten note on that sheet appears to assert that all but \$100.50 of that "salary" was paid "from draw that I gave him on 05/09/2011." Since the detail sheet shows withholding, this could mean that out of the \$800.99 net pay due to Webb according to the "paystub" sheet, only \$100.50 was actually due to him after credit for the alleged "draw." The "detail" sheet, Document 231, has a handwritten note stating, "\$500.00 per week salary." How this further alleged change in the compensation owed to Webb suddenly appeared after the previous change for the last two weeks of June is not explained at all.

42. In addition, Document 231, presented as the total of all 12 daily time totals for Webb from July 1 through July 13 (with no time for July 11 or July 14 and 15), is simply wrong. The total shown on Document 231 is 109.91, divided into 92.43 hours of regular time and 17.48 hours of overtime. Although those two numbers added together would total 109.91, the total of all hours that Document 231 shows as worked by Webb, July 1 through July 13, is actually 96.59 hours. The total of all "regular" hours that Document 231 reports that Webb worked is actually 87.11 hours, not the 92.43 hours the document shows. The total of all "overtime" hours that Document 231 reports that Webb worked is actually 9.48 hours, not the 17.48 hours the document shows. Document 231 demonstrates that the numbers allegedly generated by its time-keeping system did not match basic mathematics in this instance. Except for the newest salary change notation, cited above, the "detail" sheet is devoid of any details about edits to the time entries appearing upon it.

43. Even one instance of failure of a time-keeping system to do basic math accurately must raise some doubt about the reliability of all of the system's numbers. Here, there is one manifest failure, and several other puzzles, and some uncertainties about how the system actually operated. There are also clear indications of manual adjustments to the results generated by the time-keeping system.

44. Finally, Webb appears to have been able to "punch in" whenever he wanted, and to stay "punched in" for as long as he wanted. On July 12, 2011, the time-keeping system reports that Webb worked for 27.55 hours. This perhaps means that Webb "punched in" on one calendar day, and did not "punch out" until the next calendar day, with the system crediting him with all the hours in between on the day he "punched out."

45. Because of all of the questions that remain, on this record, about the reliability of the Shaker's time-keeping system, and the accuracy of the information put into it before generating the particular documents in evidence, the documents generated by Shaker's time-keeping system lack credibility.

Payments Made by Shaker's to Webb

46. Puccio provided the Wage and Hour Unit with copies of checks from Shaker's to various persons and entities, including copies of seven checks written to, received by, and cashed by Webb. Documents 232-237. Shaker's documented payments to Webb in the following amounts, by the following checks on the indicated dates, total \$6,210.60.

No.	Date	Amt.	No.	Date	Amt.	No.	Date	Amt.	No.	Date	Amt.
1161	5-28-11	800.00	1288	6-20-11	1042.02	1172	6-1-11	1000.00	1032	6-30-11	1182.42
1147	5-9-11	1000.00	1276	6-12-11	1000.00	1232	6-6-11	186.16	TOTAL: \$6,210.60		

47. Webb testified that Shaker's checks to him were to reimburse him for expenses he paid, and pointed to the handwritten notes in the "memo" lines of all but one of the checks as proof that these were expense reimbursements. Puccio had no clear explanation of why the notes were on the memo lines, but insisted in her testimony that the checks were for Webb's work for Shaker's, including his incessant and excessive overtime hours from the opening of the restaurant until Shaker's put him on salary. Webb had no clear explanation for why he would be spending his own money for restaurant expenses and then getting reimbursement, when he was authorized to charge expenses to the restaurant. He submitted a substantial number of receipts, but the evidence is disputed about whether the purchases were charged to the employer or to Webb, and whose money paid for them.

48. As already noted, there are many reasons to doubt Webb’s veracity, and the Hearing Officer does doubt it. On the other hand, Puccio’s challenges to Webb’s extensive reports of hours (on Shaker’s time-keeping system) as well as hours he claimed to have worked both before the restaurant opened and after he was put on salary, are thinly supported by any evidence of record aside from her testimony. Shaker’s time-system numbers are dubious. Puccio is continuing to contest this claim because she fears that Webb may seek to hold her personally liable, since the LLC is admittedly defunct. Webb and Puccio have financial interests in the outcome of this case, and the shadows cast over their respective credibility reinforces concern that financial motives could be influencing the testimony.

49. Based upon the evidence of record, it is more likely than not that Shaker’s paid Webb \$6,210.60 for the work that he did as an employee of Shaker’s.

50. At the end of the day, the Hearing Officer has insufficient credible and substantial evidence to establish that Webb kept accurate time records from which it can be found that, as a “matter of just and reasonable inference,” he is owed wages that can be specified with at least a “reasonable approximation” of accuracy. In simple words, there is serious doubt about how many hours Webb actually worked, and no way to decide whether he is owed any additional money for his work, let alone how much money.

51. From the “paystub” records in evidence, Shaker’s own evidence is that Webb’s working time recorded in its time records and payroll operation meant that it owed him \$5,199.17 for wages that he had earned from May 16, 2011 through July 15, 2011.

“Paystub” Pay Date	Work Period Covered	Net Wages Due
June 7	5/16-5/31	\$2,075.23
June 17	6/1 - 6/15	\$1,042.02
July 5	6/16-6/30	\$1,182.42
July 19	7/1 - 7/15	<u>\$ 899.50</u>
TOTAL NET WAGES EARNED:		\$5,199.17

52. As already found, Webb received \$6,210.60 in wage payments, for net wages due after withholding. Whatever these wage payments are called by the parties, the evidence supports the finding that they were payments for wages earned.

53. It is impossible to discern, from Webb’s inflated hours reported and from Shaker’s shifting assertions about “salary” being paid to Webb, how much Webb earned from July 16, 2011 through July 29, 2011. However, it is inherently incredible that Shaker’s would convert him to a specific salary (\$1,320.00 per half-month) and then immediately reduce it to a lower weekly wage (\$500.00 per week) the very next pay period. Therefore, it is more likely than not that Shaker’s owed

Webb, for his work July 16 through July 29, 2011, 14/16^{ths} of \$1,320.00, which is \$1,155.00.

54. Webb was paid \$6,210.60 for wages earned. After crediting Shaker's for paying Webb's net wages through July 15, 2011, Shaker's had paid Webb an additional \$1,011.43. Shaker's might have still owed Webb a few dollars of net wages if the figures in Findings 51 through 53 were precisely accurate, but it is more likely than not that such precision is absent here. Webb seems to have grossly exaggerated his working hours throughout his employment. Shaker's whittled away at his hours, as shown in its time-keeping system, through most of his employment after the restaurant opened. With no reliable source to determine accurate hours worked, it is more likely than not that Shaker's has paid and Webb has received all of the net wages he earned as a matter of just and reasonable inference. Neither side has proved that it is more likely than not that he was either unpaid or overpaid.

IV. DISCUSSION²

Mont. Code Ann. § 39-3-204 provides in pertinent part that “every employer of labor in the state of Montana shall pay to each employee the wages earned by the employee . . .” In this case, Webb alleged that Shaker's failed to pay him for labor undertaken in Montana, specifically, his work preparing the restaurant to open and working in it as the cook once it opened, from April 15 through July 29, 2011. Pursuant to Mont. Code Ann. § 39-3-204, the Department has subject matter jurisdiction over Webb's claim.

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. Dept. of Labor and Industry* (1977), 172 Mont. 182, 562 P.2d 473. If the employer fails to keep adequate records of the time worked by the employee, the employee can prove his case by producing sufficient evidence to “show the extent and amount of work as a matter of just and reasonable inference.” *Garsjo at* 189, 562 P.2d *at* 476-77, *citing Anderson at* 687; *Purcell v. Keegan* (1960), 359 Mich. 571, 103 N.W. 2d 494, 497; *cf., Marias Health Care Srv. v. Turenne*, ¶¶13, 14, 2001 MT 127, 305 Mont. 419, 422, 28 P.3d 494 (holding that 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). The actual reasoning of *Garsjo* and the authority cited follow:

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

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:

“ . . . 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”

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:

“ . . . 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.

In the typical work situation, when the employee is working on the employer's premises, and the employer is actually present and able to see and appreciate the hours the employee is working, but 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, Shaker's hired Webb to run the restaurant, relying upon his integrity and ability. It was Webb who originated and controlled the entry of his time into the system. Even after those records began to generate wages for Webb, Shaker's had to rely upon Webb's use, or perhaps abuse, of the time-keeping system, at least until his replacement could be found. Without Webb, it would have to close the restaurant anew.

Shaker's presented sufficient evidence that it paid Webb all the money he was owed, although, in fairness and in law, it was not required to meet that burden unless and until the claimant, Webb, did show as a matter of just and reasonable inference that he was owed wages, at which point "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." *Garsjo* at 189, 562 P.2d at 477, quoting *Purcell, supra*, 359 Mich. at 576, 103 N.W. 2d at 497. Shaker's certainly did present enough evidence to refute Webb's evidence that he worked the incredibly long hours that his calendar reflected for the time covered by Shaker's at least somewhat shaky time-keeping records. This refutation cast the rest of Webb's evidence into serious doubt. Ultimately, it was Webb who failed to meet his burden of proof, on the entire record, that he was actually entitled to receive more than Shaker's had paid him. As a result of this failure, Webb cannot recover.

Since Webb did not prove he is due unpaid wages that he earned working for Shaker's, there is no wage entitled to which any legal penalty would apply.

V. CONCLUSIONS OF LAW

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

2. Charles E. Webb has failed to meet his burden of proving work performed without proper compensation and did not prove he is owed any unpaid and earned wages by Shaker’s Roadhouse Grill, LLC. *Anderson v. Mt. Clemens Pottery Co.* (1946), 328 U.S. 680, *Garsjo v. Dept. of Labor and Industry* (1977), 172 Mont. 182, 562 P.2d 473.

VI. ORDER

The complaint of Charles E. Webb against Shaker’s Roadhouse Grill, LLC, for unpaid and earned wages is hereby dismissed.

DATED this 10th day of July, 2013.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ TERRY SPEAR
Terry Spear
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.