

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM)	Case No. 943-2013
OF RYAN B. MATTESON,)	
)	
Claimant,)	
)	
vs.)	FINAL AGENCY DECISION
)	
DAVE'S CUSTOM TILE, LLC, a Montana)	
limited liability company, d/b/a DAVE'S)	
CUSTOM TILE & FLOOR DECOR,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

On December 19, 2012, Ryan B. Matteson filed a claim with the Wage and Hour Unit of the Department of Labor and Industry alleging the respondent, Dave's Custom Tile, LLC (Dave's Custom Tile), owed him \$1,567.50 in unpaid wages. Custom Tile did not timely respond to the department's request for a response to Matteson's claim.

On January 10, 2013, the Wage and Hour Unit determined Matteson was owed \$1,567.50 in unpaid wages. A penalty of 110% was also imposed based upon the respondent's failure to respond. The respondent filed a timely request for redetermination.

On March 7, 2013, the Wage and Hour Unit issued a redetermination finding Matteson was owed \$820.00 in unpaid wages. A penalty of 15% was also imposed on the amount found to be owed, for a total of \$943.00. Matteson filed a timely appeal. The employer submitted a check in that amount to the Wage and Hour Unit within the time specified in the redetermination.

Following mediation efforts, the Wage and Hour Unit transferred the case to the department's Hearings Bureau on June 20, 2013. On June 24, 2013, the Hearings Bureau issued a Notice of Hearing and Telephone Conference. Following a

scheduling conference on July 8, 2013, the matter was set for hearing on September 30, 2013. The parties agreed to proceed by telephone.

Hearing Officer Caroline A. Holien conducted a hearing on September 30, 2013. Matteson appeared on his own behalf. Attorney Howard Toole represented the respondent. Matteson, David Larson, Teri Larson, Steve Stephens, Tom Poindexter, Brad Easterling, and Robert Williams presented sworn testimony. The parties stipulated to the admission of Wage and Hour Documents 1 through 53. The parties declined the opportunity for post-hearing briefing.

Based upon the evidence adduced at hearing, the following findings of fact, conclusions of law and final decision are made.

II. ISSUE

Whether Dave's Custom Tile owes wages for work performed, as alleged in the complaint filed by Ryan B. Matteson, and owes penalties or liquidated damages, as provided by law.

III. FINDINGS OF FACT

1. Dave's Custom Tile is a business engaged in tile installation, as well as other construction projects. At all times material to this case, David Larson has owned and operated Dave's Custom Tile.

2. Dave's Custom Tile employed Ryan B. Matteson as a laborer beginning on or about August 30, 2012. Matteson's workweek was typically Sunday through Saturday. Matteson's last day worked was October 2, 2012. Matteson's regular hourly wage was \$10.00.

3. Dave's Custom Tile pays employees their regular hourly rate for the time they spend driving to an out-of-town job site if the employee drives his or her own vehicle to the job site. Employees who ride with another employee were paid for the time spent traveling to the job site one-way.

4. Matteson was required to complete a time card on a weekly basis. The pay period for Dave's Custom Tile runs from Wednesday to Tuesday. Employees are paid on Fridays. Employees are encouraged to enter their start and end times on the time cards. Dave's Custom Tile had accepted time cards from Matteson in which he merely indicated the number of hours he spent working that day.

5. In September 2012, Matteson had a conflict with Brad Easterling, who has worked for Dave's Custom Tile for approximately 18 years. Matteson was working as Easterling's helper at a job site in St. Regis, Montana. Matteson and Easterling had a conflict at the job site. Matteson contacted law enforcement and alleged the employee had assaulted him. No criminal charges have been filed against the employee. That employee and another long-term employee complained frequently to David Larson about Matteson's performance, as well as his attitude and demeanor at work. David Larson did not place Matteson on another job after Matteson returned home from the job site.

6. In late September 2012, David Larson accepted a job installing siding at a remodeling project in Livingston, Montana. Larson asked Matteson to do the job because Matteson had represented to him that he had the skills necessary to perform siding work. Larson told Matteson that he would pay him a bonus of \$5.00 an hour if he completed the job satisfactorily without any complaints from the superintendent or other crew members. Larson also told Matteson that it was important that the job get done quickly. Larson estimated the job would take approximately seven days.

7. Matteson's hourly wage at the Livingston job site was \$10.00. Matteson did not complete the project and was, therefore, not entitled to an hourly wage of \$15.00, as he had argued in his complaint and during the hearing.

8. On September 26, 2012, Matteson spent 3.5 hours driving to the Livingston job site. Matteson is owed \$35.00 for the time spent driving to the Livingston job site as per the employer's policy to pay employees for the time spent driving to an out-of-town job site.

9. Matteson worked the following hours at the Livingston job site during the workweek beginning September 23, 2012:

September 26, 2012	9 hours
September 27, 2012	12 hours
September 28, 2012	12.5 hours
September 29, 2012	11.5 hours
TOTAL:	45 hours

10. Matteson is owed \$400.00 for the 40 regular hours of work he performed during the week of September 23, 2012 ($\$10.00 \times 40 \text{ hours} = \400.00). Matteson is owed \$75.00 for the five hours of overtime worked that same week ($\$15.00 \times 5 \text{ hours}$

= \$75.00). Matteson is owed a total of \$475.00 for work performed during the week of September 23, 2012 ($\$400.00 + \$75.00 = \$475.00$).

11. Matteson worked the following hours at the Livingston job site during the workweek beginning September 30, 2012:

September 30, 2012	11 hours
October 1, 2012	12 hours
October 2, 2012	11.5 hours

TOTAL: 34.5 hours

12. Matteson is owed \$345.00 for the 34.5 hours of work he performed during the week of September 30, 2012 ($\$10.00 \times 34.5 \text{ hours} = \345.00).

13. Larson received repeated complaints from Tom Poindexter, who was the General Contractor on the Livingston project, and Superintendent Steven Stephens. Both men complained about the quality of Matteson's work, as well as the pace he was working at. The siding work was not completed at the time Matteson left the job site and Poindexter had to call in additional workers to finish the siding job and to redo much of the work completed by Matteson.

14. On October 3, 2012, Matteson attempted to turn in his time card to Teri Larson, who performs the payroll and administrative work for Dave's Custom Tile. Matteson had noted on the time card that his pay rate was \$15.00 an hour. Teri Larson told Matteson that he had to submit a time card that did not include the note regarding his hourly wage. Teri Larson also questioned the number of hours on the pay card given the complaints her husband had received from Stephens and Poindexter. Matteson refused to submit a corrected time card and left. Matteson has not yet been paid for the work he performed at the Livingston job site.

15. Matteson performed 79.5 hours of work for Dave's Custom Tile from the period beginning September 26, 2012 through October 2, 2012. Matteson is owed \$820.00 in unpaid wages for work performed during that period. In addition, Matteson is owed \$35.00 for the 3.5 hours spent driving to the Livingston job site on September 26, 2012. Matteson is owed a total of \$855.00 in unpaid wages for the period beginning September 26, 2012 through October 2, 2012 ($\$820.00 + \$35.00 = \$855.00$).

16. Teri Larson indicated at the time of hearing that the employer had submitted a check to the Wage and Hour Unit in the amount of \$943.00, which was

the total amount found to be owed if the unpaid wages were paid within the time specified by the redetermination. Teri Larson indicated the check number was 14708, but she did not know when it had been sent in or if the check had been received by the Wage and Hour Unit.

17. On October 4, 2013, Hearings Bureau staff confirmed with the Wage and Hour Unit that no such check had been received from Dave's Custom Tile. Windy Knutson, Wage and Hour Unit - Collective Bargaining Unit, indicated there was no copy of the check in the wage trust form on file.

18. There is no proof in this case that the special circumstances decided in Admin. R. Mont. 24.16.7556 exist such that the maximum penalty permitted by Admin. R. Mont. 24.16.7561 (110%) must be imposed. Under the facts adduced at hearing, imposition of a 55% penalty under Admin. R. Mont. 24.16.7561 is appropriate.

19. Penalty on the unpaid wages amount equates to \$470.25 ($\$855.00 \times 55\% = \470.25).

IV. DISCUSSION¹

A. *Matteson has shown he is owed unpaid wages for the period from September 26, 2012 through October 2, 2012.*

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

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

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 is no dispute that no one at the Livingston job site was responsible for tracking and verifying the number of hours Matteson worked. Matteson's time card for the period of September 26, 2012 through October 2, 2012 was admitted. The employer offered no direct or credible evidence to contravert Matteson's sworn testimony that he worked the hours he listed on the time card. Further, the evidence shows the employer had allowed Matteson to enter the total number of hours he worked each day rather than the time he started and the time he ended prior to the Livingston project. Matteson has shown he worked 79.5 hours on the Livingston project and is, therefore, owed wages for the time he worked. The next issue is what Matteson's hourly wage was during the Livingston project.

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."

Matteson's hourly wage prior to the Livingston project was \$10.00. Matteson testified David Larson promised to pay him \$15.00 per hour if the job was done fast. Larson conceded he promised to pay Matteson \$15.00 per hour if the job was done quickly and he received no complaints about Matteson's performance. Larson testified, as did Poindexter and Stephens, that there were several complaints about the quality and pace of Matteson's work. Further, the work was not completed at the time Matteson left the job site and another crew had to be called upon to redo much of Matteson's work, as well as complete the job itself. The evidence shows Matteson was not entitled to the \$15.00 per hour promised to him because the job was not completed at the time he left the job site. Therefore, the evidence shows Matteson's hourly wage during the period in question was \$10.00.

Matteson argued that he was due overtime pay for the time spent on the Livingston project. "An employer may not employ any employee for a workweek longer than 40 hours unless the employee receives compensation for employment in excess of 40 hours in a workweek at a rate of not less than 1.5 times the hourly wage rate at which the employee is employed." Mont. Code Ann. § 39-3-405(1). A "workweek" is defined as a "regularly recurring period of 168 hours in the form of seven consecutive 24-hour periods . . . Employment for two or more workweeks

cannot be averaged out for the sake of figuring overtime or minimum wage.” Admin. R. Mont. 24.16.501(1).

A review of Matteson’s time cards from September 2012 and October 2012 shows that his workweek was typically Sunday through Saturday. Documents 39 through 42. The evidence shows Matteson worked a total of 45 hours during the week of September 23, 2012. Therefore, Matteson is owed \$400 for the 40 hours of work performed at his regular hourly wage ($\$10.00 \times 40$ regular hours = \$400.00). Matteson is owed overtime wages for the five hours of overtime work performed during that period at an hourly rate of \$15.00. Matteson is owed \$75.00 in overtime wages for the week of September 23, 2012 ($\$15.00 \times 5$ overtime hours = \$75.00). Matteson is owed a total of \$475.00 for the work performed.

The evidence shows Matteson worked a total of 34.5 hours during the week of September 30, 2012. Therefore, Matteson is owed \$345.00 for the work performed during the week of September 30, 2012 ($\$10.00 \times 34.5$ regular hours = \$345.00).

Matteson is owed a total of \$820.00 for the work performed at the Livingston job site during the period beginning September 26, 2012 through October 2, 2012.

B. Matteson is owed for the 3.5 hours he spent driving to the Livingston job site.

Matteson argued he should be paid for the 3.5 hours he spent driving to the Livingston job site on September 26, 2012. An employee that is required to travel away from home overnight is travel away from home. Travel away from home is clearly work time when it cuts across the employee’s workday. Admin. R. Mont. 24.16.1010(6).

An employer and an employee are free to enter into their own employment agreement so long as the employee’s regular rate of pay is equal to or greater than the applicable minimum wage under Admin. R. Mont. 24.16.2512(2)(e)(i).

David Larson testified that he typically pays an employee their regular hourly wage when the employee uses his or her own vehicle when traveling to an out-of-town job site. The evidence shows that Matteson would have been entitled to receive his regular hourly wage for time spent traveling to the Livingston job site according to the employment agreement between himself and the employer. Therefore, Matteson is owed \$35.00 for the 3.5 hours he spent traveling to the Livingston job site on September 26, 2012 ($\$10.00 \times 3.5$ hours = 35 hours). However, the evidence clearly shows Matteson was no longer an employee of Dave’s Custom Tile when he left the

Livingston job site on October 2, 2012. Therefore, he would not be entitled to payment for the hours he spent traveling home from Livingston on October 2, 2012.

It is, therefore, determined Dave's Custom Tile owes Matteson \$855.00 in unpaid wages for the period of September 26, 2012 through October 2, 2012 (\$820.00 + \$35.00 = \$855.00).

Matteson argued the employer owes him promised fuel reimbursement. Fuel expense reimbursements are not compensation for time worked. As such, they are not recoverable under the applicable statutes. *Johnson v. K&T Manufacturing, Inc.*, 191 Mont. 458, 625 P.2d 66 (1981).

C. *Penalty On Amounts Owed.*

Montana law assesses a penalty when an employer fails to pay wages when they are due. Mont. Code Ann. § 39-3-206. For claims not involving minimum wage or overtime, a 55% penalty must be imposed. Admin. R. Mont. 24.16.7566. Imposition of the penalty is mandatory.

Teri Larson testified that the employer had submitted a check in the amount of \$943.00, which was the total amount found to be owed if the unpaid wages were paid within the time specified by the redetermination. Teri Larson testified the check number was 14708 but she did not know what the status of the check was at the time of hearing. There is no evidence showing the Wage and Hour Unit received the check. As a result, it is determined Dave's Custom Tile did not pay the amount found due and owing in the redetermination dated March 7, 2013. As a result, a 55% penalty must be imposed. Therefore, Dave's Custom Tile is required to pay a penalty in the amount of \$470.25 on the \$855.00 in unpaid wages found to be owed to Matteson (\$855.00 x 55% = \$470.25).

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. Matteson has shown he is owed additional wages for work performed in Montana from September 26, 2012 through October 3, 2012 in the amount of \$855.00.

3. A 55% penalty amounting to \$470.25 is due on the amount of unpaid wages if it is paid within the time period specified in the order below. Admin. R. Mont. 24.16.7561.

VI. ORDER

Dave's Custom Tile, LLC is hereby ORDERED to tender a cashier's check or money order in the amount of \$1,325.25, representing \$855.00 in wages and \$470.25 in penalty, made payable to Ryan Matteson 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. Dave's Custom Tile, LLC may deduct applicable withholding from the wage portion, but not the penalty portion, of the amount due.

DATED this 21st day of October, 2013.

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.