

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

IN THE MATTER OF THE WAGE CLAIM) Case No. 1649-2014
OF PETE J. RAMBO,)
)
Claimant,)
)
vs.) **AMENDED**
) **FINAL AGENCY DECISION**
FAMILEE CONSTRUCTION, LLC,)
a Montana limited liability company,)
)
Respondent.)

* * * * *

This amended decision is being issued to correct errors in the original decision regarding the amount owed by Familee Construction, LLC and to direct the Wage and Hour Unit of the Montana Department of Labor and Industry to release the check issued by Familee Construction, LLC on January 20, 2015 to the Claimant. Changes to the original Final Agency Decision are in bold text.

I. INTRODUCTION

On April 8, 2014, Pete J. Rambo filed a claim with the Wage and Hour Unit of the Department of Labor and Industry contending Familee Construction, LLC (Familee) owed him \$120.00 in wages for work performed during the period of March 30, 2014 through April 8, 2014. Exhibits 139 and 140.

On April 16, 2014, Rambo amended his claim to allege Familee owed him an additional \$2,635.50 in unpaid wages for work performed during the period of November 4, 2013 through April 8, 2014.

On July 7, 2014, the Independent Contractor Central Unit (ICCU) of the Employment Relations Division issued a decision finding Rambo performed services for Familee as an employee from November 4, 2013 through April 8, 2014. Exhibits 14 through 20.

On August 4, 2014, the Wage and Hour Unit issued a determination finding Rambo was owed \$295.00 in unpaid wages and imposed a 55% penalty of \$162.25 for a total of \$457.25. Exhibits 84 through 89.

On August 11, 2014, Respondent filed a timely request for redetermination. Exhibit 81.

On October 23, 2014, the Wage and Hour Unit issued a redetermination finding Rambo was owed \$21.00 in unpaid wages and imposed a 55% penalty of \$11.55 for a total of \$32.55. Exhibits 57 through 62. The redetermination was later amended to show an appeal date of November 20, 2014. Exhibit 55.

On November 14, 2014, Rambo filed a timely request for redetermination. Rambo included calendar sheets for January, February, and March 2014, as well as several pages of a handwritten transcription of text messages exchanged between himself and Brian Lee, owner of Familee Construction, LLC. Exhibits 27 through 54.

On January 9, 2015, the Wage and Hour Unit issued a second redetermination finding Rambo was owed \$141.00 in unpaid wages and imposed a 15% penalty of \$21.15 for a total of \$162.15. Exhibits 9 through 13. The total of \$141.00 was based upon the \$21.00 found to be owed under the October 23, 2014 determination and an additional \$120.00 found to be owed for work performed during work week ending April 5, 2014.

On January 20, 2015, Familee issued a check in the amount of \$162.15, which was later deposited into the Wage and Hour Unit Trust Fund on May 11, 2015. Exhibits 7 and 8.

On January 26, 2015, Rambo timely appealed the redetermination. Exhibit 6.

Following mediation efforts, the Wage and Hour Unit transferred the case to the Department's Office of Administrative Hearings on June 26, 2015.

On July 2, 2015, the Office of Administrative Hearings issued a Notice of Hearing and Telephone Conference that advised the parties that a limited liability company must be represented by an attorney. Following a scheduling conference on July 16, 2015, a Scheduling Order was issued setting the matter for hearing on September 28, 2015. The Scheduling Order also advised the parties that a limited liability company must be represented by an attorney.

On September 23, 2015, Lee filed a written request for a continuance on the basis that he was still "working to secure an attorney. . . ." Another hearing officer

conducted a telephone conference with Lee because the undersigned was out of the office due to a family emergency. Lee was given until Friday, September 25, 2015, to notify the Office of Administrative Hearings (OAH) as to whether he had secured legal counsel. Lee did not contact OAH by the deadline and the matter proceeded to hearing as scheduled.

Hearing Officer Caroline A. Holien held a contested case hearing in this matter on September 28, 2015 in Helena, Montana. Rambo and Brian Lee, owner of Familee Construction, LLC, appeared personally and testified under oath. Lee appeared on behalf of Familee Construction, LLC without legal counsel. Lee was not allowed to act as a legal representative but was allowed to appear as a witness. The witnesses listed by Rambo were not available when called by the Hearing Officer. Rambo indicated he was prepared to go forward without his witnesses testifying. Rambo also indicated he had other exhibits he intended to offer, which he failed to bring with him to hearing.

The parties stipulated to the admission of the administrative record compiled by the Wage and Hour Unit (Documents 1 through 140). Neither party offered any new documentary evidence. At the close of the hearing, Rambo offered an oral closing statement and the matter was deemed submitted for decision. Based on the evidence and argument presented at the hearing, the following findings of fact, conclusions of law, and final order are made.

II. ISSUE

Whether Familee Construction, LLC, a Montana limited liability company, owes wages for work performed, as alleged in the complaint filed by Pete J. Rambo, and owes penalties and liquidated damages, as provided by law.

III. FINDINGS OF FACT

1. In late March 2013, Brian Lee, owner of Familee Construction, LLC (Familee), was looking for a finisher to perform construction work. Lee learned through a mutual acquaintance that Pete J. Rambo was looking for work.

2. Familee is based in Billings, Montana, but performs construction work throughout the state.

3. Rambo lived in the Helena and Great Falls areas prior to and after his employment with Familee. Rambo did not have permanent housing available to him in Billings and was frequently required to stay at extended stay hotels when work required him to stay in Billings.

4. Lee and Rambo agreed Rambo would receive an hourly wage of \$15.00 and Familee would pay for lodging and other travel expenses if Rambo was required to travel for work. There was no agreement between Lee and Rambo that Lee would pay for Rambo's housing or hotel expenses when work required him to stay in Billings.

5. In early April 2013, Rambo's hourly wage was increased to \$20.00.

6. Lee did not track Rambo's work hours. Lee relied on Rambo to report his hours each week. Lee or his wife would issue a check to Rambo the following week. Lee reduced whatever wages he paid Rambo for any charges Rambo made to the business' credit card for items such as cigarettes and other sundry items when traveling for work.

7. Familee generally paid Rambo the following week for work performed during the previous week. However, there was no consistent pattern of payment or certain day on which Familee paid Rambo wages owed to him for work performed.

8. Rambo's last day of work was more likely than not April 2, 2014.

9. On April 8, 2014, Rambo filed a claim with the Wage and Hour Unit alleging he was owed \$120.00 in wages for work performed on or about April 2, 2014.

10. On April 16, 2014, Rambo amended his claim to allege he was owed an additional \$2,635.50 in wages earned during the period of November 4, 2013 through April 8, 2014.

11. Familee owes Rambo a total of \$9,155.00 in wages for 437 hours, including 29.5 hours of overtime, worked from November 4, 2013 through April 5, 2014. See Addendum A.

12. Familee paid Rambo a total of \$9,014.00 in wages for work performed during the period of November 4, 2013 through March 30, 2014. See Addendum A.

13. Familee owes Rambo \$141.00 in unpaid wages for work performed during the period of November 4, 2013 through March 30, 2014 ($\$9,155.00 - \$9,014.00 = \$141.00$).

14. A 15% penalty was properly imposed under Mont. Code Ann. § 39-3-205 as Familee paid the wages owed to Rambo within the time specified under the redetermination dated January 9, 2015. No additional penalty shall

be imposed in this case as there are no special circumstances warranting additional penalty.

15. The Wage and Hour Unit shall release the check issued by Familee on January 20, 2015 in the amount of \$162.15 to Rambo.

IV. DISCUSSION

A. Rambo was an employee of Familee Construction, LLC.

On July 7, 2014, the ICCU issued its decision finding Rambo was an employee of Familee. The ICCU based its finding on several factors, including Familee's control over the manner and means in which Rambo completed his work; Familee paying Rambo on an hourly basis rather than on a per-job basis; Familee providing a truck, work trailer, tools, and equipment for Rambo to use while on the job; and the ability of each party to terminate the working relationship without penalty. The ICCU also found Rambo was not established in an independent business and did not hold a valid independent contractor exemption certificate at the time he provided services to Familee. Therefore, no evidence having been offered to the contrary, Rambo is determined to have been an employee of Familee during the period of November 4, 2013 through April 5, 2014.

B. Rambo proved Familee owes him unpaid wages for work performed from November 4, 2013 through April 5, 2014.

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). An employee's records may be used when the employer fails to record the employee's hours. *Anderson*, 328 U.S. at 687; 66 S. Ct. at 1192.

Rambo did not dispute the accounting of the Wage and Hour Unit for the hours he worked in November and December 2013. Rambo testified the hours he worked in January 2014, February 2014, and March 2014 were, in some instances, different than the hours found by the Wage and Hour Unit. The Hearing Officer

asked Rambo to address each week he claimed to have worked and to state clearly the number of hours he worked. At times, Rambo's testimony was consistent with the calendar sheets admitted as Exhibits 28, 29, and 30. Often, Rambo either added to or subtracted from the number of hours he had noted on the calendar sheets. However, Rambo's sworn testimony and supporting evidence shows he performed work for Familee for which he was not compensated. The amount of unpaid wages due to Rambo will be discussed below.

- C. Familee failed to show Rambo did not perform work for which he was not paid during the period of November 4, 2013 through April 5, 2014.

Once an employee has shown as a matter of just and reasonable inference that he 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.

The burden to maintain accurate records falls on the employer regardless of whether the employee is responsible for recording his own hours. *Arlington v. Miller's Trucking, Inc.*, 2015 MT. 68, ¶ 17; 378 Mont. 324, 329, 343 P.3d 1222, 1228 (quoting *McGrath v. Cent. Masonry Corp.*, 2009 U.S. Dist. LEXIS 94870, 17 (D. Colo. 2009)). The Fair Labor Standards Act makes clear that employers, not employees, bear the ultimate responsibility for ensuring that employee time sheets are an accurate record of all hours worked by employees. *Arlington*, 2015 MT. 68, ¶ 17, 378 Mont. 324, 329, 343 P.3d 1222, 1228 (quoting *Skelton v. American Intercontinental Univ. Online*, 382 F. Supp. 2d 1068, 1071, 72). "Indeed, the Supreme Court's reasoning in *Anderson* makes it clear that an employer should not benefit from its own failure to maintain an adequate and accurate record-keeping system." *Arlington*, 2015 MT. 68, ¶ 17, 378 Mont. 324, 329, 343 P.3d 1222, 1228-29 (quoting *McGrath*, 2009 U.S. Dist. LEXIS 94870 at 17).

Lee did not dispute the hours reported by Rambo during the initial stages of his claim and relied upon by the Wage and Hour Unit when issuing the determination and subsequent two redeterminations. Lee argued during the claim process that Rambo should not be allowed to continue submitting additional documents that changed the number of hours he was claiming. Lee further argued Rambo was paid for the work he performed with the checks set forth in Exhibits 122 through 132.

Lee offered no direct or credible evidence regarding the precise number of hours Rambo worked or to negate the reasonableness of Rambo's claim. See *Wage Claim of Holbeck v. Stevi West*, 240 Mont. 121, 126, 783 P.2d 391, 395 (1989). Therefore, having failed to discredit Rambo's evidence regarding the hours he claimed to have worked during the period in question, Familee has failed to meet its burden. The next issue is how many hours of work Rambo performed for which Familee owes him unpaid wages.

D. Rambo failed to establish with credible evidence that he worked the number of hours he claimed at the time of hearing.

“When the employer fails to record the employee's hours, the employee's records may be used to determine the amount of time worked.” *Arlington*, 2015 MT. 68, ¶ 19; 378 Mont. 324, 330, 343 P.3d 1222, 1229. “[W]hen an employer has failed to maintain adequate records of an employee's hours, it is expected the employee will not be able to offer convincing substitutes for the employer's records. Moreover, whatever evidence the employee does produce can be expected to be ‘untrustworthy.’” *Arlington*, 2015 MT. 68, ¶ 21; 378 Mont. 324, 331, 343 P.3d 1222, 1230 (quoting *Anderson*, 328 U.S. at 687, 66 S. Ct. At 1192). As the court noted in *Arlington*, the solution in such situations “is not to penalize the employee for his inability to accurately prove his hours by denying his claims in their entirety.” *Arlington*, 2015 MT. 68, ¶ 21; 378 Mont. 324, 331, 343 P.3d 1222, 1230.

Both parties appeared at hearing woefully unprepared and unable to provide detailed and direct evidence regarding the number of hours Rambo worked for Familee during the period of November 4, 2013 through April 5, 2014. As noted above, Rambo continually added to or subtracted from the hours he claimed he worked on his calendar sheets admitted as Exhibits 28, 29, and 30. Rambo claimed to have additional exhibits at home that supported his claim. However, Rambo failed to bring those exhibits with him to hearing, as he did with the hearing packet.

The Hearing Officer spent a good deal of time reviewing Exhibits 1 through 140 in an attempt to reconcile the information presented in the exhibits with the testimony offered by Rambo. The Hearing Officer was unable to do so and was left wondering how Rambo was unable to clearly state the number of hours of work he performed for which he was not paid by Familee at any step of the process. Indeed, the Hearing Officer is left with the overwhelming impression that Rambo inflated his claim each time he received a determination or redetermination from the Wage and Hour Unit. Further, Rambo's calendar sheets for January 2014, February 2014, and March 2014 (Exhibits 28, 29, and 30) are inherently unreliable. Rambo first submitted Exhibits 28, 29, and 30 with his request for redetermination filed on November 14, 2014. Previous to that, Rambo had submitted an accounting of the

number of hours of work he performed each day and a handwritten note indicating what check he received. See Exhibits 119 through 121. It is perplexing that he did not submit calendar sheets for the months of November 2013 and December 2013 if that was truly his practice to track his hours using his personal calendar. Further, it is even more puzzling that an account on which he clearly spent a great deal of time is different than the hours he noted on his calendar sheets in Exhibits 28, 29, and 30. In short, Rambo's conflicting and rambling testimony and his ever-changing documentary evidence is not considered credible. The Hearing Officer is not persuaded that Familee owes Rambo \$2,635.50 in unpaid wages for work performed from November 4, 2013 through April 5, 2014. While Rambo's burden is a light one, as noted by the court in Arlington, the burden is not non-existent. Rambo has failed to show he is owed the amount of unpaid wages claimed at the time of hearing.

Seeing that no new documentary evidence was offered at the time of hearing and having found Rambo's testimony not credible, it is therefore determined that the Wage and Hour Unit correctly found Familee owes Rambo \$141.00 in unpaid wages. The figures relied upon by the Wage and Hour Unit are hereby incorporated into this decision and are reflected in Addendum A. Further, a 15% penalty **was properly imposed under Mont. Code Ann. § 39-3-205 as Familee paid the wages owed to Rambo within the time specified under the redetermination dated January 9, 2015.**

- E. The evidence does not show the withholdings made by Familee for personal charges made by Rambo to the company credit card were improper.

Rambo argued Lee improperly withheld various amounts from his paychecks throughout his employment. Lee testified withholdings were made to cover charges Rambo made to the company credit card for personal items such as cigarettes and other sundry goods. Neither party offered receipts or any kind of accounting showing what was withheld or what amounts were charged by Rambo to the company credit card for personal items. The evidence shows it was a common and accepted practice between the parties for Rambo to charge personal items to the company credit card while traveling for work and Lee would subsequently withhold an amount from his wages to cover those personal charges. Absent a more detailed and credible presentation of evidence concerning this issue, Rambo has not shown he is owed any additional money for amounts withheld by Familee to cover his personal charges to the company credit card.

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. Familee Construction, LLC owes Rambo \$141.00 in unpaid wages for work performed from November 4, 2013 through April 5, 2014.

3. A 15% penalty was properly imposed under Mont. Code Ann. § 39-3-205 as Familee paid the wages owed to Rambo within the time specified under the redetermination dated January 9, 2015. Therefore, Familee Construction, LLC was properly required to pay a penalty of \$21.15 for a total of \$162.15 (\$141.00 + \$21.15 = \$162.15).

4. No additional penalty shall be imposed in this case as Familee paid the wages owed to Rambo within the time required under the redetermination dated January 9, 2015. There are no special circumstances in this case that would require the imposition of a penalty of 110% under Admin. R. Mont. 24.16.7561.

VI. ORDER

Familee Construction, LLC owes Pete Rambo \$162.15, which includes \$141.00 in unpaid wages and a 15% penalty of \$21.15. The Wage and Hour Unit is directed to release to Pete Rambo the check submitted by Familee Construction, LLC on January 20, 2015.

DATED this 24th day of November, 2015.

DEPARTMENT OF LABOR & INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

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.

ADDENDUM A

| Work Week Ending | Regular Hours | Regular Wages Earned ¹ | Overtime Hours | Overtime Wages Earned ² | Total Wages Earned | Wages Paid |
|------------------|---------------|-----------------------------------|----------------|------------------------------------|--------------------|------------|
| 11/09/2013 | 36 | \$720.00 | 0 | 0 | \$720.00 | \$700.00 |
| 11/16/2013 | 40 | \$800.00 | 12 | \$360.00 | \$1,160.00 | \$480.00 |
| 11/23/2013 | 36 | \$720.00 | 0 | 0 | \$720.00 | \$800.00 |
| 11/30/2013 | 28 | \$560.00 | 0 | 0 | \$560.00 | \$300.00 |
| 12/07/2013 | 29 | \$580.00 | 0 | 0 | \$580.00 | \$80.00 |
| 12/14/2013 | 0 | 0 | 0 | 0 | 0 | \$680.00 |
| 12/21/2013 | 0 | 0 | 0 | 0 | 0 | \$340.00 |
| 12/28/2013 | 0 | 0 | 0 | 0 | 0 | \$480.00 |
| 01/04/2014 | 0 | 0 | 0 | 0 | 0 | \$424.00 |
| 01/11/2014 | 32.5 | \$650.00 | 0 | 0 | \$650.00 | \$200.00 |
| 01/18/2014 | 34 | \$680.00 | 0 | 0 | \$680.00 | \$570.00 |
| 01/25/2014 | 0 | 0 | 0 | 0 | 0 | \$200.00 |
| 02/01/2014 | 40 | \$800.00 | 6.5 | \$195.00 | \$995.00 | \$200.00 |

¹ Rambo's hourly wages during the relevant period of the claim was \$20.00.

² Rambo's hourly wage for overtime work was \$30.00 (1.5 x his regular wage of \$20.00).

ADDENDUM A

| Work Week Ending | Regular Hours | Regular Wages Earned | Overtime Hours | Overtime Wages Earned | Total Wages Earned | Wages Paid |
|------------------|---------------|----------------------|----------------|-----------------------|--------------------|-------------------|
| 02/08/2014 | 5.5 | \$110.00 | 0 | 0 | \$110.00 | \$200.00 |
| 02/15/2014 | 0 | 0 | 0 | 0 | 0 | \$720.00 |
| 02/22/2014 | 40 | \$800.00 | 2 | \$60.00 | \$860.00 | \$440.00 |
| 03/01/2014 | 6.5 | \$130.00 | 0 | 0 | \$130.00 | \$740.00 |
| 03/08/2014 | 40 | \$800.00 | 5.5 | \$165.00 | \$965.00 | \$300.00 |
| 03/15/2014 | 0 | 0 | 0 | 0 | 0 | \$100.00 |
| 03/22/2014 | 40 | \$800.00 | 3.5 | \$105.00 | \$905.00 | \$100.00 |
| 03/29/2014 | 0 | 0 | 0 | 0 | 0 | \$160.00 |
| 04/05/2014 | 6 | \$120.00 | 0 | 0 | \$120.00 | \$400.00 |
| 04/12/2014 | 0 | 0 | 0 | 0 | 0 | \$400.00 |
| TOTAL: | 413.50 | \$10,230.00 | 29.5 | \$295.00 | \$9,155.00 | \$9,014.00 |