

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

IN THE MATTER OF THE WAGE CLAIM)	Case No. 776-2016
OF MICHAEL FOSTER,)	
)	
Claimant,)	
)	
vs.)	FINAL AGENCY DECISION
)	
JOHN POST, individually, d/b/a THE HOME)	
IMPROVEMENT COMPANY,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

On October 26, 2015, Michael Foster filed a wage claim with the Wage and Hour Unit of the Montana Department of Labor and Industry (DLI) alleging John Post owed him \$790.00 for drive time and hours worked from October 13, 2015 to October 17, 2015. Post denied owing any wages to Foster.

On February 4, 2016, the Wage and Hour Unit determined Post owed Foster \$632.50 for unpaid wages, which was calculated by multiplying the 31.50 hours that the Wage and Hour Unit determined Foster worked from October 13, 2015 to October 17, 2015 by \$15.00 per hour and adding 16 hours of drive time at \$10.00 per hour. A 15% penalty of \$94.88 was assessed, for a total amount owed of \$727.38. Post requested a redetermination asserting he did not owe any wages to Foster.

On April 15, 2016, the Wage and Hour Unit issued a redetermination that Post owed Foster unpaid wages of \$632.50, which was redetermined using the same hours and rates of pay. A 15% penalty was again assessed for a total amount owed of \$727.38, but Post was informed that if the amount was not paid by May 2, 2016, a 55% penalty would be assessed. Post filed an appeal on May 2, 2016, asserting no wages were owed to Foster.

On May 11, 2016, the Wage and Hour Unit transferred the case to the Office of Administrative Hearings for hearing after an unsuccessful attempt at mediation. On May 31, 2016, Hearing Officer Steven Wise held a scheduling conference during

which the parties agreed on deadlines for hearing preparation. Those agreed upon deadlines were set forth in a Scheduling Order issued on June 7, 2016.

The hearing in this case was originally scheduled for August 29, 2016, but was postponed at Post's request and rescheduled for October 13, 2016.

On October 13, 2016, Hearing Officer Steven Wise conducted a hearing in this matter. Michael Foster participated telephonically in the hearing. John Post participated in the hearing in person with a witness, Dianne Gors. Foster, Post, and Gors presented sworn testimony.

Documents 1 through 66 were admitted into evidence without objection.

Post submitted a motion to dismiss the wage claim due to argument that the Montana Department of Labor and Industry lacked jurisdiction over the wage claim since the work was performed on the Crow Indian Reservation. Foster was given an opportunity to respond to the motion to dismiss and sent in a letter with his response on October 19, 2016. Based on the evidence and on the arguments presented at the hearing and in the respondent's brief, the Hearing Officer makes the following findings of fact, conclusions of law, and final agency decision.

II. ISSUES

Does the Department of Labor & Industry have jurisdiction over a wage claim when the work was performed on the Crow Indian Reservation?

Does John Post, d/b/a The Home Improvement Company, owe wages and penalties or liquidated damages, as provided by law, to Michael Foster?

III. FINDINGS OF FACT

1. John Post was a sole proprietor of a business called The Home Improvement Company. In September 2015, Michael Foster answered an advertisement in the local newspaper placed by John Post looking for a carpenter. Post initially hired Foster to do some work at Post's residence fixing a chicken coop, painting, and installing edging along a driveway. He paid Foster \$15.00 per hour for that work.

2. Post then spoke to Foster about a job Post had lined up in Garryowen, Montana. The job involved traveling from Hamilton, where Post and Foster lived, to Garryowen to install wood flooring in the living room, dining room, and kitchen of the customers' home. Post offered the job to Foster because he could not find anyone else capable of installing the flooring who was willing to travel that far.

3. In discussing the job, Post told Foster he would pay him \$20.00 per hour for installing the flooring, \$10.00 per hour for drive time, and \$20.00 a day for meals. Post agreed to pay for a motel room for Foster. Foster accepted this and asked to be paid in cash. No written employment agreement was made between the parties.

4. Originally, Foster was going to have a friend drive him to Garryowen because he did not have a vehicle or driver's licence. When that arrangement fell through, Post and his wife, Dianne Gors, agreed to travel to Garryowen with their motor home and pickup with Foster. They did not know Foster did not have a driver's license until the trip back to Hamilton on October 17.

5. Foster, Post, and Gors started on the trip to Garryowen at about 7:30 a.m. on October 13, 2015, from Post's residence. Foster drove the pickup truck, and Gors drove the motor home. They initially drove to Missoula from about 7:30 a.m. to 9:00 a.m. Then they drove from Missoula to Billings from about 10:00 a.m. to 5:30 p.m. After stopping in Billings to pick up the flooring for the job, they drove to Hardin, Montana, from about 7:30 to 8:30 p.m. The flooring was hauled in the pickup truck.

6. When they got to Hardin, Foster stayed overnight in a motel room that Post charged to his debit card at a cost of \$64.19. Post gave Foster \$20.00 in cash for food. Foster and Gors stayed in their motor home at the customers' property in Garryowen.

7. On Wednesday, October 14, Foster worked on the floors at the customers' residence in Garryowen from about 8:00 a.m. to 6:00 p.m., with a half-hour lunch, for a total of 9.5 hours of work. At the end of the day, Foster drove the pickup back to the motel in Hardin. The motel room was charged to Post's debit card at a cost of \$64.19. Post gave Foster \$20.00 for food.

8. On Thursday, October 15, Foster worked on the floors at the customers' residence from about 8:00 a.m. to 6:00 p.m., with a half-hour lunch, for a total of 9.5 hours. Foster again went back to the motel in Hardin for the evening. Post gave Foster \$20.00 for food and was charged \$59.99 for the motel room.

9. On Friday, October 16, Foster worked on the floors again. Post was dissatisfied with Foster's progress in installing the floors and was concerned they weren't going to be finished by Saturday, which was when Post wanted to return to Hamilton. As a result, Post contacted a flooring company in Hardin and spoke to the owner's son. Post hired the man to help Foster with the flooring on Friday afternoon. The man started in the kitchen while Foster continued in the living room. Foster worked from about 8:00 a.m. to 5:00 p.m., with a half-hour lunch, for a total of

8.5 hours of work. The man had to leave after about three hours and did not finish the kitchen floor.

10. On Friday afternoon, the customers said they were unhappy with the flooring that Foster installed in the living room. They pointed out to Post and Foster that there were some gouges in the floor and that Foster's pattern was different than what was done in the kitchen by the other worker so it did not flow. The customers insisted that the flooring in the living room be taken out and redone.

11. After finishing work for the day, Foster again went back to the motel in Hardin. Post gave Foster \$20.00 for food. Foster's motel bill of \$64.19 was charged to Post's debit card.

12. On Saturday, October 17, Foster worked from 8:00 a.m. to 10:30 a.m. for a total of 2.5 hours. He did not work on the floors, but instead Post had him texturing drywall in the bathroom.

13. Post had to get back to Hamilton on Saturday. He called a contractor in Billings to come out and look at the flooring. When the contractor came out, he told Post that he could do the job the following week but would have to tear everything out and start over. Post approved the contractor redoing the flooring job.

14. When Foster completed texturing the wall at about 10:30 a.m., Post informed him that they were returning to Hamilton. Foster drove the pickup back to Hamilton from about 11:00 a.m. to 7:00 p.m. for a total of eight hours of travel time. Foster drove the truck back to Post's residence.

15. When Foster, Post, and Gors returned to Hamilton, Gors took two \$100 bills from her purse and gave them to Post to pay Foster. The money was from the payment check from the customers that was cashed. When Foster asked Post for his pay, Post gave him the \$200.00 and told Foster to call him on Monday. Gors witnessed Post give Foster the money.

16. Post did not answer when Foster called him on Monday, October 19, so he went to Post's house. When Post answered the door, he asked Foster what he wanted. Foster said he wanted to get paid. Post told Foster that he did not owe him anything more and to get off his porch. They then argued over whether Post owed Foster additional wages.

17. Post then asked Foster to write down his hours. Foster wrote down the dates and times he had recorded on his cell phone on a sheet of paper—which included drive time of 16 hours at \$10.00 per hour and work time of 10 hours on

October 14 and 15, 9 hours on October 16, and 2.5 hours on October 17 at \$20.00 per hour, for a total of \$790.00.

18. When Foster handed Post the sheet with his hours, Post again told Foster he did not think he owed Foster anything more and it had cost Post money because of paying for the motel room and money for dinner. Foster then told Post he was not leaving until Post paid him. Post replied that he would call the police if Foster did not leave. At that point, Foster left the residence.

19. Later in the week, Post went to the motel where Foster lived and worked hoping to resolve the pay issue. Post talked to the motel manager because Foster was not there. He asked the manager to let Foster know that he was willing to settle the pay issue for \$200.00. Foster received the message but told the manager that he would not accept the offer. Post later called the manager and was told that Foster would not settle for \$200.00.

20. Foster's wage claim included round-trip drive time of 16 hours at \$10.00 per hour for \$160.00. It also included work time of 10 hours on October 14 and 15, 9 hours on October 16, and 2.5 hours on October 17—for a total of 31.5 hours. At \$20.00 per hour, the total pay for work time claimed was \$630.00—for an overall claim of \$790.00 in unpaid wages. Foster did not deduct his lunch breaks.

21. The total amount of charges for the four nights Foster stayed in the motel was \$252.56. The cash given to Foster for his meals was \$80.00.

22. There was no agreement between Foster and Post that the cost of lodging and the payment for meals were to be deducted from the wages owed to Foster. Post did give Foster some food for lunch on some days during the week, but there was no agreement between Foster and Post that the cash value of the food was to be deducted from the wages owed to Foster. The employer paid for the gas for the pickup truck that Foster was allowed to use during the week. There was no agreement between Foster and Post that cost of fuel for the pickup truck would be deducted from the wages owed to Foster.

23. The amount of the work order paid by the customers to Post for the flooring project was \$5,000.00. Post ended up paying about \$2,000.00 to the contractor to redo and complete the flooring job.

24. The customers' property where the work was performed in Garryowen is located within the boundaries of Crow Reservation. There is no evidence as to whether the property is trust land or fee land. Post believed the wife was a member of the Crow Tribe. Neither Post nor Foster are members of the Crow Tribe.

25. Post owes Foster \$560.00, calculated using 30 hours at \$20.00 per hour (\$600.00) for on-site work plus 16 hours at \$10.00 per hour for travel time (\$160.00), minus \$200.00 that was paid by Post to Foster.

26. A penalty in the amount of \$308.00 is owed on the unpaid wages (0.55 x \$560.00).

IV. DISCUSSION AND ANALYSIS

A. DLI has jurisdiction over this wage claim even though the work was performed within the boundaries of the Crow Indian Reservation

The current test for deciding state civil regulatory or adjudicatory jurisdiction was established in *In re Estate of Big Spring*, 2011 MT 109, 360 Mont. 370, 255 P.3d 121. According to the Court, the question is “whether the exercise of jurisdiction by a state court or regulatory body is preempted by federal law or, if not, whether it infringes on tribal self government.” *Id.* at ¶42.

Post presented no actual legal argument with citations to statutes or case law. He instead submitted a copy of a law review article from 1984.¹ The article references the test established in *Iron v. District Court*² for deciding state jurisdictional issues, which was overruled by *In re Estate of Big Spring*, at ¶45. Post has not cited any federal law preempting the state from exercising wage claim jurisdiction under the facts of this case—nor does research disclose any such federal law. Likewise, Post has not presented an argument supported by legal authority that state wage claim jurisdiction infringes on the “right of reservation Indians to make their own laws and be ruled by those laws.” *Id.* at ¶42. In this case, while the work was performed within the Crow Reservation boundaries, the dispute is between non-Indian parties. Consequently, the exercise of jurisdiction in this case is not preempted by federal law and does not in any way infringe on the right of reservation Indians to make their own laws and be ruled by those laws. *Id.* at ¶42.

B. Wage Claim Legal Principles

Montana law allows employees owed wages, including wages due under the FLSA, to file a claim with the Department of Labor and Industry to recover wages due. Mont. Code Ann. § 39-3-207; *Hoehne v. Sherrodd, Inc.* (1983), 205 Mont. 365,

¹ Mickale Carter, *Regulatory Jurisdiction on Indian Reservations*, 5 PUB. LAND L.REV. 147 (1984).

² 162 Mont. 335, 519 P.2d 1292 (1973).

668 P.2d 232. Foster has never claimed he is owed overtime pay so neither the FLSA or Montana's Minimum Wage and Overtime Compensation Act apply in this case.

An employee seeking unpaid wages has the initial burden of proving work performed without proper compensation. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946); *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*, 359 Mich. 571, 103 N.W. 2d 494, 497 (1960).

Once an employee has shown as a matter of just and reasonable inference that he or she is owed wages, "the burden shifts to the employer to come forward with evidence of the precise amount of the work performed or with evidence to negate the reasonableness of the inference to be drawn from the evidence of the employee, and if the employer fails to produce such evidence, it is the duty of the court to enter judgment for the employee, even though the amount be only a reasonable approximation'" *Garsjo*, 172 Mont. at 189, 562 P.2d at 477, quoting *Purcell v. Keegan*, *supra*, 359 Mich. at 576, 103 N.W. 2d at 497.

Finally, Montana law requires employers to pay to employees the wages earned "in lawful money of the United States or checks on banks convertible into cash on demand" and prohibits them from withholding "wages earned or unpaid for a longer period than 10 business days after the same are due and payable." Mont. Code Ann. § 39-3-204(1). The statute further provides, "reasonable deductions may be made for board, room, and other incidentals supplied by the employer, whenever such deductions are a part of the conditions of employment, or other deductions provided for by law." Mont. Code Ann. § 39-3-204(1).

C. Post owes wages to Foster

Both Post and Foster agreed on the dates and times that Foster was on the job site and that the total of that time was 31.5 hours. Post testified that Foster took a half-hour lunch each day on October 14, 15, and 16. Foster did not dispute this so the time worked must be reduced by 1.5 hours to 30 hours. They agree the travel time from Hamilton to the job on October 13 and back to Hamilton on October 17 would be 16 hours round trip. Post, however, disputes that he agreed to pay for travel time, which dispute is discussed in detail below.

The first issue to resolve in this case is whether there was an oral employment agreement that Post would pay Foster \$20.00 per hour for installing flooring, \$10.00 per hour for travel time, and \$20.00 a day for meals, along with paying for a motel

room. Post contends that there never was such an agreement, while Foster insists there was. Post testified that rate of pay, meals, lodging, and travel time were never discussed at all when Foster was hired for the job in Garryowen. Foster testified that Post specifically offered him \$20.00 per hour for labor, \$10.00 per hour for travel time, \$20.00 a day for meals, and lodging when they discussed the job. The preponderance of the evidence supports Foster on this issue as explained below.

First, Post testified that he told Foster what he tells all his workers when he hires them—that they will be paid what they are worth. He testified after he told Foster that he would be paid what he was worth, Foster replied that he was okay with that. Post further testified that he always decides what to pay a worker after observing and evaluating the worker’s work product. But in Post’s response to the wage claim dated February 10, 2016, contrary to his claim that no amount was quoted to Foster, he answered the question “What was the agreed upon rate of pay?” with “\$15.00 per hour” (Document 31).

Second, Post said in his initial letter to the Wage and Hour Unit dated November 8, 2015 that “The job was a long ways away from Hamilton and no one that I knew was capable of installing flooring wanted to go there (16 hours round trip)” (Document 56). This suggests that Post, after landing the job in Garryowen, was having trouble finding someone willing to go that distance to work. This supports Post needing to offer Foster a substantial wage, meals, motel, and travel time to get him to take the job.

Third, consistent with this, Foster credibly testified that he would never have accepted a job eight hours away from home without knowing his hourly rate of pay, being paid for travel, getting a per diem for food, and having his lodging provided. His claim of an oral agreement with Post for \$20.00 per hour for labor, \$10.00 per hour for travel time, \$20.00 for meals, and a paid motel room has been consistent throughout this proceeding. Since Post previously paid Foster \$15.00 per hour for fixing a chicken coop, painting, and putting in edging along a driveway, \$20.00 per hour for a more skilled job of installing wood floor seems logical and reasonable.

Fourth, Post testified that lodging, meals, and drive time were not discussed at all when he discussed the flooring job with Foster. He insisted that he never pays for meals or lodging for his employees. But when asked why he in fact gave Foster \$20.00 per day for food and paid for his motel room, his explanation was that Foster did not have money and they were advances against his pay that Foster agreed to. When asked how Foster agreed to these advances, Post testified that every time he gave Foster \$20.00, he told Foster it was an advance on his pay. No specific testimony was presented detailing how Foster agreed that the motel bill would be

deducted from his pay. Foster denies that there was any such agreement or that he was told when he got the money for meals that they would be deducted from his pay.

Because Foster's testimony and evidence regarding the oral agreement is more believable than Post's testimony and evidence on this point, Foster was due wages for his hours worked at \$20.00 per hour and travel time at \$10.00 per hour. He was properly paid for his meals and the motel room was paid for by the employer according to their oral agreement.

In regard to the travel time, apart from the agreement, the department rules provide guidance in regard to whether travel time is work time. Admin. R. Mont. 24.16.1010(2) states that "normal travel from home to work is not work time." But Admin. R. Mont. 24.16.1010(4) provides that travel to another city for a special work assignment would be considered working time if it was performed for the employer's benefit and at the employer's request for the needs of the assignment.

In this case, Foster reported to Post's residence and drove the employer's truck to the job site. The truck was used to pick up materials for the job. The truck was driven back to Post's residence. As such, the travel would qualify as work time since the travel from Hamilton to Garryowen and back was for the employer's benefit and at the employer's request and was needed to complete the flooring assignment.

The finding explained earlier that there was an oral agreement that Post would pay Foster \$20.00 a day for meals and pay for a motel room necessarily means Post was not entitled to deduct the hotel bill and money given to him for meals from the wages payable to Foster under Mont. Code Ann. § 39-3-204(1). That statute states that "reasonable deductions may be made for board, room, and other incidentals supplied by the employer, whenever such deductions are a part of the conditions of employment" (Emphasis added). The evidence shows there was no condition of employment established between Post and Foster that the motel bill and money for meals were to be deducted from his wages. Post also argued that the value of food given to Foster for lunch and the amount paid to fill up the truck with gas should be deducted from the amount owed. Again, the record does not reflect any agreement that these amounts be deducted from Foster's pay.

In addition, Post argues that Foster's poor workmanship, which resulted in Post having to pay a contractor about \$2,000.00 to redo the floor, should be considered in deciding whether Foster is owed wages. In *Christiansen v. Taylor Bros.* (1987), 225 Mont. 318, 319, 732 P.2d 841, 843, however, the Montana Supreme Court recognized the difference between voluntary deductions and deduction of wages "at the employer's instigation, for the benefit of the employer." The court ruled that "Employers cannot deduct from an employee's wages to cover expenses incurred by

the employer.” Id. The court cited a 1975 Montana Attorney General opinion that deductions from wages may not be made for “damages caused by an employee’s negligence, for unauthorized truck mileage or for other expenses incurred by the employee as a result of his employment.” 36 Op. Att’y Gen. 17 (1975). As a result, the fact that Post had to have the floor redone does not affect Foster’s wage claim.

The final issue to resolve is whether Post paid Foster \$200.00 when they returned to Hamilton on October 17, 2015. Post’s testimony that he paid Foster \$200.00 was corroborated by Gors’ very credible testimony that she took \$200.00 from her purse, which was from cashing the check that the customer had given them, and gave it to Post. She further testified credibly that she saw Post give Foster the money. It is quite likely that when Post declined to pay Foster any additional money, and Foster recognized that the \$200.00 was paid in cash, Foster determined that he should claim he was not paid anything. The fact that Foster insisted repeatedly in the hearing that he never drove the pickup truck, which clearly was untrue, undercuts his testimony. The same cannot be said for Gors who seemed forthright in her testimony. The preponderance of the credible evidence establishes Post paid Foster \$200.00, which must be deducted from the pay owed to him.

Consequently, Post owes Foster \$560.00, calculated using 30 hours at \$20.00 per hour (\$600.00) for on-site work plus 16 hours at \$10.00 per hour for travel time (\$160.00), minus the \$200.00 which was paid by Post to Foster.

D. Post must pay a 55% penalty on the amount found owed to Foster

Montana law assesses a penalty when an employer fails to pay wages when they are due. Mont. Code Ann. § 39-3-206. By failing to pay Foster his full wages, the employer failed to pay his wages when they were due. Post is, therefore, subject to penalty. There are no special circumstances in this case that would require the imposition of the maximum penalty of 110% under Admin. R. Mont. 24.16.7556. As a result, the penalty is 55% on the unpaid wages, or \$308.00. Admin. R. Mont. 24.16.7551(2); 24.16.7561.

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. John Post owes Michael Foster \$560.00 in wages. Mont. Code Ann. § 39-3-204; Mont. Code Ann. § 39-3-204.

3. John Post owes a 55% penalty on the unpaid pay in the amount of \$308.00. Admin. R. Mont. 24.16.7566.

VI. ORDER

John Post IS HEREBY ORDERED to tender a cashier's check or money order in the amount of \$868.00, representing \$560.00 in unpaid wages and \$308.00 in penalties, payable to the claimant, Michael Foster, and delivered to the Employment Relations Division, P.O. Box 201503, Helena, Montana 59620-1503, no later than March 13, 2017. John Post may deduct applicable withholding from the wage portion but not the penalty portion.

DATED this 9th day of February, 2017.

DEPARTMENT OF LABOR & INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ STEVEN A. WISE
STEVEN A. WISE
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. A copy of the petition must be served upon the department at the following address:

Department of Labor & Industry
Wage & Hour Unit
P.O. Box 201503
Helena, MT 59620-1503

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.