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

IN THE MATTER OF THE WAGE CLAIM OF CHRISTINA L. MARSHALL,	)	Case No. 883-2017
Claimant,	)	
vs.	)	**FINAL AGENCY DECISION**
SEVEN POINT RANCH, LLC, a Montana limited liability company,	)	
Respondent.	)	

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I. INTRODUCTION

On December 9, 2016, Christina L. Marshall filed a wage and hour claim with the Wage & Hour Unit of the Montana Department of Labor & Industry (Wage & Hour Unit) alleging Seven Point Ranch, LLC, a Montana limited liability corporation (Seven Point Ranch), owed her $13,422.90 in unpaid overtime wages for work performed during the period of May 15, 2016 through November 15, 2016.

On February 24, 2017, the Wage & Hour Unit issued a determination finding Marshall's claim was subject to the Fair Labor Standards Act (FLSA) and Marshall was not exempt from minimum wage or overtime. The Wage & Hour Unit determined Seven Point Ranch owed Marshall $2,420.75 in overtime wages and $117.02 in minimum wages and imposed a 55% penalty. In addition, the determination found liquidated damages to be proper and imposed a penalty in the amount of 100% of the wages owed pursuant to 29 U.S.C. § 216 for a total of $5,022.88. Seven Point Ranch requested an appeal to a contested case hearing, and Marshall requested a redetermination.

On April 17, 2017, the Wage & Hour Unit issued a redetermination finding Marshall was owed $2,985.09 in overtime and imposed liquidated damages as described above. The determination provided that the matter could be resolved by Seven Point Ranch submitting a check or money order in the amount of $5,970.18

(including the liquidated damages and penalties). Seven Point Ranch filed a timely request for a contested case hearing.

Following mediation efforts, the Wage & Hour Unit transferred the case to the Office of Administrative Hearings (OAH) on June 9, 2017. On June 14, 2017, OAH issued a Notice of Hearing and Telephone Conference.

On June 26, 2017, Hearing Officer David A. Scrimm conducted a telephone scheduling conference with Marshall appearing via telephone. Joshua Van de Wetering, counsel of record for Seven Point Ranch, was unavailable and the conference proceeded without his participation. Hearing Officer Scrimm subsequently issued a Scheduling Order setting the matter for hearing on October 17, 2017.

On August 17, 2017, the matter was reassigned to Hearing Officer Chad R. Vanisko. Hearing Officer Vanisko held a telephone conference with the parties on September 11, 2017 and subsequently issued a revised scheduling order setting the matter for hearing on October 10, 2017.

On October 10, and October 11, 2017, the Hearing Officer conducted a hearing in this matter at the Bozeman Job Service. Marshall appeared *pro se.* Van de Wetering represented Seven Point Ranch. Marshall, Chris Fanuzzi, Marge Standish, Randall Simms, Cornelius Dougherty, and Gabe Perry all testified under oath.

The administrative record compiled at the Wage & Hour Unit (Documents 1 through 162) was admitted into the record upon the agreement of the parties, as were Claimant's Exhibits A-C and Respondent's Exhibit 1. The parties requested the opportunity for post-hearing briefing. Upon the filing of the final brief on May 4, 2018, the record was closed and the case was deemed submitted. Based upon the evidence and argument adduced at hearing, the Hearing Officer makes the following findings of fact, conclusions of law, and final agency decision.

II. ISSUE

Whether Seven Point Ranch, LLC, owes wages for work performed, as alleged in the complaint filed by Christina L. Marshall and owes penalties or liquidated damages, as provided by law.

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III. FINDINGS OF FACT

1. Seven Point Ranch, LLC (Seven Point Ranch or the Ranch) is located in Paradise Valley near Emigrant, Montana. It is owned and/or operated by Chris Fanuzzi and his partner, Alaina Garcia.

2. Seven Point Ranch has been operating as a guest ranch since 2014. At that time, it had only four to six rooms available to the public. As of the date of the hearing, it had approximately ten rooms available for rent. It also has a facility on the property that it rents out for weddings and other special events.

3. Fanuzzi and Garcia have been friends with Christina Marshall for several years. Marshall owned a ranch in Ecuador where Garcia worked as a student and volunteer several years earlier. Marshall also served as a midwife for Garcia during the birth of her and Fanuzzi's child in 2014.

4. In April or May of 2016, Marshall contacted Fanuzzi about a possible job after she had left Ecuador seeking donations after a catastrophic earthquake had damaged the area. Fanuzzi offered Marshall a job as guest services manager for Seven Point Ranch.

5. On June 11, 2016, Garcia sent Marshall a text message with an attachment describing the job duties expected of the guest services manager. The attachment was a handwritten document prepared by Garcia that included, in pertinent part:

> 7-day/week on-call, on-site living quarters; flexible vacation (8 days/month) scheduled, monthly salary . . . 40 hours week approx. . . . Must welcome guests, show rooms, give Yellowstone Tours, get up at 5:45 a.m. to prepare breakfast . . . Tech savy to organize/book rooms/communicate with guests/contractors/owners. . . Must post relevant social media about events/wildlife sitings [sic] 1-4 times/mo. . . . Must clean rooms/common areas . . . willing to do high quality maintenance for on-site basics (replace light bulbs/laundry/weeding/water plants) . . . willing to work the on-site coffee-hut.

(Admin. at 138-39.)

6. Marshall accepted a position as guest services manager with Seven Point Ranch. The handwritten job description, although ostensibly only a "doodle," was an accurate description of the guest services manager position.

7. On June 15, 2016, Marshall began working for Seven Point Ranch as its guest services manager. The parties mutually agreed that Marshall would be paid a monthly salary of $3,000.00 regardless of the number of hours she worked.

8. From June 15, 2016, until her final day of work on October 20, 2016, Marshall has claimed 508.84 hours of overtime.

9. Fanuzzi expected that Marshall would work 40-50 hours per week.

10. Although not an explicit requirement of the position, Marshall was effectively required to live on the property so she could be available to guests and generally oversee the daily operations of the Ranch.

11. It was initially understood that Marshall would pay $300.00 per month for a room at the Ranch. Although Marshall received the benefit of housing, rent was never actually deducted from Marshall's salary by Gabriel Perry, the accountant and bookkeeper for Seven Point Ranch. Marshall paid for her own food.

12. Marshall initially kept track of her work hours via a personal log/diary. She kept this log contemporaneous to her work. Later, David Lieberman, the director of operations for Seven Point Ranch, set up a time clock program (TimeClock Wizard) where Marshall recorded her hours from August 19, 2016 through October 18, 2016.

13. Fanuzzi and Garcia were aware that Marshall was working overtime and expressed concern that she should not be working as many hours, but never stopped her from working overtime hours.

14. Fanuzzi was a "micromanager," who did not allow Marshall to make decisions of any importance without his knowledge and final approval. Marshall was not primarily responsible for performing duties that required an exercise of discretion or independent judgment with respect to matters of significance, nor anything related to management.

15. David Lieberman was rarely onsite and typically worked remotely.

16. Standish, who is currently the manager of Seven Point Ranch and was, by all accounts, a fast and efficient worker, worked three to four hours each day as a maid along with her daughter. Standish was not usually on the Ranch premises on the weekends. Standish observed Marshall working as many as seven to eight hours a day, but generally had no knowledge of many things that Marshall did on the Ranch or for the Ranch. Standish had known Fanuzzi for many years.

17. Randall "RJ" Simms was the property manager for Seven Point Ranch, and primarily did grounds keeping work. Simms resided at the Ranch and paid between $800.00 to $1,500.00 for his lodging until moving off-site in July of 2016 after being married on the Ranch property in June. Although he claimed to work for upwards of nine hours for 6-7 days a week, Simms also claimed that he never saw Marshall make breakfast or clean rooms despite the fact it was undisputed that Marshall typically made breakfast every day and helped to clean rooms. While Simms was working, he was also receiving disability benefits, and was apparently not reporting his income from the Ranch. Simms was not happy with Marshall's behavior at his wedding, and he continued to have negative feelings toward Marshall.

18. Cornelius "Neal" Dougherty was working as a sub-contractor for Big Bear Electric during much of Marshall's employment, and was onsite approximately four hours per day. He moved to the Ranch in September, 2016, when he began working for Seven Point Ranch as a property and security manager. Animosity existed between Marshall and Dougherty, in part stemming from a feeling that Marshall was bossing workers/contractors around, and in part because Marshall raised issues concerning his use of a vehicle while without a valid license as the result of a DUI. Dougherty testified that it took him 20 minutes daily to make cold breakfast for guests.

19. Marshall's daily duties generally included, but were not limited to providing all aspects of guest services, from processing payments and guest reservations online via the ResNexus system to arranging and taking guests on tours–including to Yellowstone Park–to making hot breakfasts, cleaning public areas and rooms, washing linens, watering and mowing lawns, trash removal, event contracting, working at weddings and other large events, creating and maintaining a comprehensive inventory of the facility, checking on insurance issues for events, providing a "public face" at news conferences, Chamber of Commerce events, and in other forums requiring public interaction.

20. In addition to the ResNexus system handled primarily by Marshall, guest reservations were also made through Airbnb, which was handled primarily by Garcia.

Garcia was in a position to have knowledge of occupancy rates during Marshall's employment with the Ranch.

21. Marshall worked closely with local contractors and tradesmen to coordinate their work at the Ranch, which was undergoing significant renovation.

22. Marshall never expressly requested overtime compensation until after leaving her job.

23. From June 15, 2016, through October 20, 2016, Marshall was paid $15,000.00 in salary and received $1,200.00 in rental benefits.

24. From June 15, 2016, through October 20, 2016, Marshall worked 1,219.28 hours in total, 497.48 of which was overtime, as set forth in more detail herein.

IV. DISCUSSION[1]

A. Montana Wage Protection Act.

Montana law provides, ". . . every employer of labor in the state of Montana shall pay to each employee the wages earned by the employee in lawful money of the United States or checks on banks convertible into cash on demand at the full face value of the checks, and a person for whom labor has been performed may not withhold from any employee any wages earned or unpaid for a longer period than 10 business days after the wages are due and payable, except as provided in § 39-3-205." Mont. Code Ann. § 39-3-204.

The requirement to pay minimum wage and overtime does not apply to "resident managers employed in lodging establishments or assisted living facilities who, under the terms of their employment, live in the establishment or facility." Mont. Code Ann. § 39-3-406(l). The burden of proving that an employee is excluded from overtime requirements falls upon the employer who asserts it. *Kemp v. Board of Personnel Appeals*, 1999 MT 255, 296 Mont. 319, 989 P.2d 317. To meet this burden, an employer must present evidence to show that the employee falls "plainly and unmistakably within the exemption's terms." *Id. at* ¶16, *citing Public Employees Ass'n v. Dept. of Transportation*, 1998 MT 17, 287 Mont. 229, 954 P.2d 21.

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[1] 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).

The evidence, including Marshall's own testimony, shows she was a resident manager as contemplated by Mont. Code Ann. § 39-3-406(1)(l). Although there was some dispute as to whether Marshall was required to live on the business premises as part of her hiring terms, it was apparent from her actual duties that being a "resident" was very much part of the job, that having a room was part of her compensation, and that the kinds of front desk tasks along with her daily responsibilities for guests and all manner of things related thereto, she was a "resident manager" within the meaning of the Montana Code. *See, e.g., Moore v. Imperial Hotels Corp.*, 1998 MT 248, ¶¶ 7, 24, 291 Mont. 164, 967 P.2d 382. As such, Marshall is therefore excluded from the minimum wage and overtime provisions of Mont. Code Ann. §§ 39-3-404, -405. *See* Mont. Code Ann. § 39-3-406(1)(l).

Exclusion from Montana's Wage Protection Act does not, on its own, exclude Marshall from coverage under the FLSA. The issues then become whether Marshall is covered under the FLSA, and, if so, whether she was compensated at a rate not less than the applicable minimum wage rate for every hour worked, and what amount of overtime she is due.

B. Fair Labor Standards Act (FLSA).

A claimant has the burden of proving three elements in an FLSA claim:

(1) The existence of an employer-employee relationship;
(2) Coverage under the Act; and
(3) A violation of one or more of the statutory standards.

See Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 686–87 (1946). There is no dispute that Marshall was an employee of Seven Point Ranch. Notwithstanding an apparent concession that the FLSA otherwise applies (albeit with an exemption), the issue of coverage requires more analysis, as certain criteria must be met for application of the FLSA.

The FLSA provides coverage to employees on two different bases–enterprise coverage and individual coverage. With regard to enterprise coverage, an "[e]nterprise engaged in commerce or in the production of goods for commerce" means an enterprise with two or more employees that, in relevant part:

(i) has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise

> working on goods or materials that have been moved in or produced for commerce by any person; and
>
> (ii) is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level that are separately stated). . . .

29 U.S.C. § 203(s)(A)(i)-(ii). Seven Point Ranch is excluded from enterprise coverage because it was readily apparent from financial documentation provided at hearing that the business had annual gross sales of less than $500,000.00.

Employees of non-covered enterprises may still be subject to the FLSA's protections on an individual basis if they were individually engaged in interstate commerce or in the production of goods for interstate commerce, or in any closely-related process or occupation directly essential to such production. *See* 29 U.S.C. §§ 206-207; *see also Zorich v. Long Beach Fire Dep't & Ambulance Serv.*, 118 F.3d 682, 685-86 (9th Cir. 1997). Seven Point Ranch has argued its case based solely on the assumption that the FLSA applies, but that Marshall is subject to coverage exemptions. In other words, it has conceded that the FLSA applies. Even if it had not made this concession, however, it is apparent that Marshall was engaged in interstate commerce on behalf of Seven Point Ranch.

No *de minimis* rule applies to coverage under the FLSA, and any regular contact with commerce, no matter how small, will result in coverage. *See Mabee v. White Plains Publishing Co., Inc.*, 327 U.S. 178, 181-84 (1946). A determination is made based on whether the employee's work is actually in commerce or is so closely related to the movement of commerce that it is for practical purposes a part of it, rather than an isolated, local activity. *See Mitchell v. C. W. Vollmer & Co.*, 349 U.S. 427, 429 (1955). "Employees are 'engaged in commerce' within the meaning of the Act when they are performing work involving or related to the movement of persons or things (whether tangibles or intangibles, and including information and intelligence) among the several States or between any State and any place outside thereof." 29 C.F.R. 779.103; *but see Sobrinio v. Med. Ctr. Visitor's Lodge, Inc.*, 474 F.3d 828, 829-30 (5th Cir. 2007) (noting that employees engage in commerce when their work is entwined with a continuous stream of interstate travel, and that providing local transportation for out-of-state motel guests could not be viewed as part of a constant stream of interstate travel). "Typically, but not exclusively, employees engaged in interstate or foreign commerce include . . . clerical and other workers who regularly use the mails, telephone or telegraph for interstate communication; and employees who regularly travel across State lines while working." 29 C.F.R. 779.103.

Marshall was responsible for taking reservations from future Ranch guests in all locales via the ResNexus reservation system over the Internet. She was further responsible for processing their electronic payment information and for maintaining post-stay relations with certain guests, again through the Internet. These guests were not only from Montana, but also outside the state. Marshall was also responsible for taking guests on tours to Yellowstone Park. This activity was undertaken on behalf of Seven Point Ranch to serve its guests, and in contrast to the *Sobrino* case, *supra*, it required that Marshall not merely travel locally with guests, but that she cross state lines from Montana to Wyoming. *See Marshall v. Victoria Transp. Co.*, 603 F.2d 1122, 1124-25 (5th Cir. 1979) (regarding interstate transportation of guests). Seven Point Ranch's concession regarding FLSA coverage notwithstanding, the evidence shows that she was engaged in interstate commerce through her employment with Seven Point Ranch.

Marshall's coverage under the FLSA then raises the issue of whether the exemption raised by Seven Point Ranch is applicable–namely, whether Marshall is exempt from the coverage of the FLSA as a bona fide administrative employee as argued by Seven Point Ranch.

1. Marshall is Not a Bona Fide Administrative Employee Under the FLSA.

Seven Point Ranch argues that Marshall is covered by the FLSA, but is exempted because she is employed in a bona fide administrative capacity. The Code of Federal Regulations provides that the term "employee employed in a bona fide administrative capacity" means any employee:

> (1) Compensated on a salary or fee basis pursuant to § 541.600 at a rate per week of not less than the 40th percentile of weekly earnings of full-time nonhourly workers in the lowest-wage Census Region (or 84 percent of that amount per week, if employed in American Samoa by employers other than the Federal government), exclusive of board, lodging or other facilities. Beginning January 1, 2020, and every three years thereafter, the Secretary shall update the required salary amount pursuant to § 541.607;
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> (2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; ***and***

(3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

29 C.F.R. 541.200(a)(1)-(3) (emphasis added).

Marshall's $3,000.00 per month salary meets the salary criteria of (a)(1), which has been set at a minimum of $455.00 per week. With regard to Marshall's duties, however, the evidence shows that although Marshall was responsible for a great many manual and clerical duties as a guest services manager, she was not primarily responsible for performing duties that required an exercise of discretion or independent judgment with respect to matters of significance, nor anything related to management. Garcia and Fanuzzi were involved in actual decision-making related to the Seven Point Ranch's operations, as was Lieberman. Marshall testified that Fanuzzi was a "micromanager," who did not allow Marshall to make decisions of any importance without his knowledge and final approval. Seven Point Ranch has not met its burden to show that Marshall falls within the terms of the exemption for a bona fide administrative employee, and its argument therefore fails.

2. Hours Worked by Marshall.

a. Burden of Proof.

With coverage under the FLSA established and no applicable exemptions, the question becomes the amount of work, if any, which Marshall performed without proper compensation. An employee seeking unpaid wages under the FLSA has the initial burden of proving work performed without proper compensation. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686-87 (1946). 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. *Anderson,* 328 U.S. at 687. To ensure employees are paid overtime when it is owed, the law requires employers to keep records of employee's hours. 29 U.S.C. § 211(c). In *Anderson*, *supra*, the U.S. Supreme Court held that when the employer fails to record the employee's hours, the employee's records may be used to determine the amount of time worked. *Anderson*, 328 U.S. at 687. As the Supreme Court stated in *Anderson*:

> [W]here the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes a more difficult problem arises. . . . 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. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

Anderson, 328 U.S. at 687-88.

Thus, under *Anderson*, if the employer fails to comply with 211(c) and record the employee's hours, the employee's records may be used to determine the amount of time worked. The employee may substantiate the claim by showing that she has, in fact, performed work for which she was improperly compensated and by producing sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. 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 produce evidence either showing the precise amount of worked performed or negating the reasonableness of the inference. "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." *Mitchell v. Caldwell*, 249 F.2d 10, 11 (10th Cir. 1957) (emphasis added) (citing *Anderson*, *supra*; *Porter v. Poindexter*, 158 F.2d 759 (10th Cir. 1947); *Handler v. Thrasher*, 191 F.2d 120 (10th Cir. 1951)).

Other than Lieberman's use of the TimeClock Wizard program, Seven Point Ranch failed to record any of Marshall's hours that would contradict her own reporting, and Marshall's own timekeeping is therefore the only evidence of her hours worked. She asserts that the hours recorded by her are not an approximation, but rather an accurate representation of her time she spent performing work for the Ranch. Conversely, because Seven Point Ranch failed to record any of Marshall's time independent of her reporting, it is unable to provide any alternative, accurate measure of Marshall's hours. Marshall has therefore met her burden of showing that, as a matter of just and reasonable inference, she is owed wages. This showing shifts the burden back to Seven Point Ranch to negate the reasonableness of the inference established by Marshall's evidence.

Because Seven Point Ranch was unable to produce evidence of a precise amount worked that was contradictory to Marshall, it attempted to negate the reasonableness of Marshall's hours at the hearing in this matter. To this end, it

argued the amount of time it *should have* taken Marshall to accomplish tasks, but presented no evidence expressly disproving the amount of time it *actually did* take Marshall to do these tasks. Seven Point Ranch also presented speculative, untrustworthy testimony from Simms regarding his failure to notice Marshall doing tasks that no one disputes she performed. Adding to concerns about Simms' character for truthfulness was the fact that he was "working" at Seven Point Ranch while also receiving disability payments. Indeed, Fanuzzi's own trustworthiness is called into question here, as he was knowingly employing Simms in a manner that enabled him to both receive a salary and disability payments.

Dougherty also provided questionable testimony regarding how, for example, he was able to prepare cold breakfast for guests every morning in only 20 minutes. Even if the speed with which he claimed to work was accurate, Marshall was preparing a hot breakfast, making his comparison one of apples to oranges, so-to-speak. Standish offered more trustworthy testimony, but it was nonetheless useless in negating Marshall's claimed hours. Both parties acknowledged that Standish was a much faster worker than Marshall, and that she also only worked for a portion of the days as did Marshall.

None of the individuals who testified on behalf of Seven Point Ranch performed the full gamut of duties undertaken by Marshall. Fanuzzi was not present to observe Marshall's work, so could not offer credible testimony regarding how much time she actually spent on various tasks. Thus, no witness of Seven Point Ranch offered persuasive testimony sufficient to rebut the evidence offered by Marshall showing the extent and amount of work she performed as the guest services manager for Seven Point Ranch.

b. Unauthorized Overtime.

Seven Point Ranch put forward evidence that Marshall had not been authorized to work overtime when she was hired. The evidence also shows, however, that Seven Point Ranch was aware Marshall was working overtime and did nothing to stop her from doing so. The CFR addresses such cases:

> Work not requested but suffered or permitted is work time. [. . .] The reason is immaterial. The employer knows or has reason to believe that he is continuing to work and the time is working time.

* * *

> In all such cases it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so.

29 C.F.R. 785.11, 785.13; *see also Handler v. Thrasher*, 191 F.2d 120, 123 (10th Cir. 1951). Thus, any argument that Marshall was not permitted or authorized to work overtime fails under these rules.

c. Adjustments to Claimed Hours.

Notwithstanding Seven Point Ranch's failure to specifically rebut Marshall's claimed hours, the Hearing Officer nonetheless struggles with Marshall's representation of her hours because they appear to be high. It was Seven Point Ranch's burden, though, to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of Marshall's hours, neither of which it did. To the extent it attacked the reasonableness of the hours, Seven Point Ranch failed to offer evidence or testimony that was any more persuasive than that of Marshall.

One potential empirical measure of reasonableness offered (but not specifically testified to by Garcia, who was not present at hearing) by Seven Point Ranch was its approximate occupancy rate, which it suggested should be a guide for Marshall's hours. (Although the occupancy rate itself was not entirely accurate, as family and friends who lodged were not always reflected in the numbers, and the occupancy numbers themselves were not necessarily representative of the number of people staying in a room.) The Hearing Officer examined the correlation between weekly occupancy and hours claimed, and found a weak-to-moderate positive correlation, as shown in the following scale-adjusted graph:

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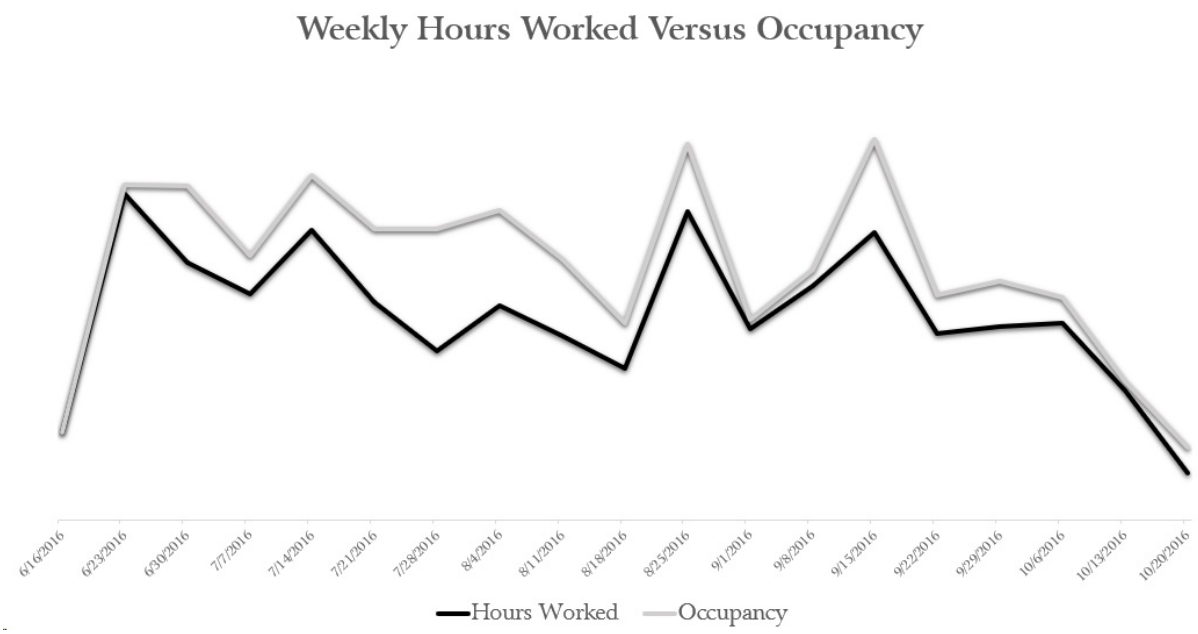

Although the correlation is mild on a statistical basis, the two factors are not completely disconnected.

Given the evidence and testimony presented at the hearing, the Hearing Officer feels that it would be outside the bounds of his discretion to reduce Marshall's hours given both the positive correlation between hours and occupancy rate and the panoply of Marshall's duties that were not directly connected to occupancy. *See* 29 C.F.R. 785.23 (noting that it can be difficult to determine the exact hours of an employee living at a job site). To reiterate, however long Fanuzzi–who observed very little of Marshall's work–or anyone else who worked at the Ranch believed it should have taken Marshall to complete tasks, their belief does not represent the time it actually took her to do those tasks. Any figure the Hearing Officer might use to substitute for Marshall's claimed hours would be speculative at best, and not based on any actual observation of Marshall's time worked given that Seven Point Ranch has not provided any alternative, accurate measure of Marshall's hours. In *Anderson*, *supra*, the Supreme Court specifically contemplated that employees' evidence of the hours they worked would be imprecise and untrustworthy. *Anderson*, 328 U.S. at 687. The Court nonetheless held that, because of the employer's duty to keep records of employee hours, the employee bears a light burden of production when the employer fails to keep such records. Such is the case here.

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3. Monetary Award.

a. Fluctuating Work Week (FWW) Calculations.

With regard to the amount of overtime owed, the CFR also addresses cases where a fixed salary is paid to a worker subject to overtime rules. Under the fluctuating workweek (FWW) method, an employee may be paid a fixed salary if it is sufficient to compensate the employee for all regular hours worked at a rate not less than the minimum wage and the employee is paid an additional one half of the regular rate for all overtime hours. *See* 29 C.F.R. 778.114(a). The regular rate of pay varies due to the fluctuating hours worked week to week, and the full salary must be paid even when the full schedule of hours is not worked. *See id*. The use of the FWW method prohibits the practice of cutting salary for a week in which less than 40 hours is worked in order to counterbalance compensation for hours over 40 worked in another week of the same pay period. *See* 29 C.F.R. 778.114(c); *see also Samson v. Apollo Res., Inc.*, 242 F.3d 629, 635 (5th Cir. 2001). While there is admittedly a split among the federal courts as to whether the FWW method can be applied retroactively in a misclassification case, the Hearing Officer has determined that, based on the facts in this case and the discussion set forth *infra*, it is appropriate to apply it where both the employer and the employee have agreed that the employee will be paid a fixed salary to work fluctuating hours. *See Black v. Settlepou, P.C.*, 732 F.3d 492, 498 (5th Cir. 2013).

In order to apply the FWW method, there must be a clear and mutual understanding of the parties that the fixed salary is "compensation for however many hours the employee may work in a particular week, rather than for a fixed number of hours per week." *Clements v. Serco, Inc.*, 530 F.3d 1224, 1230 (10th Cir. 2008). "An agreement or understanding need not be in writing in order to validate the application of the fluctuating workweek method of paying overtime. Where an employee continues to work and accept payment of a salary for all hours of work, her acceptance of payment of the salary will validate the fluctuating workweek method of compensation as to her employment." Wage and Hour Opinion Letter FLSA-772 (Feb. 26, 1973); *see also* Wage and Hour Opinion Letter FLSA2009-3 (Jan. 14, 2009). Furthermore, the regulations do not require that the understanding extend to the method used to calculate the overtime pay. *See Valerio v. Putnam Assocs., Inc.*, 173 F.3d 35, 40 (1st Cir. 1999). Employers and employees with a fluctuating pay plan need not even understand the manner in which overtime pay will be calculated, nor need they agree there would be any additional payments for overtime hours. *See Bailey v. County of Georgetown*, 94 F.3d 152, 156-57 (4th Cir. 1996). "The parties

must only have reached a 'clear mutual understanding' that while the employee's hours may vary, his or her base salary will not." *Valerio*, 173 F.3d at 40.

Here, the parties had a clear mutual understanding that Marshall would be paid $3,000.00/month. There was further a clear mutual understanding that Marshall would be paid that amount regardless of the amount she worked, which it was obvious from evidence and testimony at the hearing both parties were aware would fluctuate from week-to-week. There is no question, then, as to the applicability of the FWW method. The only question is as to how any amounts due Marshall under the FWW should be calculated.

Based on a salary of $3,000.00/month, Marshall's weekly wage was approximately $692.31. To apply the FWW method, each week's hourly wage is then computed by dividing the number of hours worked into that weekly wage. If the hourly wage is less than the applicable federal minimum wage of $7.25/hr. (because the Montana Wage Protection Act does not apply, neither does the Montana minimum wage), the employer must supplement wages to meet the minimum wage. To the extent there is overtime in a week, the overtime rate is computed based on that week's hourly wage rate. Contrary to Marshall's assertions, her overtime is not based on a constant hourly rate of pay for a 40-hour workweek (*e.g.*, assuming a $500.00 weekly salary, a week in which an employee worked 60 hours would have an hourly rate of $8.33 from which overtime would be calculated, whereas a week in which the employee worked 50 hours would have an hourly rate of $10.00 from which to calculate overtime). A calculation of the amounts due Marshall under the FWW method is set forth as follows (to be consistent with the workweek used by the parties, all calculations are done based on weeks ending on Thursdays):

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Week Ending	Hours	OT	Per Hr.	Weekly Wage	Wages Due	OT Due
6/16/2016	27.25	0.00	$ 7.26	$ 197.80	$ -	$ -
6/23/2016	102.00	62.00	$ 6.79	$ 692.31	$ 47.19	$ 674.25
6/30/2016	80.50	40.50	$ 8.60	$ 692.31	$ -	$ 522.46
7/7/2016	70.75	30.75	$ 9.79	$ 692.31	$ -	$ 451.35
7/14/2016	90.75	50.75	$ 7.63	$ 692.31	$ -	$ 580.74
7/21/2016	68.00	28.00	$10.18	$ 692.31	$ -	$ 427.60
7/28/2016	53.00	13.00	$13.06	$ 692.31	$ -	$ 254.72
8/4/2016	67.00	27.00	$10.33	$ 692.31	$ -	$ 418.49
8/11/2016	57.75	17.75	$11.99	$ 692.31	$ -	$ 319.18
8/18/2016	47.50	7.50	$14.57	$ 692.31	$ -	$ 163.97
8/25/2016	96.50	56.50	$ 7.17	$ 692.31	$ -	$ 608.01
9/1/2016	59.61	19.61	$11.61	$ 692.31	$ -	$ 341.63
9/8/2016	73.21	33.21	$ 9.46	$ 692.31	$ -	$ 471.08
9/15/2016	89.93	49.93	$ 7.70	$ 692.31	$ -	$ 576.57
9/22/2016	58.15	18.15	$11.91	$ 692.31	$ -	$ 324.13
9/29/2016	60.67	20.67	$11.41	$ 692.31	$ -	$ 353.80
10/6/2016	61.71	21.71	$11.22	$ 692.31	$ -	$ 365.34
10/13/2016	40.45	0.45	$17.12	$ 692.31	$ -	$ 11.55
10/20/2016	14.55	0.00	$47.58	$ 692.31	$ -	$ -
Totals:	1219.28	497.48			$ 47.19	$6,864.85

Based on the foregoing, Marshall is due an additional $47.19 in base wages for the week ending June 23, 2016, because her hourly rate was below the federal minimum wage (the overtime rate for that week is calculated based on 1.5 times $7.25/hr.). Marshall is also due $6,864.85 in overtime (which is calculated separately for each week based on the per hour rate). Even though the hours worked have not been adjusted from Marshall's own reporting, Marshall claims more hours in overtime–508.84 hours–than the 497.48 hours found here. A review of Marshall's records shows that the differing figures result from calculation errors on Marshall's part, which are corrected herein. This leaves the question of what offsets should be counted against the amounts due Marshall.

b. Offsets.

Marshall does not claim she is owed any additional base wages beyond $12,000.00. (The Hearing Officer recognizes the weekly wage amount that must be applied with the FWW method does not perfectly align with the $12,000.00 figure, but the weekly wage figure is only for calculating overtime and minimum wage compliance, not underlying wages due in this case.) She also agrees that the

additional $3,000.00 she had paid to her should offset the overtime award, as should the $1,200.00 ($300.00 x 4 mos.) in rental value she received for her rent-free room at Seven Point Ranch. The $3,000.00 overpayment and $1,200.00 in rental value may therefore directly offset the $6,912.04 ($47.19 + $6,864.85) due Marshall, resulting in a net award of $2,712.04.

b. Liquidated Damages.

Marshall has not requested attorneys' fees, but has requested liquidated damages. If awarded, liquidated damages are equal to the amount of unpaid wages recovered. 29 U.S.C. § 216(b). Although liquidated damage awards are discretionary, there is a strong presumption in favor of liquidated damages. *See* 29 U.S.C. § 260; *Shea v. Galaxie Lumber & Constr. Co.*, 152 F.3d 729, 733 (7th Cir. 1998). In the absence of a finding that the employer acted in good faith and on reasonable belief that it was complying with the law, liquidated damages are mandatory. *See* 29 U.S.C. § 216(b). The onerous burden to demonstrate good faith rests with the employer: "'[D]ouble damages are the norm, single damages the exception. . . .'" *Brock v. Wilamowsky*, 833 F.2d 11, 19 (2d Cir. 1987) (quoting *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 310 (7th Cir. 1986)). Even if an employer carries the burden, liquidated damages may still be awarded. *See Mireles v. Frio Foods, Inc.*, 899 F.2d 1407, 1416 n. 8 (5th Cir. 1990); *see also Tacke v. Energy W., Inc.*, 2010 MT 39, ¶¶ 25-30, 355 Mont. 243, 249, 227 P.3d 601, 607.

At the outset of the employment relationship, neither party to this case contemplated that Marshall may be an hourly employee. It was also apparent, however, that Seven Point Ranch did nothing to apprise itself of wage and hour law before hiring Marshall. Furthermore, although the necessity of presenting a defense may have brought Seven Point Ranch to argue Marshall was administratively exempt from the FLSA, there is no evidence of a good faith belief this was the case when Marshall was hired. Indeed, Seven Point Ranch has not put forth any other substantive argument with regard to the reasonableness of its actions or whether it acted in good faith. It has therefore failed to meet its burden of showing good faith, and liquidated damages in the amount of $2,712.04 are appropriate. *See* 29 U.S.C. §§ 216, 260.

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.*; *see also State v. Holman Aviation*, 176 Mont. 31, 575 P.2d 925 (1978).

2. Marshall was a resident manager at Seven Point Ranch as that term is defined under Mont. Code Ann. § 39-3-406(1)(l), and is therefore excluded from the minimum wage and overtime provisions of Mont. Code Ann. §§ 39-3-404, -405.

3. Marshall sufficiently engaged in interstate commerce while in the employ of Seven Point Ranch that she is covered under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq*., on an individual basis.

4. Marshall was not a bona fide administrative employee while employed at Seven Point Ranch, and therefore is not subject to exclusion from coverage under the FLSA pursuant to 29 C.F.R. 541.200(a).

5. Marshall met her burden of proving she performed work without proper compensation and proved the extent of that work as a matter of just and reasonable inference, whereas Seven Point Ranch did not meet its burden of negating or otherwise rebutting Marshall's claims. *See Anderson*, 328 U.S. at 686-88.

6. Marshall was permitted to work overtime by Seven Point Ranch. *See* 29 C.F.R. 785.11. 785.13.

7. There was a clear mutual understanding between the parties that Marshall would be paid a fixed salary to work fluctuating hours, and retroactive application of the FWW method to determine wages owed Marshall is appropriate under the facts of this case. *See Black*, 732 F.3d at 498; 29 C.F.R. 778.114.

8. Marshall worked 497.48 hours of compensable overtime, which results in $6,864.85 in overtime due her. She is also due $47.19 to make up for work at rates below federal minimum wage. Marshall acknowledged appropriate offsets of $3,000.00 for a wage overpayment and $1,200.00 in rental value received, resulting in a net award of $2,712.04.

9. Seven Point Ranch failed to meet its burden of showing good faith, and liquidated damages in the amount of $2,712.04 are appropriate. *See* 29 U.S.C. §§ 216, 260.

10. Marshall is entitled to receive $5,424.08 for her claim.

VI. ORDER

Seven Point Ranch is hereby ORDERED to tender a cashier's check or money order in the amount of $5,424.08, $2,712.04 in overtime and regular pay and $2,712.04 in liquidated damages, payable to Christina L. Marshall. Seven Point Ranch may deduct applicable withholding taxes from the portion of the payments representing wages, but not from the portions representing liquidated damages. All payments shall be mailed to Department of Labor and Industry, Wage and Hour Unit, P.O. Box 201503, Helena, Montana, 59624-1503.

DATED this 15th day of August, 2018.

DEPARTMENT OF LABOR & INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ CHAD R. VANISKO
CHAD R. VANISKO
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. Please send a copy of your filing with the district court to:

Department of Labor & Industry
Wage & Hour Unit
P.O. Box 201503
Helena, MT 59624-1503

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.