

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

IN THE MATTER OF THE WAGE CLAIM )	Case No. 400-2018
OF GLEN A. MORTENSEN, JR., )	
)	
Claimant, )	
)	
vs. )	<b>FINAL AGENCY DECISION</b>
)	
PIONEER AMBITIONS, LLC, a Montana )	
limited liability company, d/b/a PIONEER )	
SAND & GRAVEL, LLC, )	
)	
Respondent. )	

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**I. INTRODUCTION**

Claimant Glen A. Mortensen, Jr. (Mortensen) submitted a Wage Claim Form to the Department of Labor and Industry, which the Department marked as received on September 7, 2017. Mortensen claimed that Respondent Pioneer Ambitions, LLC (Pioneer) owed \$28,000.00 for “Salary” for the period from July 1, 2016, through March 9, 2017, and \$20,000.00 for “Commission/Bonus” for the period from February 8, 2017, to March 1, 2017.

On February 5, 2018, the Wage and Hour Unit determined that it was procedurally barred from processing Mortensen’s claim because it was filed outside the 180-day statutory time limit. Following mediation efforts, the Wage and Hour Unit transferred the case to the Office of Administrative Hearings (OAH) on May 14, 2018.

On August 24, 2018, the Hearing Officer issued an order denying a motion for summary judgment filed by Pioneer. Hearing Officer Chad Vanisko conducted an in-person hearing on August 29, 2018. Mortensen was present and represented himself. Russell Martello, Pioneer’s CEO, was present on Pioneer’s behalf, which was represented by its counsel, Connor J. Murphy. In addition to Mortensen and

Martello, Glen Mortensen, Sr., Nathan Wilson, Patricia Hammill (Hammill), Michael Huber (Huber), and Conor Lattin testified under oath.

The administrative record compiled at the Wage and Hour Unit (Documents 1 through 65) was admitted into the record upon the agreement of the parties as Admin. Exhibit 1. Claimant's Exhibit 1 was admitted without objection. Respondent's Exhibits 100 through 102 were also admitted without objection.

At the close of the hearing, Respondent's counsel moved for a motion for "directed verdict," which the Hearing Officer took under consideration. Because an administrative hearing is the equivalent of a bench trial, Respondent's motion was evaluated as a motion to dismiss pursuant to Mont. R. Civ. Proc. 41(b). On September 10, 2018, after considering the evidence and testimony, the Hearing Officer elected to issue a full, written decision on the merits in lieu of granting Respondent's motion, and without requiring additional, post-hearing briefing from the parties. The case was thus deemed submitted.

## **II. ISSUE**

Whether the Wage and Hour Unit is procedurally barred from processing the wage claim of Glen A. Mortensen, Jr. due to the late filing of the claim.

## **III. FINDINGS OF FACT**

1. Pioneer was at all relevant times a member-managed limited liability company (LLC). During the time period at issue, Pioneer operated primarily as a sand and gravel business.
2. During the relevant periods herein, Mortensen was a member of Pioneer, as were Huber and Martello. Martello was the chief executive officer (CEO), Huber was the chief financial officer (CFO), and Mortensen was the chief operating officer (COO).
3. As COO, Mortensen was tasked with managing matters such as production, delivery, and equipment maintenance. Much of Mortensen's work from approximately June through December of 2016 was working in Pioneer's gravel pit.
4. Mortensen had no written employment agreement with Pioneer, and had no commission agreement of any kind with Pioneer.

5. Although Mortensen was initially paid as an independent contractor for Pioneer, he was made an employee in or around June, 2016, and was an hourly employee for purposes of payroll. He was paid a fixed salary of \$3,500.00 per month, but had Mortensen worked more than 40 hours in any given week and submitted proof of such, he would have been paid overtime.

6. Mortensen submitted timecards while working in the gravel pit after being salaried, but they were used primarily as a method to track cost of production, and not to calculate his salary.

7. Due to financial difficulties at Pioneer, Mortensen agreed to temporarily forgo his salary in exchange for remuneration at a later date. Mortensen last received a wage payment in or around late-July of 2016.

8. Because of inclement weather conditions, Mortensen's last day of work in the gravel pit was on or about December 2, 2016. The pit continued to operate at a minimal level through the winter thereafter, but Mortensen did not physically return to work in the pit other than to move the crusher, as discussed below.

9. On or about December 21, 2016, Mortensen met with Martello and Huber. Mortensen had learned that Showalter Construction Co., Inc. (Showalter) of Idaho, the employer of his girlfriend, Patricia Hammill (Hammill), may be interested in purchasing Pioneer's crusher and other assets, and relayed this information to Martello and Huber. Mortensen was told to pursue the possibility of a sale. What, if anything, Mortensen may individually receive from the sale was left open.

10. Through Mortensen's efforts, a sale of Pioneer's crusher and other assets to Showalter was consummated when a bill of sale dated January 17, 2017 (the parties signed between January 18, 2017, and January 23, 2017), was signed by the parties and a \$100,000.00 check (of a \$200,000.00 total sale price) was transferred to Pioneer.

11. The bill of sale stated that all property was being sold "as is" and "with all faults." The bill of sale was to be "effective as to the transfer of all property listed in it as of January 17, 2017."

12. On January 17, 2017, Martello and/or his agent filed documents with the Montana Secretary of State indicating Mortensen had been removed as a member of Pioneer. Although Mortensen had record notice of the action, he did not have actual knowledge at that time.

13. Mortensen worked to prepare the crusher for delivery in early-to-mid February, 2017.

14. On February 21, 2017, Mortensen delivered the crusher to Showalter Construction in Idaho. At that time, he received another check for \$100,000.00, representing full payment of the \$200,000.00 purchase price as agreed upon in the January 17, 2017, bill of sale.

15. Mortensen first discussed wanting a commission on the sale of the equipment with Martello and/or Huber on or about February 21 or 22, 2017.

16. On February 22, 2017, Huber and Martello met with Mortensen and informed him that his work with Pioneer was done and his services were no longer needed, and terminated his employment effective as of that date.

17. From December 3, 2016, through February 22, 2017, Mortensen performed no work for Pioneer other than services related to the sale of the equipment to Showalter.

18. On February 27, 2017, Martello sent correspondence to Mortensen on behalf of Pioneer in an attempt to resolve any claims he had in or against Pioneer. The letter asserted that Pioneer had operated at a deficit since its inception, and offered to assume Mortensen's ownership interest and relieve him of his share of indebtedness without compensation. The letter enclosed a withdrawal agreement as well as various financial statements. Mortensen did not sign the withdrawal agreement.

19. Neither Martello, Huber, or any authorized agent of Pioneer ever directed Mortensen to follow up on the sale of the equipment to Showalter, to make any phone calls, or to go to Idaho on behalf of Pioneer. Nonetheless, although the sale had already been fully consummated and his employment with Pioneer terminated without need for further services, Mortensen took it upon his own volition to instruct Showalter employees in the operation of the crusher in late-February and March of 2017. Hammill, Mortensen's girlfriend, worked for Showalter at the time, and he stayed with her while performing these activities. Neither Martello, Huber, or any authorized agent of Pioneer authorized or had knowledge of Mortensen's follow-up activities at Showalter at the time they occurred, though they later believed he may have accepted employment with Showalter.

20. When an issue arose with equipment titles on March 31, 2017, Martello inquired whether Showalter had spoken with Mortensen about the issue. Martello's inquiry was not indicative of Mortensen still working for or acting on behalf of Pioneer, but rather of Martello's belief that Mortensen had handled the issue since he had brokered the sale to Showalter.

21. Mortensen submitted a Wage Claim Form to the Department of Labor and Industry, which was date-stamped by the Department as received on September 7, 2017.

22. The Wage Claim Form was signed by Mortensen and notarized, and listed Mortensen's dates of work with Pioneer as February 1, 2016, through March 9, 2017.

23. The Wage Claim Form stated \$28,000.00 was owed for "Salary" for the period from July 1, 2016, through March 9, 2017, and \$20,000.00 was owed for "Commission/Bonus" for the period from February 8, 2017, to March 1, 2017.

24. Mortensen's calculation for claiming \$28,000.00 in salary was \$3,500.00 per month for eight months, beginning at the start of July, 2016. This would place the final date of Mortensen's wage claim at the end of February, 2017. His basis for wanting \$20,000.00 in commissions was that it was the 'industry standard.'

25. Mortensen used the date of March 9, 2017, on the Wage Claim Form because it was the date Mortensen sent an e-mail response to the February 27, 2017, correspondence from Huber and Martello.

26. On June 7, 2017, Mortensen submitted an invoice to Pioneer from OJM Construction (Mortensen goes by "OJ" Mortensen), Mortensen's personal company, claiming 1,707.5 hours worked in the gravel pit on behalf of not himself (versus roughly 895 hours reported on his personal timesheets), but rather OJM Construction. Mortensen could only explain the discrepancy between his personal claim and the claim of OJM Construction by stating he did all of his personal bookkeeping through the company and its financial software.

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## IV. DISCUSSION

### **A. Mortensen was an Hourly Employee of Pioneer and is Subject to Wage and Hour Laws.**

The only issue certified for hearing was whether Mortensen timely filed his wage claim. A threshold matter to that issue, however, is whether or not this tribunal even has jurisdiction to determine timeliness. In that regard, Pioneer has raised issues about Mortensen's status as an LLC member, asserting that he could not be both an employee and a member. In essence, Pioneer argues this action is a claim for recovery of Mortensen's membership share in the LLC under the repackaged guise of a wage and hour action, and that this tribunal therefore cannot hear the action. Based on the testimony and evidence presented at the hearing, these issues are moot.

Martello's testimony very clearly and affirmatively stated that Mortensen was an hourly employee of Pioneer while working in the gravel pit, and that he would have been paid overtime had he claimed it. There is nothing mutually exclusive between being an LLC member and also an hourly employee. Whether or not an LLC or corporation member is exempt from wage and hour laws is a question of fact specific to each case. *See Hoven, Vervick & Amrine, P.C. v. Mont. Comm'r of Labor*, 237 Mont. 525, 531, 774 P.2d 995, 999 (1989); *see also, e.g., Matrai v. DirecTV, LLC*, 168 F. Supp. 3d 1347, 1352-57 (D. Kan. 2016). Here, through Martello's testimony, Pioneer has conceded that Mortensen's wage claim is properly before this tribunal, regardless of his status as a member of the LLC.

Some question still exists as to whether Mortensen's claim for commissions, to the extent any are even due, pertains to his wages or his membership interest in the assets and sales proceeds. Again, though, this issue is ultimately moot. Regardless of how the commissions, if any, were earned or characterized, Mortensen's claim was untimely, as discussed below.

### **B. Mortensen Cannot Recover for Work Performed More than 180 Days from the Date of His Claim Filing.**

Wage and hour claims are limited in duration by statute. The Montana Code<sup>1</sup> provides that an employee may recover all wages and penalties provided for the violation of Mont. Code Ann. § 39-3-206 by filing a complaint within 180 days of

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<sup>1</sup>The parties have not alleged that the Fair Labor Standards Act (FLSA) applies to this case, nor have they established any facts which would support such a contention. *See* 29 U.S.C. 201, *et seq.*

default or delay in the payment of wages. Mont. Code Ann. § 39-3-207(1). The 180-day clock does not begin to run until the *last* date on which the employer fails to pay. *Harrell v. Farmers Educ. Coop. Union*, 2013 MT 367, ¶ 29, 373 Mont. 92, 314 P.3d 920 (citing *Jensen v. State*, 2009 MT 246, ¶ 11, 351 Mont. 443, 214 P.3d 1227); *see also* Mont. Code Ann. § 39-3-205(1) (regarding wages due upon an employment separation). A continual, repeated failure to pay wages is relevant for penalties, but is not relevant for determining accrual dates. *See* Mont. Code Ann. § 39-3-207(3).

At hearing, Martello plainly testified that Mortensen was an hourly employee. Pioneer also acknowledged that, due to financial difficulties, Mortensen had not been paid wages it owed him. The question, then, is whether Mortensen's claims are timely. Mortensen testified that he used the date of March 9, 2017, on the Wage Claim Form because it was the date Mortensen sent an e-mail response to the February 27, 2017, correspondence from Huber and Martello. Using March 9, 2017, as the accrual date for Mortensen's claim makes it untimely. Mont. Code Ann. § 39-3-207(1). The March 9, 2017, date must be further examined, however, as Mortensen has made other claims, such as that he was working through the end of March, 2017.

Assuming for the sake of argument that Mortensen's work on the sale of the crusher and related equipment was compensable as part of his wage and hour claim, all requirements of the January 17, 2017, bill of sale were completed as of no later than February 21, 2017. The equipment had all been delivered to Showalter, and Mortensen, on behalf of Pioneer, had received the full remainder of the \$200,000.00 purchase price. Both parties acknowledge that, on February 22, 2017, Huber and Martello met with Mortensen and informed him that his work with Pioneer was done and his services were no longer needed. Mortensen's employment with Pioneer was therefore terminated effective as of February 22, 2017. *See, e.g., Redfern v. Montana Muffler*, 271 Mont. 333, 896 P.2d 455; *Allison v. Jumping Horse Ranch, Inc.*, 255 Mont. 410, 414, 843 P.2d 753, 756 (1992); *see also, e.g.,* Mont. Code Ann. § 39-2-903(1)-(2).

Neither Martello nor Huber ever directed Mortensen to follow up on the sale of the equipment to Showalter, to make any phone calls, or to go to Idaho on behalf of Pioneer. Nonetheless, although the sale had already been fully consummated and his employment with Pioneer terminated without need for further services, Mortensen took it upon his own volition to instruct Showalter employees in the operation of the crusher in late-February and March of 2017. No one at Pioneer authorized or had knowledge of Mortensen's follow-up activities at Showalter at the

time they occurred, and such activities were entirely gratuitous on Mortensen's part. It is also telling that, in the Wage Claim Form filed by Mortensen under penalty of perjury, he did not claim time for this work after March 1, 2017.

Mortensen did not perform compensable work or earn any commissions after February 22, 2017, at the latest. Assuming again for the sake of argument that Mortensen's claim did not fully accrue until 15 days thereafter pursuant to Mont. Code Ann. § 39-3-205(2), Mortensen's claim accrued on March 9, 2017—exactly the date he claimed on the Wage Claim Form. Pursuant to Mont. Code Ann. § 39-3-207(1), Mortensen had 180 days in which to file his claim, or until September 5, 2017. Mortensen did not file until September 7, 2017.

No factors exist which would alleviate Mortensen of the duty to file his claim within 180 days. The 180-day time limit is not permissive, and there is no good cause standard for waiving the requirement. *See* Mont. Code Ann. § 39-3-207(1). Mortensen has not asserted any circumstances which would justify staying the time limit. *See* Mont. Code Ann. §§ 27-2-401 *et seq.* In fact, he took steps during the interim period to make claims on behalf of OJM Construction for some of the same claims, but did nothing to file his own claim. Furthermore, ignorance of the law concerning Mortensen's potential remedies is not a defense to filing an untimely claim.

Based on the foregoing, Mortensen's claim is untimely, and the Wage and Hour Unit is therefore procedurally barred from processing the claim.

## 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*, 176 Mont. 31, 575 P.2d 925 (1978).

2. Mortensen failed to timely file a wage and hour claim within the 180-day period provided for under Mont. Code Ann. § 39-3-207.

3. The Wage and Hour Unit is procedurally barred from processing Mortensen's wage claim due to the late filing of the claim.

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**VI. ORDER**

**IT IS THEREFORE ORDERED THAT:**

1. Mortensen's appeal is DISMISSED.
2. Pioneer's motion to dismiss pursuant to Mont. R. Civ. Proc. 41(b) is DENIED as moot.

DATED this 1st day of November, 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