

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

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| IN THE MATTER OF THE WAGE CLAIM) | Case No. 1877-2018 |
| OF CHRIS A. BAKER,) | |
|) | |
| Claimant,) | |
|) | |
| vs.) | FINAL AGENCY DECISION |
|) | |
| HOG N JOG CAFÉ & BBQ, LLC,) | |
| a limited liability company,) | |
|) | |
| Respondent.) | |

* * * * *

I. INTRODUCTION

On May 7, 2018, Chris A. Baker (Baker) filed a claim with the Wage and Hour Unit of the Department of Labor and Industry contending that Hog N Jog Café & BBQ, LLC, (the Café) owed him \$12,208.13 in unpaid wages for work performed from March 12, 2018, through April 30, 2018.

On December 12, 2018, the Wage and Hour Unit issued a determination finding Baker was owed \$12,196.88 in unpaid wages for work performed. On December 24, 2018, the Café appealed the determination. As a result, on February 13, 2019, the Wage and Hour Unit transferred the matter to the Office of Administrative Hearings (OAH) after attempts at mediation were unsuccessful.

A hearing was initially scheduled for June 6, 2019. The parties had originally agreed to a telephonic hearing, but counsel for the Café subsequently submitted a request for an in-person hearing, which was granted. However, on May 31, 2019, counsel for the Café submitted a motion to continue the hearing because he had failed to adequately prepare and interview witnesses sufficiently in advance of the hearing (counsel would dispute this characterization, but the stated reason for the continuance was that he had not yet even made contact with witnesses he intended to call for the hearing the following week). The continuance was granted, with the hearing to take place in-person on July 15, 2019. Because neither party had submitted required disclosures as of the date of the continuance, they would need to be fully prepared and submit all required documents pursuant to the prior orders issued in this case.

At the conference on July 8, 2019, the Hearing Officer inquired with Claimant as to why he had not submitted any of the required final pre-hearing disclosures. Claimant responded that, notwithstanding this tribunal's prior orders and verbal admonitions, he did not feel there was anything else he needed to submit to make his claim. Counsel for the Café moved at that point to dismiss Baker's case for failure to comply with this tribunal's orders (no motion was made for entry of default), but when informed that dismissal of the case would leave the order of the Wage and Hour Unit intact since the Café was the appellant, counsel agreed that this was not his intent.

Ultimately, a telephone hearing was held in this matter on August 14, 2019. At the start of the hearing, counsel for the Café moved for an in-person hearing, which the Hearing Officer denied based on the Café's role in delaying proceedings. Furthermore, pursuant to Mont. Code Ann. § 39-3-216(3), in wage and hour hearings, the hearing officer is not bound by statutory or common-law rules of evidence, and "[t]he hearing may be conducted by telephone or by videoconference."

Baker, Rosann McCrone (McCrone), Nicole Jackson (Jackson), David Hudson (Hudson), Roxanne Carlson (Carlson), and Vicki Cianciotto (Cianciotto) presented sworn testimony. The administrative record compiled at the Wage and Hour Unit (Documents 1-191) was admitted into evidence without objection.

The parties submitted post-hearing briefs. Based on the evidence adduced at hearing and the arguments of the parties in their closings at time of hearing and in their post-hearing briefing, the following Hearing Officer decision is rendered.

II. ISSUE

The issue in this case is whether Respondent owes wages for work performed, as alleged in the complaint filed by Claimant, and owes penalties or liquidated damages, as provided by law.

III. FINDINGS OF FACT

1. Baker worked at Penny's Diner in Glendive, Montana, with Vicki Cianciotto. Baker was a cook, while Cianciotto was a server.

2. On or about February 14, 2018, Baker overheard Cianciotto speaking with her husband, Hudson, about opening a restaurant in Terry, Montana, that would eventually become the Café at issue herein.

3. Baker inquired about Cianciotto's plans, and Baker was eventually asked to be a cook for the Café.

4. Documents filed with State Fund for purposes of Workers' Compensation insurance list Baker as an equal partner with Hudson and Cianciotto in the Café's limited liability corporation, which was registered with the Secretary of State. (Admin. Docs. 114-118.) Although Baker was supposed to have an ownership interest and was a member of the Café's LLC on paper, all evidence shows he was treated as an employee, not a part-owner.

5. Baker did not intend to work without remuneration for his labor, but was not being paid wages because, as a part-owner of the Café, he expected to be compensated from eventual profits.

6. Other employees submitted timesheets and left them on a shelf under the cash register. Baker did not submit timesheets in this manner.

7. As a form of compensation, Baker normally took food from the Café for his personal use, which he at least in part used as barter for rent. With permission from Hudson and Cianciotto, Baker took approximately \$311.00 in food from the Café in April, 2018, and \$155.00 in May, 2018.

8. Hudson and Cianciotto paid Baker's auto insurance in the amount of \$100.00.

9. Baker never had any access to the Café's financial accounts and could not draw funds on his own.

10. Hudson and Cianciotto did not take possession of the building for the Café until Monday, March 19, 2018.

11. Baker did work to prepare the Café before it opened. Although the evidence for a start date is disputed, the earliest date on which Baker could have started working for the Café was Tuesday, March 20, 2018.

12. The Café opened for business on or about Friday, March 23, 2018.

13. The Café's normal hours of operation were 7:00 a.m. to 7:00 p.m., Monday through Saturday, and 7:00 a.m. to 2:00 p.m. on Sundays.

14. Baker worked as a cook at the Café every day of the week.

15. In addition to cooking, Baker handled vendor orders. He took deliveries on Tuesday and Friday mornings, which required him to be there sometime between 4:30 a.m. and 6:00 a.m., though typically between 5:00 a.m. and 5:30 a.m.

16. On days where there were no deliveries, Baker would normally arrive at 6:00 a.m.

17. Baker estimated he had to stay an additional 1-2 hours every day after closing for clean-up and preparation. Although Hudson attempted to contradict this testimony by stating Baker left 15-20 minutes after closing, the testimony of a part-time server for the Café established that both were correct. As testified to by Nicole Jackson, the employees would typically leave together shortly after closing (confirming Hudson), but that this did not occur until between 8:00 p.m. and 9:00 p.m. when customers had left and the doors could be locked (confirming Baker).

18. At some point in April, 2018, Baker became upset that he was not being paid a portion of profits (to the extent any existed) being generated by the Café.

19. Baker voluntarily quit working for the Café. His last day of work was April 30, 2018.

20. Baker first presented timesheets to the Café's accountant, Roxanne Carlson (Carlson), on May 1, 2018, after he had already ceased working for the Café. (Admin. Docs. 183-184.) At that point, relations between Baker, Hudson, and Cianciotto had become adversarial.

21. No one kept contemporaneous track of the hours worked by Baker. To the extent Baker testified he turned in timesheets or contemporaneously kept track of his time prior to the end of April, 2018, he was not credible.

22. Baker's initial claim alleged he was owed wages for 284 regular hours at \$15.00 per hour, and 353.25 hours of overtime. (Admin. Docs. 187-191.) In both Baker's final contentions filed in this matter and in his testimony at the hearing, he asserted he was due 250.5 regular hours and a significant amount of overtime, which he could not specifically calculate.

23. Hudson testified it was his belief that Baker worked 250.5 regular hours and 240.5 overtime hours at minimum wage. Hudson conceded that, aside from food and auto insurance, Baker had not been paid.

24. The Café does not support its contention that Baker worked 250.5 hours with any documentation, but it is also not disputed by Baker.

25. Baker was making approximately \$11.00 per hour working for Penny's Diner, but asserted that he was offered \$15.00 per hour to work for the Café, which took into account increased travel and living expenses. No parties to this matter have documentation of any agreements with regard to wages.

26. The Café initially set forth a stipulated fact that \$15.00 was Baker's regular rate of pay in its Pre-Hearing Disclosures, but then disputed that number both at and after hearing.

27. Documentation offered as evidence at hearing shows that there may have been an offer for Baker to return to work at \$16.00 per hour after he left his employment. This amount was not part of a settlement offer.

IV. DISCUSSION¹

A. Baker was an Hourly Employee and is Subject to Wage and Hour Laws

A threshold issue regarding Baker's wage claim is whether he was a part-owner of the Café and therefore not entitled to wages. Although the Café eventually acknowledged Baker may be due wages, it previously and consistently raised the defense that Baker could not be both an employee and a member of the LLC, an issue which the Hearing Officer believes is necessary to address regardless of the Café's concessions because its stance has wavered so much throughout the proceedings.

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 the testimony of all the parties, it was apparent that Baker's work was primarily that of a cook for the Café, a job which he performed daily and continuously throughout his employment with the Café. Thus, the Café's concession notwithstanding, based on the testimony and evidence presented at the hearing, Baker was clearly an employee doing non-managerial work and subject to the wage and hour laws.

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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).

B. Baker's Rate of Pay was Minimum Wage

Montana Code Annotated § 39-3-404(1) states that, “. . . an employer shall pay to each employee a wage of not less than the applicable minimum wage. . . .” In this case, and contrary to Baker's testimony, it is apparent the parties did not have a specific agreement regarding Baker's wages² when he started because he was supposed to eventually receive a portion of what the Café earned. In the absence of a specific agreement between the parties, the Hearing Officer lacks the authority to require the employer to pay an employee more than the minimum wage in effect at the time of the employment relationship. Therefore, the applicable minimum wage shall be applied in this case, which was \$8.30 per hour.

The Café does not dispute that Baker was not paid for any work he performed, with the exception of food taken by Baker and monies paid toward car insurance. The evidence shows the Café was intended to be a form of business venture for Baker, hence why he was not initially paid. The evidence also shows that there was no formal agreement regarding Baker's rate of pay.

Montana Code Annotated § 39-3-404(1) states that, “. . . [A]n employer shall pay to each employee a wage of not less than the applicable minimum wage as determined by the commissioner in accordance with 39-3-409.” In this case, the parties did not have an agreement regarding Baker's wages. In the absence of a specific agreement between the parties, the Hearing Officer lacks the authority to require the employer to pay an employee more than the minimum wage in effect at the time of the employment relationship. Therefore, the applicable minimum wage shall be applied in this case.

C. Hours Worked by Baker and Wages Owed

The remaining question in this case concerns the amount of work which Baker performed without proper compensation. An employee seeking unpaid wages has the initial burden of proving work performed without proper compensation. *America's Best Contractors, Inc. v. Singh*, 2014 MT 70, ¶ 25, 374 Mont. 254, 321 P.3d 95 (citing *Garsjo v. Dept. of Labor & Indus.*, 172 Mont. 182, 189, 562 P.2d 473, 476-77 (1977) (citing and adopting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946))) (other citations omitted).

² It is apparent from the arguments subsequently raised by the Café that its proposed stipulated fact of a wage rate of \$15.00 per hour was an inadvertent act of counsel and should not be construed as a wage agreed upon by the parties at the time of Baker's initial employment.

To meet this burden, the employee must produce sufficient evidence showing the amount and extent of such work as a matter of just and reasonable inference. Once an employee has shown as a matter of just and reasonable inference that wages have been earned but not paid, 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 drawn from the evidence of the employee. If the employer fails to produce such evidence, the employee is entitled to judgment in his or her favor, *even though the amount is only a reasonable approximation.*

America's Best Contractors, Inc., ¶ 25 (internal citations omitted) (emphasis added). Employers are required to keep records of employees' hours. Admin. R. Mont. 24.16.6102(1)(g); *see also Arlington v. Miller's Trucking, Inc.*, 2015 MT 68, ¶ 16, 378 Mont. 324, 343 P.3d 1222 (citations omitted). "When an employer fails to record an employee's hours, the employee's records may be used to determine the amount of time worked." *Arlington*, ¶ 16.

Although it is generally held against the employer when it fails to keep track of an employee's time, the circumstances here are somewhat different than might be typical. Perhaps because of the arrangement of the parties wherein Baker expected to partake in some of the Café's revenues or profits, neither party was keeping contemporaneous track of Baker's time because neither party intended for Baker to be paid hourly--albeit that does not mean he was not legally entitled to hourly wages. To the extent Baker testified he turned in timesheets or kept track of his time prior to the end of April, 2018, he was not credible. It was not until Baker decided he was upset with the arrangement that he tallied up his time and turned in timesheets to the Café's accountant, Carlson.

Regardless of the original intent of the parties, because Baker was employed by the Café as a cook, he was entitled to wages for his work. 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 . . . 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. Here, although the Café has asserted a total number it believes are reasonable hours, it has not stated how it arrived at those hours. Baker, in contrast, has provided a partial detailed breakdown of what he asserts are his hours worked, with daily time for April, 2018.

In total, Baker worked 49 days full time for the Café, plus some amount of time helping to prepare a menu, fix up the Café, and place orders in the time before

the Café opened (only 3 days of which could have actually been at the Café premises). Of those 49 full-time days, Baker had reduced hours on Sundays for 6 days, and extended hours for deliveries on approximately 11 days.

The Café’s calculation of regular hours worked—which Baker agreed with at hearing—appears to give Baker credit for all the hours he originally claimed with the exception of the first week Baker claims he worked prior to the opening of the Café (*i.e.*, the week ending March 18, 2018), with 6.5 additional hours of regular work for that week. Based on both Baker’s stipulation and the testimony of the parties, the Hearing Officer finds it reasonable that Baker worked 250.5 hours of regular time.

Using Baker’s reported hours for the remaining weeks, in addition to 250.5 hours of regular time, Baker accrued 334.75 hours of overtime. Because the Café did not keep track of this time, Baker’s own records are the best means of determining overtime. *See Arlington*, ¶ 16. At a minimum wage of \$8.30, he is due \$2,079.15 in regular wages, and \$4,167.64 in overtime wages, as set forth below:

Regular Pay Rate: \$ 8.30
 Overtime Rate: \$ 12.45

| <u>Workweek</u> <u>Ending</u> | <u>Regular</u> <u>Hours</u> | <u>Overtime</u> <u>Hours</u> | <u>Regular</u> <u>Wages</u> | <u>Overtime</u> <u>Wages</u> | <u>Total Wages</u> <u>Due</u> |
|----------------------------------|--------------------------------|---------------------------------|--------------------------------|---------------------------------|----------------------------------|
| 03/18/18 | 6.50 | 0.00 | \$ 53.95 | \$ - | \$ 53.95 |
| 03/25/18 | 40.00 | 46.00 | \$ 332.00 | \$ 572.70 | \$ 904.70 |
| 04/01/18 | 40.00 | 69.00 | \$ 332.00 | \$ 859.05 | \$ 1,191.05 |
| 04/08/18 | 40.00 | 67.50 | \$ 332.00 | \$ 840.38 | \$ 1,172.38 |
| 04/15/18 | 40.00 | 56.00 | \$ 332.00 | \$ 697.20 | \$ 1,029.20 |
| 04/22/18 | 40.00 | 50.75 | \$ 332.00 | \$ 631.84 | \$ 963.84 |
| 04/29/18 | 40.00 | 45.50 | \$ 332.00 | \$ 566.48 | \$ 898.48 |
| 05/06/18 | <u>4.00</u> | <u>0.00</u> | <u>\$ 33.20</u> | <u>\$ -</u> | <u>\$ 33.20</u> |
| | 250.50 | 334.75 | \$ 2,079.15 | \$ 4,167.64 | \$ 6,246.79 |

The Café is entitled to \$411.00 in offsets to regular wages for the food taken by Baker and auto insurance paid, resulting in a net regular wage award of \$1,668.15 and an overtime award of \$4,167.64, prior to penalties. Because this is a wage and hour proceeding, any claims Baker may have for expenses he paid on behalf of the Café are not within this tribunal’s jurisdiction to address.

D. Penalty

The Café has not, at this point, paid anything toward Baker’s unpaid wages. As required under the law, a penalty equal to 55% of unpaid regular wages and 110% of unpaid overtime will therefore be imposed. Mont. Code Ann. § 39-3-206(1); Admin. R. Mont. 24.16.7561, 24.16.7556, 24.16.7566. Thus, a penalty of 55%, or

\$917.48, is imposed on the regular wage award, and a penalty of 110%, or \$4,584.40, is imposed on the overtime award.

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. A wage and hour hearing may be conducted by telephone. Mont. Code Ann. § 39-3-216(3).

3. Baker met his burden of proving he performed work without proper compensation and proved the extent of that work as a matter of just and reasonable inference, whereas the Café did not meet its burden of negating or otherwise rebutting Baker's claims. *See Anderson*, 328 U.S. at 686-88.

4. Absent a specific wage agreement by the parties, Baker was entitled to be paid minimum wage by the Café, which was \$8.30 per hour for the time period in question. Mont. Code Ann. § 39-3-404(1).

5. Baker was permitted and expected to work overtime by the Café and must be compensated accordingly. Mont. Code Ann. § 39-3-405; Admin. R. Mont. 24.16.1005.

6. Baker worked 250.5 hours of regular time and 334.75 hours of overtime, which results in a total of \$2,079.15 due him in regular wages at the applicable minimum wage of \$8.30 per hour and \$4,167.64 due him in overtime at \$12.45 per hour, or one-and-a-half times the minimum wage rate. The Café is entitled to offsets of \$311.00 for food taken from the Café by Baker in lieu of wages and \$100.00 in amounts paid for Baker's auto insurance, resulting in a net regular wage award of \$1,668.15.

7. A 55% penalty of \$917.48 is imposed on the regular wages due Baker, and a 110% penalty of \$4,584.40 is imposed on the overtime due him. Mont. Code Ann. § 39-3-206(1); Admin. R. Mont. 24.16.7561, 24.16.7556, 24.16.7566.

VI. ORDER

The Hog N Jog Café & BBQ, LLC, is hereby ORDERED to tender a cashier's check or money order in the amount of \$11,337.67, representing \$1,668.15 in

unpaid regular wages, \$4,167.64 in unpaid overtime wages, and penalties in the amount of \$5,501.88, made payable to Chris A. Baker. The Café may deduct applicable withholding taxes from the portion of the payments representing wages, but not from the portions representing penalties. All payments shall be mailed to **Department of Labor and Industry, Wage and Hour Unit, P.O. Box 201503, Helena, Montana, 59620-1503.**

DATED this 31st day of January, 2020.

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 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.