

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

IN THE MATTER OF THE WAGE CLAIM)	Case No. 441-2019
OF DYLAN L. HERMAN,)	
)	
Claimant,)	
)	
vs.)	FINAL AGENCY DECISION
)	
BLADES OF GLORY, LLC, a Montana)	
limited liability company,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

On September 19, 2018, Dylan L. Herman filed a claim with the Wage and Hour Unit of the Montana Department of Labor and Industry alleging the respondent, Blades of Glory, LLC, a Montana limited liability company (Blades of Glory), owed him \$650.00 in wages for unpaid overtime and improper withholding during the period beginning June 1, 2018 through June 15, 2018. Blades of Glory, by and through its owner, Damion Sgrenci, responded by denying Herman was owed any unpaid wages.

On May 16, 2019, the Wage and Hour Unit issued a determination finding Herman was owed \$123.50 in unpaid regular wages and \$410.86 in unpaid overtime wages. The Wage and Hour Unit further found the employer improperly withheld \$150.00 from Herman’s wages to cover the cost of a missing leaf blower. The respondent timely appealed the determination.

Following mediation efforts, the Wage and Hour Unit transferred the case to the Office of Administrative Hearings (OAH) on August 5, 2019. On August 15, 2019, the Hearing Officer conducted a telephone conference with both Herman and Sgrenci participating at the conference. The Hearing Officer advised Sgrenci that the respondent, as an LLC, was required to be represented by an attorney licensed to practice in the State of Montana. Sgrenci argued that his business was not required to be represented as it was no longer an LLC. The Hearing Officer advised Sgrenci

that it appeared his business was still an LLC, and he was required to obtain legal counsel for the business. To facilitate his efforts to obtain counsel, the Hearing Officer rescheduled the telephone conference for September 13, 2019. Sgrenci subsequently notified OAH that he would not be available for the conference. Sgrenci did not request the conference be rescheduled, and no attorney had filed a Notice of Appearance on behalf of the respondent. As a result, the scheduling conference went forward as scheduled with only Herman's participation. A Scheduling Order was issued on September 16, 2019 setting the matter for hearing on December 10, 2019.

On December 3, 2019, the Hearing Officer conducted a final pre-hearing telephone conference in this matter with both Herman and Sgrenci participating. The Hearing Officer advised Sgrenci that the business filing records of the Montana Secretary of State (www.mtsosfilings.gov) listed the respondent as having been involuntarily dissolved for failing to file its annual report. Based upon the dissolution of the LLC, Sgrenci was allowed to represent the respondent without legal counsel. *See* Admin. R. Mont. 1.3.231(2).

On December 10, 2019, Hearing Officer Caroline A. Holien conducted a hearing in this matter. Herman and Sgrenci both appeared by telephone and testified under oath. Documents 1 through 83 of the administrative record compiled by the Wage and Hour Unit were admitted, as was Exhibit A, which was the record of the Secretary of State noting the dissolution of the respondent's corporate status.

At the conclusion of hearing, the Hearing Officer directed Sgrenci to contact his bookkeeper, who he was meeting with later that same week, to produce Herman's time sheets for the period in question. Sgrenci was directed to have the documents in the mail no later than December 24, 2019. Sgrenci submitted no additional documents and had no contact with OAH until January 13, 2020, when he emailed OAH administrative staff and indicated he was unable to secure the documents from his bookkeeper. The Hearing Officer advised OAH administrative staff to notify Sgrenci the record was closed and a decision would be issued based upon the record made at the hearing.

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 Blades of Glory, LLC, a Montana limited liability company, owes wages for work performed, as alleged in the complaint filed by Dylan L. Herman and owes penalties or liquidated damages, as provided by law.

III. FINDINGS OF FACT

1. Blades of Glory, LLC, a Montana limited liability company (Blades of Glory), employed Dylan Herman as a laborer beginning on or about May 20, 2018.

2. Blades of Glory is a lawn maintenance company that is owned and operated by Damion Sgrenci.

3. Herman applied for the job through an advertisement on Craigslist.com. Herman understood he would be paid \$13.00 per hour, and he would work Monday through Friday, with a start time of 7:00 a.m. The work day was to end when the assigned work was completed. Herman understood his work hours could vary from day to day depending upon the amount of work assigned.

4. Sgrenci requires laborers to report to the shop each work day to receive their list of assigned lawns, which typically amount to 10 to 12 lawns each day. Employees are required to punch in and out at the shop. Employees do not have scheduled breaks but are expected to take two 15-minute breaks and one 30 minute lunch break. Employees are not required to return to the shop to punch in and out for their breaks. Employees are expected to grab lunch or take breaks as the work allows it when they are working on their assigned projects.

5. Blades of Glory's first pay period runs from the first to the 15th, with payday being on the 20th of the month. The second pay period begins on the 16th and runs to the end of the month, with the next payday being on the 5th.

6. Herman typically worked with at least one other employee. Herman was often late for work and was slow in performing his job duties. As a result, Herman and his co-worker typically worked more hours than other employees, which caused Sgrenci to suspect Herman was padding his time card. However, Herman and his co-worker typically left the shop together in the morning and returned together in the evening. Sgrenci had no similar suspicion of Herman's co-worker despite the similarities between the two employees' hours.

7. Sgrenci received customer complaints about the quality of Herman's work, which caused him further suspicion as to the hours Herman claimed to work.

8. Herman worked the following hours during the period of June 1, 2018 through June 9, 2018:

<u>DATE</u>	<u>HOURS WORKED</u>
June 1, 2018	14.65 hours
June 3, 2018	13.58 hours
June 4, 2018	11.27 hours
June 5, 2018	10.80 hours
June 6, 2018	9.95 hours
June 7, 2018	9.68 hours
June 8, 2018	12.42 hours
TOTAL:	82.35 hours

9. Herman worked the following hours during the period beginning June 10, 2018 through June 15, 2018:

<u>DATE</u>	<u>HOURS WORKED</u>
June 11, 2018	3.60 hours
June 12, 2018	13.02 hours
June 13, 2018	8.32 hours
June 14, 2018	8.08 hours
June 15, 2018	13.15 hours
TOTAL:	46.17 hours

10. Herman's final paycheck included 80 hours paid at his regular rate of \$13.00 and five hours paid at the overtime rate of \$19.50 for a total of \$1,137.50. Doc. 80.

11. Sgrenci refused to pay Herman for his remaining overtime, which totaled 43.52 hours. Herman is owed \$848.64 in unpaid overtime (43.52 x. \$19.50).

12. Sgrenci withheld \$150.00 from Herman's final check to cover the cost of a leaf blower that was lost by Herman and his co-worker. Herman has not been charged with any crime related to the missing leaf blower. There was no written, formal agreement between the parties indicating Herman agreed to have \$150.00 withheld from his pay.

13. Since Herman worked a significant amount of overtime during the final pay period of his employment, Sgrenci clearly withheld the \$150.00 from the amount over overtime wages owed to Herman.

14. On September 9, 2018, Herman filed his claim for unpaid overtime wages with the Wage and Hour Unit. The Wage and Hour Unit subsequently issued a determination finding Herman was owed \$123.50 in unpaid regular wages and \$410.86 in unpaid overtime wages. Sgrenci did not pay the amount found to be owed to Herman within the time set in the Wage and Hour Unit's determination.

15. Sgrenci owes Herman \$998.64 in unpaid overtime wages (\$19.50 x 43.52 hours + \$150.00), which also includes the amount improperly withheld to cover the cost of the lost leaf blower. A penalty of 110% on the amount of overtime wages owed, which amounts to \$1,098.50, is appropriate in this matter, for a total amount of \$2,097.14 owed.

IV. DISCUSSION

Herman alleges Sgrenci refused to pay him for the overtime hours he worked from June 1, 2018 through June 15, 2018. Sgrenci did not deny refusing to pay the claimed overtime hours but argued he did not believe Herman worked the hours claimed. Sgrenci pointed to complaints he received about the quality of Herman's work and other laborers' time sheets that did not show them working as many hours as Herman.

Sgrenci has been aware of Herman's claim since approximately September 28, 2018, when the Wage and Hour Unit first mailed him notice of the claim. *See* Docs. 76, 77. The Wage and Hour Investigator asked Sgrenci for Herman's time cards from the period of his wage and hour claim and any other supporting evidence Sgrenci may have to dispute Herman's claim. Sgrenci offered evasive, if not misleading information, such as cell phone pictures of other laborers' time cards that had the employee's name removed thereby making it impossible to identify whose time card had been submitted. *See* Docs. 50, 51.

Sgrenci continued this pattern of evasive conduct after his appeal resulted in the matter being transferred to OAH for hearing. When asked directly by the Hearing Officer to produce Herman's time cards for the relevant period, Sgrenci failed to do so and waited until several weeks after he was supposed to have mailed the documents to inform OAH that he had failed to do what he had been directed to do. It begs the question that, if Herman truly did not work the hours claimed, how or why was Sgrenci unable to produce any documentary evidence to refute Herman's claim. Instead of taking advantage of the opportunity given to him by the Hearing Officer to produce such evidence, he failed to do so. As a result, the Hearing Officer is left with only the evidence presented at hearing and Documents 1 through 83.

A. HERMAN HAS ESTABLISHED HE IS OWED OVERTIME WAGES.

An employee seeking unpaid wages has the initial burden of proving work performed without proper compensation. *Anderson v. Mt. Clemens Pottery Co.* (1946), 328 U.S. 680; *Garsjo v. Department of Labor and Industry* (1977), 172 Mont. 182, 562 P.2d 473. To meet this burden, the employee must produce evidence to “show the extent and amount of work as a matter of just and reasonable inference.” *Id.* at 189, 562 P.2d at 476-77, **citing** *Anderson*, 328 U.S. at 687, **and** *Purcell v. Keegan* (1960), 359 Mich. 571, 103 N.W. 2d 494, 497; *see also*, *Marias Health Care Srv. v. Turenne*, 2001 MT 127, ¶¶13, 14, 305 Mont. 419, 422, 28 P.3d 494, 495 (holding that the lower court properly concluded that the plaintiff’s wage claim failed because she failed to meet her burden of proof to show that she was not compensated in accordance with her employment contract).

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.

Herman produced cell phone photos of his time cards, which were illegible, and his handwritten accounting of the hours worked. As noted above, Sgrenci produced nothing on behalf of the respondent. In an analogous case, the Montana Supreme Court provided guidance as to the analysis required when neither party has maintained adequate records of an employee’s hours. In *Arlington v. Miller’s Trucking, Inc.*, 2015 MT 68, 378 Mont. 324, 343 P.3d 1222 (2015), the court held overtime hours claimed by an employee may be reduced to the extent supported by credible evidence offered by the employer but not reduced below the amount established by the employee. The court reasoned:

In short, when an employer has failed to maintain adequate records of an employee’s hours, it is expected that the employee will not be able to offer convincing substitutes for the employer’s records. Moreover, whatever evidence the employee does produce can be expected to be ‘untrustworthy’. The solution in such situations, however, is not to penalize the employee for his inability to accurately prove his hours by denying his claims in their entirety.

Arlington, 378 Mont. 324, 331, 343 P.3d 1222, 1229.

The respondent's pay periods ran the first to the 15th of the month and the 16th through the end of the month, with paychecks being issued on the 5th and 20th. The Wage and Hour Unit calculated Herman's hours using Monday through Sunday as the pay period, which accounts for the difference in the amount of hours found to have been worked by Herman in this decision. *See* Admin. R. Mont. 24.16.501 ("... a regularly recurring period of 168 hours in the form of seven consecutive 24-hour periods. The workweek need not coincide with the calendar week - it may begin any day of the week and any hour of the day. Each workweek stands alone. . ."). However, there was no evidence presented by either party calling into question the accuracy of the hours the Wage and Hour Unit found Herman to have worked during the period of his wage claim. As such, the Hearing Officer sees no reason not to accept those hours as being accurate.

The substantial and credible evidence of record shows Herman worked 82.35 hours during the week of June 1, 2018 and 46.17 hours during the week of June 9, 2018, for a total of 128.52 hours. Sgrenci offered no credible evidence to dispute Herman's testimony that he did not take two 15-minute breaks or one 30-minute break during the work day. Herman was paid \$1,137.50, which represented 80 hours of regular pay and five hours of overtime pay. Herman is owed overtime pay at \$19.50 per hour for 43.52 hours of overtime for a total amount of \$848.64.

B. \$150.00 WAS IMPROPERLY WITHHELD FROM HERMAN'S FINAL PAY.

Herman contends he is also owed \$150.00 that was withheld from his final paycheck to cover the cost of a missing leaf blower. Sgrenci did not dispute this amount was withheld, but argued he was entitled to do so given that Herman was responsible for the loss of the equipment.

Montana Code Ann. § 39-3-205(3) provides:

When an employee is discharged by reason of an allegation of theft of property or funds connected to the employee's work, the employer may withhold from the employee's final paycheck an amount sufficient to cover the value of the theft if:

(a) the employee agrees in writing to the withholding; or
(b) the employer files a report of the theft with the local law enforcement agency within 7 business days of the separation from employment subject to the following conditions:

(i) if no charges are filed in a court of competent jurisdiction against the employee for the alleged theft within 30 days of the filing of the report with a local law enforcement agency, wages are due and payable upon the expiration of the 30-day period.

(ii) if charges are filed against the employee for theft, the court may order the withheld wages to be offset by the value of the theft. If the employee is found not guilty or if the employer withholds an amount in excess of the value of the theft, the court may order the employer to pay the employee the withheld amount plus interest.

Attorney General Op. No. 17, Vol. 36 (Aug. 27, 1975) noted:

An employer cannot withhold the wages or any portion thereof due and owing to an employee as wages earned, and apply such wages for damages caused by employee negligence during the course of his employment . . . for both costs in retrieving property abandoned by the employee during the course of his employment . . . which the employee has contracted to have deducted as a condition to the employment.

There is no evidence Sgreni contacted law enforcement or that charges are pending in any jurisdiction relating to the missing leaf blower. Further, there is no evidence showing there was a written agreement indicating Herman agreed to the withholding. The respondent clearly withheld the \$150.00 from the overtime wages owed to Herman due to the significant difference between the five hours paid and the hours found to have been worked without pay in this decision. Therefore, it is determined that Blades of Glory owes Herman a total of \$998.64 in overtime wages.

C. A PENALTY OF 110% ON THE OVERTIME WAGES OWED IS APPROPRIATE.

Montana law assesses a penalty when an employer fails to pay wages when they are due. Mont. Code Ann. § 39-3-206. Imposition of the penalty is mandatory. *Id.* For cases involving minimum wage and overtime claims, a penalty of 110% will be imposed where a determination has been made that overtime wages are owed and the employer fails to pay the amounts due within the time frame prescribed by the determination. Admin. R. Mont. 24.16.7561.

In this case, the determination from which the respondent appealed found Herman was owed overtime wages and ordered respondent to pay the amount owed no later than May 31, 2019. Respondent failed to submit payment to the Wage and Hour Unit within the time provided and at any time prior to the hearing in this matter. Pursuant to Admin. R. Mont. 24.16.7561, the Hearing Officer finds a penalty of 110% is appropriate in this matter, which amounts to \$1,098.50.

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. An employee may recover wages and penalties for a period of two years prior to the date of the employee's last date of employment. Mont. Code Ann. § 39-3-207(2).

3. Blades of Glory, LLC, a Montana limited liability company, owes Dylan Herman \$998.64, representing \$848.64 in unpaid overtime wages and \$150.00 in the amount improperly withheld from the overtime wages owed to Herman.

4. A 110% penalty amounting to \$1,098.50 is due on the unpaid overtime wages. Admin. R. Mont. 24.16.7561.

VI. ORDER

Blades of Glory, LLC, a Montana limited liability company, is hereby ORDERED to tender a cashier's check or money order in the amount of \$2,097.14, representing \$998.64, in unpaid overtime wages, including improper withholding of \$150.00 from the overtime wages owed, and penalty in the amount of \$1,098.50, made payable to Dylan L. Herman, and mailed to the **Employment Relations Division, P.O. Box 201503, Helena, Montana 59620-1503**, no later than 30 days after service of this decision. The applicable withholding may be deducted from the wage portion, but not the penalty portion, of the amount due.

DATED this 11th day of February, 2020.

DEPARTMENT OF LABOR & INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ CAROLINE A. HOLIEN
CAROLINE A. HOLIEN
Hearing Officer

NOTICE: You are entitled to judicial review of this final agency decision in accordance with Mont. Code Ann. § 39-3-216(4), by filing a petition for judicial review in an appropriate district court within 30 days of the date of mailing of the hearing officer's decision. See also Mont. Code Ann. § 2-4-702. 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.