

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

IN THE MATTER OF THE WAGE CLAIM)	Case No. 962-2019
OF TYSON R. VANDENACRE,)	
)	
Claimant,)	
)	
vs.)	FINAL AGENCY DECISION
)	
RUSSELL FULKERSON individually)	
and d/b/a NORTHERN LOG HOME)	
SERVICES AND CONSTRUCTION,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION AND PROCEDURAL BACKGROUND

On January 4, 2019, Tyson R. Vandenacre filed a claim with the Wage & Hour Unit of the Department of Labor and Industry alleging that Russell Fulkerson, individually and d/b/a Northern Log Home Services and Construction (Fulkerson) owed him \$5,000.00 in unpaid wages for work performed during the period beginning September 30, 2018 through December 12, 2018.

On January 22, 2019, Fulkerson filed Respondent’s Answer to Wage Claim contending he paid Vandenacre \$7,420.00 in wages for the period of his wage claim and owed Vandenacre \$920.00 in unpaid wages.

On June 14, 2019, the Wage & Hour Unit issued a Determination finding Fulkerson owed Vandenacre \$1,745.00 in unpaid wages and imposed a 15% penalty. Fulkerson did not submit payment for the amount found to be owed and appealed the determination.

Following mediation efforts, the Wage & Hour Unit transferred the case to the Office of Administrative Hearings (OAH) on November 14, 2019.

On March 3, 2020, the Hearing Officer convened a hearing in this matter. At the appropriate time, the Hearing Officer attempted to call Fulkerson at his telephone number of record. Fulkerson was not available, and the Hearing Officer

reattempted to reach Fulkerson approximately ten minutes later. Fulkerson was not available either time, and the Hearing Officer left him two voice mail messages directing him to contact OAH.

The Hearing Officer reconvened the hearing at approximately 9:15 a.m., MST. Vandenacre agreed to proceed by telephone and testified under oath. Vandenacre was not allowed to call witnesses or offer exhibits beyond the administrative record compiled by the Wage & Hour Unit (Docs. 1-63), due to his failure to abide by the terms of the Scheduling Order. Documents 1 through 63 were admitted into the record without objection.

Vandenacre declined to submit post-hearing briefs in this matter. Therefore, 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 Russell Fulkerson, individually and d/b/a Northern Log Home Services and Construction owe wages for work performed, as alleged in the complaint filed by Tyson R. Vandenacre, and owe penalties or liquidated damages, as provided by law.

III. FINDINGS OF FACT

A. FULKERSON'S FAILURE TO APPEAR

1. On November 19, 2019, OAH mailed the Notice of Hearing and Telephone Conference to the parties at the parties' addresses of record. Neither mailing was returned as undeliverable.

2. On November 29, 2019, the Hearing Officer attempted to convene a telephone scheduling conference pursuant to the Notice of Hearing and Telephone Conference. Neither party was available when called by the Hearing Officer. Both parties contacted OAH after the scheduled telephone conference. Fulkerson updated his mailing address, and OAH staff sent the hearing packet to him at the address he provided at that time.

3. On December 3, 2019, the Hearing Officer issued a Scheduling Order that was mailed to both parties at their addresses of record. Neither mailing was returned as undeliverable.

4. The Scheduling Order set forth the pre-hearing deadlines, as well as the contested case hearing date. The Scheduling Order provided, in part:

A party's failure to appear for any conference, and/or failure to obey orders issued by the Hearing Officer, may result in sanctions against that party that can include entry of default, dismissal of an appeal, dismissal of the complaint, imposition of liability or other appropriate sanctions.

5. Neither party met the deadline set in the Scheduling Order for filing and exchanging their witness and exhibit lists; requests for relief and final contentions. Neither party had any contact with OAH during this time.

6. On February 28, 2020, the Hearing Officer conducted a final pre-hearing conference pursuant to the Scheduling Order. The Hearing Officer called Fulkerson twice and left voice mail messages directing him to contact OAH each time. After approximately ten minutes, the telephone conference proceeded with only Vandenaere's participation. Vandenaere indicated he did not agree with the determination and contended he was owed more in wages than found by the Wage & Hour Unit.

7. On March 3, 2020, the Hearing Officer called Fulkerson at his telephone number of record. When Fulkerson did not appear, the Hearing Officer proceeded to hearing based upon Vandenaere's contention he was owed more wages than found to be owed by the Wage & Hour Unit.

8. As of the date of this decision, Fulkerson has had no contact with OAH and has offered nothing by way of establishing good cause for his failure to abide by the orders of the Hearing Officer or participate in the telephone hearing.

B. VANDENACRE'S CLAIM FOR UNPAID WAGES

9. Vandenaere came to know Fulkerson when Fulkerson was working as a bouncer at the Rialto in Helena, Montana. Fulkerson approached Vandenaere about working for him on roofing jobs in the Helena area.

10. Vandenaere agreed to work for Fulkerson at an hourly rate of \$20.00. At no time was Vandenaere an independent contractor during the period he performed work for Fulkerson, who owned and operated Northern Log Home Services and Construction.

11. Vandenaere understood he would be paid at the conclusion of each job and after Fulkerson received payment from the customer. There were no set pay

periods or pay dates. Fulkerson paid Vandenacre and other workers in cash, and he frequently failed to pay Vandenacre the entire amount of wages owed to him.

12. Vandenacre never received a loan or draw against future wages during the time he performed work for Fulkerson. There was never a formal agreement that Fulkerson could withhold wages owed to Vandenacre.

13. Vandenacre worked the following hours for Fulkerson:

WEEK ENDING	HOURS WORKED	WAGES EARNED	WAGES PAID
08/11/2018	32	\$640.00	0
08/18/2018	35	\$700.00	\$700.00
08/25/2018	32	\$640.00	\$660.00
09/01/2018	21	\$420.00	0
09/08/2018	20	\$400.00	0
09/15/2018	29	\$580.00	\$500.00
09/22/2018	25	\$500.00	\$600.00
09/29/2018	25	\$500.00	0
10/06/2018	0	0	0
10/13/2018	20	\$400.00	\$400.00 ¹
10/20/2018	30	\$600.00	0
10/27/2018	26.5	\$530.00	\$300.00
11/03/2018	0	0	0
11/10/2018	0	0	0
11/17/2018	37.5	\$750.00	0
11/25/2018	24	\$480.00	0

¹ Fulkerson paid Vandenacre an additional \$80.00 to reimburse Vandenacre for fuel and supplies Vandenacre purchased for the employer. The \$80.00 does not constitute wages and was not considered in calculating the unpaid wages owed to Vandenacre.

WEEK ENDING	HOURS WORKED	WAGES EARNED	WAGES PAID ²
12/01/2018	37	\$740.00	\$1,200.00
12/08/2018	41.5	\$860.00	0
12/15/2018	17	\$340.00	0
12/22/2018	6	\$120.00	\$1,200.00
TOTAL	458.5	\$9,185.00	\$5,500.00

14. Vandenaere worked a total of 458.50 hours for Fulkerson. Vandenaere worked 1.5 hours of overtime during the week ending December 8, 2018. Therefore, Vandenaere is owed \$15.00 in unpaid overtime wages (1.5 hours x \$10.00) and \$9,170.00 in unpaid regular wages (458.5 hours x \$20.00) Fulkerson actually paid Vandenaere a total of \$5,500.00.

15. Vandenaere is owed \$3,685.00 in unpaid wages.

16. A 110% penalty on the unpaid overtime wages owed is appropriate and amounts to \$16.50 for a total of \$31.50. As Fulkerson failed to pay the amount of unpaid regular wages found to be owed within the time set in the Wage & Hour Unit's determination dated June 14, 2019, a penalty of 55% is appropriate on the unpaid regular wages of \$9,170.00, which amounts to \$5,043.50. Docs. 11-19.

IV. DISCUSSION

A. DEFAULT IS ENTERED AGAINST FULKERSON

This is a contested case proceeding subject to the Montana Administrative Procedures Act (MAPA) pursuant to Mont. Code Ann. § 2-4-601 et. seq and § 39-3-302. MAPA specifically provides that informal disposition may be made of any contested case by, among other things, a default unless such disposition is precluded by law. Mont. Code Ann. § 2-4-603(1)(a). Nothing in Title 39 or Title 2 prohibits imposition of a default where a party fails to comport with any facet of a scheduling order, fails to respond to a tribunal's direct order, or fails to appear for a scheduled hearing.

² The Hearing Officer relied upon the documentation Vandenaere submitted to the Wage & Hour Unit (Docs. 23-30) in her calculation of wages paid, rather than the documentation submitted by Fulkerson (Docs. 39-57), for the reasons set forth in the Discussion section.

The Department has adopted the Attorney General's model rules, which provide in pertinent part, "[I]n a contested case, if a party does not appear to contest an intended agency action, the agency may enter a default order. If a default is entered, pursuant to Mont. Code. Ann. § 2-4-623, the order must be in writing and include findings of fact and conclusions of law" (emphasis added). Admin. R. Mont. 1-3-213(1) and 24-2-101(1).

Fulkerson failed to appear at the initial scheduling conference and the final pre-hearing conference. The Hearing Officer attempted to contact Fulkerson at his telephone number of record for both conferences. Fulkerson did not respond to any of the messages left for him by the Hearing Officer. Fulkerson then failed to meet any of the pre-hearing deadlines set in the Scheduling Order or have any contact with OAH. Continuing this pattern of conduct, Fulkerson failed to appear for hearing. As of the date of this decision, Fulkerson has had no contact with OAH.

Therefore, default shall be entered against Fulkerson on the issue of whether Vandenaere is owed wages for work performed during the period of his wage claim. The only issue left to be addressed is the amount of those unpaid wages.

B. VANDENACRE IS OWED UNPAID OVERTIME AND REGULAR 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. Unused paid-time-off (PTO) is "considered in the same category as wages and is collectible in the same manner and under the same statutes as are wages." See 23 Op. Att'y Gen. 151, 153 (1949); *In re the Wage Claim of Sharon Langager*, (1998) 287 Mont. 445, 453; 954 P.2d 1169, 1173-1174.

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 the lower court properly concluded 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). As the Montana Supreme Court has long recognized, it is the employer's duty to maintain accurate records of hours worked, not the employee's. *Smith v. TYAD, Inc.*, 2009 MT 180, ¶46, n.3, 351 Mont. 12, 209 P.3d 228.

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.

The Montana Supreme Court provided guidance as to the analysis required in a situation such as this where 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 employer. 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.

Vandenacre testified Fulkerson did not require him to submit a time sheet or otherwise track his hours. Vandenacre produced a series of journal entries, which listed hours worked each day and for what job; wages paid; and wages owed. Vandenacre testified he maintained the journal entries while working for Fulkerson and entered the hours worked on or near the date the work was performed. Vandenacre's testimony established the trustworthiness of the documents sufficiently so as to ensure the reliability of those documents.

The Hearing Officer did not rely upon the documentation submitted by Fulkerson in response to the inquiry of the Wage & Hour Unit that was prompted by Vandenacre's wage claim. Documents 39 through 57 purport to be invoices prepared by Fulkerson for the jobs in question. Vandenacre testified he had never before seen many of the documents. However, Vandenacre did admit his signature appeared on Document 39, which he conceded having seen before. Vandenacre could not attest to the accuracy of the information contained in Documents 39 through 57.

Documents 39 through 57 constitute inadmissible hearsay. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or

hearing, offered in evidence to prove the truth of the matter asserted.” Rule 801(c), M.R.Evid. Hearsay evidence is not admissible unless it falls within an exception to the hearsay rule. Rule 802, M.R.Evid.

One exception to the hearsay rule that is potentially applicable in this case is the “business records exception,” which provides:

Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnosis, made at or near the time of the acts, events, conditions, opinions, or diagnosis, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make a memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. . . . The term “business” as used in this paragraph includes business, institution, association, profession, occupation and calling of every kind, whether or not conducted for profit.

Rule 803(6), M.R.Evid.

Fulkerson did not appear at hearing. Without Fulkerson’s testimony, the necessary circumstantial guarantees of trustworthiness cannot be established for Documents 39 through 57. Further, Fulkerson’s absence denied Vandenacre the opportunity to cross examine Fulkerson as to the information contained in those documents. Therefore, the Hearing Officer cannot rely upon those documents in rendering a decision in this matter. *See Bean v. Montana Bd. of Labor Appeals*, 1998 MT 222, 290 Mont. 496, 965 P.2d 256 (due process rights of claimant violated when inadmissible hearsay is relied upon by the hearing officer in an administrative proceeding).

The preponderance of the evidence shows Vandenacre worked a total of 458.50 hours, with 1.5 hours constituting overtime. Vandenacre is owed \$15.00 in unpaid overtime wages (1.5 hours x \$10.00) and \$9,170.00 in unpaid regular wages (458.50 hours x \$20.00), for a total of \$9,185.00. Vandenacre received a total of \$5,500.00 in wages. Therefore, Fulkerson owes Vandenacre \$3,685.00 in unpaid overtime and regular wages.

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. The sole exception to this rule is where none of the special circumstances described in Admin. R. Mont. 24.16.7556 apply. In those cases, a reduced penalty in the amount of 55% may be imposed.

There is no evidence showing Fulkerson submitted payment for the unpaid regular wages found to be owed in the Wage & Hour Unit's June 14, 2019 determination. The Wage & Hour Unit did not find Vandenacre was owed overtime wages. However, the evidence of record shows Vandenacre worked 1.5 hours of overtime for a total of \$15.00 in overtime wages being owed to him. Therefore, a 110% penalty will be imposed on that amount for a total of \$16.50. *See* Admin. R. Mont. 24.16.7561. A penalty of 55% is appropriate on the unpaid regular wages, which amounts to \$2,018.50 (\$3,670.00 x 55%), for a total penalty of \$2,035.00. *See* Admin R. 24.16.7566(1)(a).

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. Russell Fulkerson, individually and d/b/a Northern Log Home Services and Construction failed to follow the Scheduling Order dated December 3, 2019, and failed to appear for hearing. Therefore, default is entered against Russell Fulkerson, individually and d/b/a Northern Log Home Services and Construction pursuant to Mont. Code. Ann. § 2-4-623.

3. Tyson R. Vandenacre has shown he performed work for Russell Fulkerson, individually and d/b/a Northern Log Home Services and Construction during the period of his wage claim for which he was not properly compensated. By failing to appear for hearing, Russell Fulkerson, individually and d/b/a Northern Log Home Services and Construction failed to offer sufficient evidence to negate the evidence establishing Tyson R. Vandenacre performed work for which he was not properly compensated. *See Anderson*, 328 U.S. at 686-88.

4. Tyson R. Vandenacre has shown Russell Fulkerson, individually and d/b/a Northern Log Home Services and Construction owes him \$15.00 in unpaid overtime wages and \$3,670.00 in unpaid regular wages.

5. A 110% penalty on the unpaid overtime wages owed is appropriate and amounts to \$16.50 (\$15.00 x 110%) for a total of \$31.50. *See* Admin. R. Mont. 24.16.7561(1)(a).

6. A 55% penalty on the unpaid regular wages owed to Tyson R. Vandencree is appropriate based upon the evidence in this case. That 55% penalty amounts to \$2,018.50 (\$3,670.00 x 55%). *See* Admin R. 24.16.7566(1)(a).

7. Russell Fulkerson, individually and d/b/a Northern Log Home Services and Construction owes Tyson R. Vandencree a total of \$5,720.00, including unpaid overtime wages, regular wages, and penalties.

VI. ORDER

Russell Fulkerson, individually and d/b/a Northern Log Home Services and Construction is hereby ORDERED to tender a cashier's check or money order in the amount of \$5,720.00, representing \$15.00 in unpaid overtime wages, \$3,670.00 in unpaid regular wages, and \$2,035.00 in penalty, made payable to Tyson R. Vandencree, 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. Russell Fulkerson, individually and d/b/a Northern Log Home Services and Construction may deduct applicable withholding taxes from the portion of the payments representing wages, but not from the portions representing penalties.

DATED this 20th day of March, 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.