

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

IN THE MATTER OF THE WAGE CLAIM)	Case No. 1485-2021
OF TAYLOR R. BENSON,)	
)	
Claimant,)	
)	FINAL AGENCY DECISION
vs.)	
)	
LARSEN FARMS, INC.,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

Claimant Taylor Benson (Benson) filed a wage claim on February 27, 2020 alleging Larsen Farms, Inc. (Larsen Farms) owed him unpaid wages amounting to \$6,975.00.

On September 21, 2020, the Wage and Hour Unit issued a determination finding wages and penalties due to Benson in the amount of \$4,545.38. Larsen Farms appealed to mediation, which was unsuccessful. As a result, on April 16, 2021, the Wage and Hour Unit transferred the matter to the Office of Administrative Hearings (OAH).

A telephonic hearing was held on September 24, 2021. Benson appeared and called his grandparents, Bill and Joyce Benson, as witnesses. Loren O’Toole represented Larsen Farms and called Kevin Larsen (Larsen), Breana Halverson (Halverson), Toney Berry (Berry), and Stephen Speelmon (Speelmon). The administrative record, Documents 1 through 30, were admitted without objection. In addition, Benson submitted a document from the Skagit County Superior Court in Washington State. This document was designated Document 31 and was also admitted without objection. During closing statements, Benson objected to Larsen’s testimony regarding statements Benson had made to Larsen about another person’s allegedly fraudulent and successful wage claim. O’Toole opposed the objection, asserting the testimony was admissible as a statement against interest and therefore, an exception to the hearsay rule. The Hearing Officer sustained the objection because the alleged statement against interest was posed entirely as a leading

question by counsel so Larsen did not testify regarding this actual specific conversation with Benson.

II. ISSUE

Whether Larsen Farms owes Benson wages for work performed, as alleged in the complaint filed by Benson, and owes penalties, as provided by law.

III. FINDINGS OF FACT

1. Larsen Farms was homesteaded in approximately 1914 by Larsen's family. Larsen is the fourth generation on this farm.

2. Halverson has lived on the farm with Larsen for 12 years and shares a child with Larsen.

3. Berry has worked at Larsen Farms full time for approximately 16 years. Berry performs all tasks needed and works seven days a week when necessary. Berry is paid when he requests payment.

4. Berry does not live on Larsen Farms property, but has his own residence and a rental unit in Medicine Lake.

5. Speelmon is a friend of Berry and has known him for about 20 years.

6. Speelmon lives in the state of Washington and he comes out periodically to work at Larsen Farms for both planting and harvesting seasons. Speelmon drove trucks and hauled grain, from the combines to the graineries, from the farm to the grain elevator, and other tasks as needed.

7. Larsen Farms pays Speelmon in cash and he is paid when he requests payment.

8. Speelmon repairs boats. Speelmon was in possession of a boat that needed to be delivered to Detroit. Speelmon planned to deliver the boat then stop at Larsen Farms and help with the harvest.

9. Benson's father and Speelmon are acquainted. As a result of that acquaintance, Speelmon offered to Benson that he go with him to deliver the boat. Speelmon indicated Benson might be able to pick up some work in Montana. Speelmon was intending to visit his friend Berry and work at Larsen Farms as he had

in the past. Speelmon invited Benson on this endeavor. Speelmon was not an agent for Larsen Farms and could not offer Benson a job on behalf of Larsen Farms.

10. Benson sought and received permission from the state of Washington, in order to pursue possible work. The Skagit County court order reads: "Def may travel to Montana for work as long as he returns for subsequent court dates."

11. Benson rode with Speelmon part of the way to deliver the boat, and learned about driving trucks with different transmissions. Benson arrived at Larsen Farms in early-August 2019.

12. Speelmon returned to Montana after he delivered the boat.

13. When Benson arrived in Montana, he temporarily stayed in the trailer next to a Larsen Farm's shop known by the parties as "Kevin's shop."

14. Speelmon and Benson then stayed in Berry's rental unit. No rent was paid. Benson stayed in that location until he left Montana.

15. Benson was present in Montana with Speelmon and Berry from about August 4, 2019 until September 25, 2019.

16. 2019 had a wet fall, and the rain frequently interrupted the harvest on the farm.

17. The harvest took longer than normal because there were many wet mornings. Work did not start consistently at 8:00 a.m. because the crop was too wet to harvest in the morning.

18. Due to the rain, there were numerous days that little to no work was done that fall. The harvest was not complete until January 2020.

19. Benson was not formally hired as an employee at Larsen Farms. There was no agreement, verbal or otherwise, that Benson would be an employee of Larsen Farms. There was no agreement on the rate of pay Benson would be paid. Benson was not required to be at Larsen Farms. However, he was present at Larsen Farms and performed work. Benson cleaned grain bins, mowed grass, and did other odd jobs.

20. Berry works at Larsen Farms regularly and is very familiar with the work done there. Berry is present every day when needed. Berry is credible regarding the work Benson performed.

21. Berry observed that Benson performed approximately 50 hours of work while he was at Larsen Farms. Berry noted that Benson gave him one ride out to the field during the two-month period. Benson helped Berry with a few bolts one time. Benson cleaned bins.

22. Speelmon has worked at Larsen Farms for a number of years. Speelmon is credible regarding the work Benson performed.

23. Speelmon observed that Benson performed somewhat less than 40 hours of work at Larsen Farms.

24. Halverson prepares meals for whoever is helping on the farm. Because she lives on the farm, Halverson is credible regarding who is regularly present on the farm.

25. Halverson observed that Benson was occasionally present at meals and that she did not know when he would and would not be there. Halverson estimated that Benson put in a week's worth of work during the two months he was present in Montana at Larsen Farms.

26. Larsen and Halverson gave Benson cash from time-to-time for work Benson performed. Larsen and Halverson were aware Benson was working and were paying him for that work in cash. Larsen also gave money to Benson gratuitously.

27. Benson submitted timesheets in support of his claim that generally represent he was present at Larsen Farms ten hours a day every day for most of the time Benson was in Montana. (Documents 17-19.) Benson also submitted notes that purported to show his work. (Documents 13-16.)

28. Benson stated he recreated a "copy" of his timesheets when he wrote Documents 17 to 19. The three-page document on its face indicates it was written at one time and was not created contemporaneously with the work. The timesheets submitted by Benson are not credible.

29. The notes submitted by Benson have no indication of date or time to indicate the work performed. Documents 13-16. At least some of the notes were created after Benson left Montana because the wording indicates Benson had left Montana.

30. Benson is not credible regarding the amount of work he performed. Benson was not given much work and did not work full time.

31. Benson worked about 50 hours at Larsen Farms during the time he was staying in Montana.

32. Speelmon hauled a load of grain for Larsen Farms using a Larsen Farms truck to a grain elevator. Benson accompanied him. Speelmon performed all the work for this task without Benson's help. Speelmon instructed Benson to obtain a check from the elevator for the freight. Because Benson obtained the check, the check was made out to him. The check was for approximately \$3,800.00. Although he performed all the work, Speelmon intended to split that money between himself, Benson, and Berry for their living expenses.

33. Benson could not deposit the grain elevator check because he did not have a checking account.

34. Benson signed and mailed the check to his grandparents for deposit. The bank did not allow his grandparents to deposit a check that was signed over to them. The check was returned. The grain elevator then made the check payable to Speelmon under Larsen's instruction. Speelmon received and deposited the check after Benson left Montana.

35. Benson decided to return to Washington in late September. Benson stated he was unable to obtain a ride from anyone at Larsen Farms to the train station. He walked from Reserve, Montana, to the train station in North Dakota, which took him approximately four days. Benson contacted his grandparents who arranged a train ticket for him.

IV. DISCUSSION¹

A. Larsen Farms Suffered or Permitted Benson to Work

The first question to address is whether Benson was an employee of Larsen Farms. Larsen Farms asserts Benson was not an employee, because Larsen never had an agreement with Benson to hire Benson. Benson asserts he had a verbal agreement with Larsen to work at Larsen Farms.

Section 39-2-101, MCA, defines employment as a contract by which one engages another to do something for the benefit of the employer. Under Section 39-3-201(3), MCA, "employ" means "to permit or suffer to work." Also, under Section 39-3-201(4), "employee" is defined as including "any person who works for

¹ Statements of fact in this discussion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

another for hire.” The law requires that an employer pay wages to someone it knowingly suffered or permitted to work for the employer’s benefit. In this case, there was no explicit verbal agreement that Benson would be an employee. Speelmon was not an agent for Larsen Farms and could not hire Benson for Larsen Farms. Even though Benson had hoped he would be a temporary full-time employee, the evidence of the relationship between the parties demonstrates that Benson was not a temporary full-time employee. Rather, the evidence of the relationship between the parties demonstrates the parties agreed Benson could perform occasional work for Larsen Farms. Larsen Farms knowingly allowed and permitted Benson to be present on its property and perform occasional work. Berry, Speelmon, Halverson, and Larsen all observed Benson performing some work and admitted Benson performed some work for Larsen Farms.

The arrangement with Benson was somewhat similar to the arrangement Larsen Farms had with Speelmon, to perform occasional work as needed. Speelmon often helped with planting or with hauling grain at harvest at Larsen Farms and was paid by Larsen Farms. While Benson did not do the same work as Speelmon, Benson was given odd jobs from time to time. Larsen Farms may have intended to simply provide Benson occasional jobs as a gratuitous favor so he could earn some money, that intent does not change the fact that an employment relationship was established for occasional work. The witnesses for Larsen Farms all testified that Benson occasionally worked for Larsen Farms. Further, Benson’s work would not be exempt as casual domestic employment under Section 39-3-406(1)(b), MCA, because Larsen Farms is incorporated and is not simply a private home. Because Larsen Farms permitted Benson to work on its behalf, Larsen Farms employed Benson and Benson’s employment status was an employee.

B. Benson is Due Wages from Larsen Farms for Hours Worked

Because Larsen Farms employed Benson for odd jobs, the next question that must be answered is how much work Benson performed and what wages are due. Benson asserts he performed 465 hours of work from August to September. Benson submitted documents he asserts are timesheets that show he worked ten hours a day every day almost every week he was at Larsen Farms. In addition, Benson asserts ARM 24.16.2524 requires he be paid for all hours he was required to be present at Larsen Farms, even if he did not work all those hours. Benson asserts that, because he was required to be present, he was required to be paid for ten hours a day. Benson also cites ARM 24.16.1005(3) to argue management is in control of an employee’s work, so he has to be paid even if he was not doing work. In contrast, besides asserting Benson is not due any pay because he was not an employee, Larsen Farms further asserts Benson did not work the hours he represents he worked.

The Montana Supreme Court set out the required analysis when inadequate employment records are kept in *Arlington v. Miller's Trucking, Inc.*, 2015 MT 68, 378 Mont. 324, 343 P.3d 1222. In *Arlington*, the court was tasked with determining whether an employee was owed unpaid wages when both the employee and the employer failed to maintain adequate records regarding the number of hours worked. The court noted the ultimate responsibility of ensuring the maintenance of accurate records of hours worked upon the employer. *Arlington*, ¶ 17. An employee's failure to track his or her hours does not absolve the employer of this duty. *Arlington*, ¶ 18. "If plaintiff's evidence of hours worked is inaccurate or imprecise because the employer's time-keeping practices made it difficult to ascertain the truth, the employer rather than the employee must suffer the consequences." *Id.* This rule requires that an employer cannot escape their responsibility to pay wages by putting the record keeping burden on an employee. Accordingly, in the absence of more valid or routinely maintained records, employee time records are normally relied upon to determine the wages due.

However, the general rule from *Arlington* is not a blanket rule that implies employee records are always used to determine time worked. Rather, *Arlington* also followed *Garsjo* which provides an employee must substantiate a claim by showing "that he did in fact perform . . . work for which he was not properly compensated and produce[s] sufficient evidence to show the extent and amount of such work as a matter of just and reasonable inference." *Garsjo v. Department of Labor & Indus.*, 172 Mont. 182, 188–89, 562 P.2d 473, 476–477 (1977); see also *Arlington* ¶ 30-32 (when an employee's records lack credibility, the appropriate remedy is to reduce the hours). Therefore, Benson must present sufficient evidence he in fact performed the work for which he alleges he was improperly compensated.

In this matter, the Hearing Officer finds the records submitted by Benson are simply not credible and therefore do not establish as a just and reasonable interference that Benson worked the hours he alleges. Benson himself indicated Documents 17 through 19 showing 465 hours were a "copy" he created after-the-fact and were not a contemporaneous record. The documents simply list ten hours a day, day after day. However, Benson had no agreement to be a regular employee of the farm. Even Berry, the regular farm employee, rarely started work at 8:00 a.m. every day. Berry himself was not at the farm ten hours a day, day after day at that time. In addition, that fall there were numerous days when little work was done by any of the witnesses due to the rain. Documents 17 through 19 also do not establish Benson was present and working ten hours at day at Larsen Farms. Specifically, some of the notes in Documents 13 through 16 indicate on their face that the notes were written after Benson left Larsen Farms. For example, one of the most detailed notes is the one in which Benson explains that he walked to the train station to get back to Washington. Another detailed note involves the grain elevator check. The

notes do not have sufficient detail on the work performed to be able to support a reasonable inference that he actually did work 465 hours or even that he worked every day or all day.

Further, Benson himself argues he should be paid for non-productive time, asserting Larsen Farms is required to pay him for all the time he was allegedly present on the farm even if he wasn't working. This is incorrect. The law does not favor absurd results. Benson was not required to be at Larsen Farms. Benson had no verbal agreement with Larsen Farms that set out an expectation he would be present ten hours a day. Benson was not present ten hours a day. Benson was free to come and go and he spent time at a creek. Benson did not work 465 hours at Larsen Farms. Benson changed his version of events as he testified at hearing. In contrast, Berry, Speelmon, Halverson, and Larsen all credibly testified that Benson worked a very minor amount and that Benson was often absent. Berry was regularly present on the farm and even he was not present ten hours a day. There were many days that fall when little work was performed due to the rain. The Hearing Officer finds the work Benson performed was minor. Benson cleaned grain bins, gave Berry one ride, screwed in 32 bolts, and mowed the lawn once, along with other odd jobs. Benson did not establish a reasonable inference that he performed the extent of work he claims. The Hearing Officer finds Benson worked 50 hours during the time he was present on Larsen Farms.

C. Benson is Not Due Wages from Larsen Farms for Time Present at the Farm When Benson was Not Working

In addition to asserting he worked the hours he claims, Benson asserts as a matter of law that he is due for all the time he was present, even if he didn't work. Benson points to ARM 24.16.2524 which states:

(1) Under the law an employee must be compensated for all hours worked. As a general rule the term "hours worked" will include all time during which an employee is required to be on duty or to be on the employer's premises or at a prescribed work place and all time during which an employee is suffered or permitted to work whether or not he is required to do so. Thus, working time is not limited to the hours spent in active productive labor, but includes time given by the employee to the employer even though part of the time may be spent in idleness.

Benson asserts ARM 24.16.1005(3) also requires that Larsen Farms is responsible for his non-productive time.

(3) Duty of management. 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.

Benson argues these two rules require him to be compensated for 465 hours.

Employees are required to be paid for working time even when the time spent is not in productive labor. For example, an employee must be paid when they are engaged to be waiting for work by their employer, rather than waiting to be engaged by their employer. See *Stubblefield v. Town of W. Yellowstone*, 2013 MT 78, ¶ 17, 369 Mont. 322, 298 P.3d 419 (“Whether time is spent predominately for the employer’s benefit or for the employee’s is a question dependent upon all the circumstances of the case. . . .The key is whether the employee was engaged to wait, which is compensable, or whether the employee waited to be engaged, which is not compensable.”) In addition, management is responsible for exercising control over the work.

In this case, the facts show Benson was not required by Larsen Farms to be present at all. Larsen did not hire Benson as a temporary full-time employee. Benson was present and working at Larsen Farms as a result of the long standing friendship that Speelmon had with both Berry and with Larsen. The fact that Larsen was willing to allow Benson on his property and was willing to give him occasional work was because Benson was a friend of Speelmon. That good relationship does not in turn mean Larsen had to compensate Benson for any time he was present at Larsen Farms. Benson’s presence on the farm does not equate to work time that must be compensated because Larsen did not require him to be there. Larsen Farms must only compensate Benson for the time he worked for Larsen Farms. Benson failed to establish the time he worked with credible evidence. Speelmon, Berry, Halverson, and Larsen, the individuals who Benson worked with, established that Benson worked 50 hours during his time in Montana.

D. The Amount of Wages Benson is Due from Larsen Farms

There was no agreement for the rate of pay for Benson’s work. Therefore, Benson is required to be paid minimum wage for the work he performed under Section 39-3-404, MCA. Minimum wage during the time period at issue was \$8.50 per hour. Further, Benson is exempt from any overtime requirements by Section 39-3-406(2)(h) or (i), MCA. Although the testimony was credible that Benson was given cash payments up to \$500 and Benson did not dispute that

testimony, there is no evidence of the actual payments. Furthermore, cash payments alone are generally not acceptable as proof of payment of wages or proper withholding because no record is kept. Larsen Farms bears the burden to prove with proper record keeping that it paid Benson. See *Arlington*, ¶ 17. Larsen Farms also did not assert that any proceeds from the check from the grain elevator constituted payment to Benson. Therefore, Larsen Farms must pay Benson \$8.50 times 50 hours for \$425.00 in wages. Because the Hearing Officer finds Benson is due wages, the 55% penalty required by ARM 24.16.7561 applies. None of the evidence indicates the higher 110% applies in this matter. Therefore, Larsen Farms must also pay \$233.75 in penalties.

Benson asserts he was due punitive damages and emotional distress for having to walk to the train station because no one would give him a ride when he left to return to Washington. Benson cannot recover such damages under a statutory wage claim, because the statute only provides for recovery of wages and the specified penalties.

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. Benson timely filed a wage and hour claim within the 180-day period provided for under Mont. Code Ann. § 39-3-207(1).

3. Benson was an employee of Larsen Farms because Larsen Farms suffered and permitted Benson to work at Larsen Farms. Mont. Code Ann. § 39-3-201(3).

4. Benson performed 50 hours of work for Larsen Farms.

5. Benson is owed unpaid wages amounting to \$425.00. Mont. Code Ann. §§ 39-3-201(6)(a), -205.

6. Benson is owed penalties in the amount of \$233.75. Admin. R. Mont. 24.16.7561.

VI. ORDER

Larsen Farms, Inc., is hereby ORDERED to tender a cashier's check or money order in the amount of \$658.75, representing wages and penalties, made payable to Taylor Benson. Larsen Farms, Inc., 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**, no later than 30 days after service of this decision.

DATED this 6th day of December, 2021.

DEPARTMENT OF LABOR & INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ JUDY BOVINGTON
JUDY BOVINGTON
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.