

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

IN THE MATTER OF THE WAGE CLAIM) Case No. 1590-2022
OF KENDAL J. DUNKERSON,)
)
 Claimant,)
)
 vs.) **FINAL AGENCY**
) **DECISION**
)
 IRON HORSE TOWING, INC.,)
)
 Respondent.)

* * * * *

I. INTRODUCTION

On March 1, 2021, Kendal Dunkerson (Dunkerson) filed a wage claim with the Wage and Hour Unit of the Montana Department of Labor and Industry (the Department) alleging Iron Horse Towing, Inc. (Iron Horse) owed him \$953.25 in hourly wages, \$1,969.80 in overtime wages, and \$476.00 in improper withholdings. On January 12, 2022, the Wage and Hour Unit issued a Redetermination, concluding that Iron Horse owed Dunkerson \$468.00 in wages (for improper withholdings), \$250.88 in overtime, and \$321.08 in penalties if paid by January 27, 2022, or \$508.28 if paid thereafter.

Iron Horse filed an appeal on January 19, 2022. On April 22, 2022, the Wage and Hour Unit transferred the case to the Office of Administrative Hearings for hearing.

Due to counsel for Iron Horse’s failure to appear at the originally-scheduled final pre-hearing conference as well as the fact that neither party submitted any pre-hearing disclosures even after being informed they had failed to comply with the Scheduling Order, an order was issued on August 24, 2022, reiterating an oral ruling at the final pre-hearing conference and limiting the parties’ ability to present witnesses and evidence at hearing. The parties were only permitted to call the Claimant and the designated representative for the Respondent as witnesses, and were further only permitted to present and submit exhibits already contained in the administrative file, which were marked as Documents 1 through 96.

The hearing was held via Zoom on August 25, 2022. Dunkerson participated in the hearing with sworn testimony from himself. Iron Horse participated in the hearing through its counsel, Robert Bell, with sworn testimony from its owner and president, Scott Wolff. Administrative Documents 29, 50-57, and 88-90 were admitted into evidence. Administrative Documents 80-81, text messages offered by Iron Horse, were rejected because they were not complete copies of the text conversation. Documents 1-28, 30-49, 58-79, 82-87, and 91-96 were not admitted because neither party specifically pointed to those documents in support of their case or otherwise attempted to admit those documents at hearing. The Hearing Officer also took judicial notice of a June, 2022, deferred prosecution agreement between the Missoula County Attorney's Office and Dunkerson relating to charges of theft of items from Iron Horse.

At the close of Dunkerson's case in chief, Iron Horse moved for dismissal of the hourly and overtime wage claims on the merits due to Dunkerson's failure to present any evidence he was due regular or overtime wages, which the Hearing Officer granted.

The parties were given the opportunity to submit optional post-hearing briefing on the remaining issue, which neither party submitted. Upon expiration of that timeframe, the record was closed and the case was deemed submitted. 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 Iron Horse owes wages for work performed by Dunkerson, and owes penalties or liquidated damages, as provided by law.

III. FINDINGS OF FACT

1. Dunkerson began working for Iron Horse as a truck driver on or around October 7, 2020. His last day of employment with Iron Horse was January 24, 2021, when he was terminated.

2. Dunkerson acknowledged receipt of the Iron Horse Employee Handbook on October 20, 2020. (Admin. Ex. 88.) In the Handbook, the employee acknowledges that deductions may be taken from paychecks for damages, infractions, fines, and other items.

3. Dunkerson presented no testimony showing evidence of unpaid overtime wages, nor did he offer into evidence any exhibits supporting a claim for unpaid overtime.

4. On November 14, 2020, Dunkerson was issued a ticket in Washington State for a traffic violation totaling \$476.00 in fines. (Admin Ex. 29.) The ticket was specifically for a violation of RCW 46.44.041, being over the legal weight on a tractor drive axle. *Id.*

5. The ticket was issued to Iron Horse as the driver of the vehicle, with Dunkerson listed as the employer. Based on Wolff's reported conversations with Washington State law enforcement, the ticket being issued to Iron Horse as the driver was the result of a clerical error.

6. Dunkerson entered an agreement with Iron Horse on November 18, 2020, to repay the ticket, titled a "Driver Violation Fine Contract." (Admin. Ex. 90.)

7. Because Dunkerson did not have sufficient funds to pay the fine, however, and because Iron Horse wished for Dunkerson to maintain his license, Iron Horse paid the \$476.00 fine on Dunkerson's behalf.

8. Iron Horse deducted the monies paid on Dunkerson's behalf for the traffic violation from his paychecks of November 20, 2020, and December 18, 2020, and January 1, 2021, in an initial \$238.00 installment and two subsequent \$115.00 installments. (Admin. Exs. 52, 54-55.) The total amount deducted was inadvertently for \$468.00, not the full \$476.00 ticket amount.

9. Sometime in November, 2020, Dunkerson received a \$450.00 cash advance from Iron Horse, which is reflected in his November 20, 2020, paycheck. (Admin. Ex. 52.) Dunkerson did not dispute receiving the cash advance.

10. In his January 1, 2021, paycheck, Iron Horse made a \$119.49 deduction for work pants purchased by Dunkerson. (Doc. 55.) Dunkerson did not dispute purchasing work pants.

11. In mid-January, 2021, although only reflected as part of an \$893.65 deduction from his final paycheck of January 29, 2021, Iron Horse gave Dunkerson a \$1,000.00 cash advance to assist with family medical

expenses.¹ (Ex. 57.) Dunkerson did not dispute receiving the cash advance amount.

12. As a result of deductions for the amounts still owed by Dunkerson on his cash advances from Iron Horse, he was not paid any wages from his final paycheck. Deductions for the \$476.00 traffic violation (which, as stated, only amounted to \$468.00), was not part of the deductions in the final paycheck.

13. Although allegations of theft were made by Iron Horse against Dunkerson in connection with his termination, no theft-related deductions were made from any paychecks.

IV. DISCUSSION

A. Hourly and Overtime Wages

At the close of Dunkerson's case in chief, Iron Horse moved for dismissal of the hourly and overtime wage claims on the merits due to Dunkerson's failure to present any evidence he was due regular or overtime wages. "In a non-jury trial, the . . . court may enter a judgment on partial findings, pursuant to M. R. Civ. P. 52(c), when the party pursuing a claim has been fully heard and failed to prove the elements of the claim." *McCann v. McCann*, 2018 MT 207, ¶ 12, 392 Mont. 385, 390, 425 P.3d 682, 687 (citations omitted). Pursuant to Rule 52(c), "[i]f a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. . . . A judgment on partial findings must be supported by findings of fact and conclusions of law as required by Rule 52(a)." M. R. Civ. P. 52(c). For the reasons set forth below, the Hearing Officer granted judgment in favor of Iron Horse.

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 of the United States or checks on banks convertible into cash on demand at the full face value of the checks, 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

¹ Although Dunkerson disputes the validity of his signature on a January 18, 2021, Cash Advance Contract in which he agrees to be responsible for the \$1,000.00 advanced to him (Admin. Ex. 89), Dunkerson did not dispute that the cash advance occurred or his responsibility for repaying the advance at hearing.

payable, except as provided in § 39-3-205.” Mont. Code Ann. § 39-3-204. The burden of proof is on the employee in an action to recover compensation to establish, by a preponderance of the evidence, the elements of a case entitling him to recovery, including that the employee has performed work for which he has received inadequate compensation. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).

With regard to overtime specifically, “[a]n employer may not employ any employee for a workweek longer than 40 hours unless the employee receives compensation for employment in excess of 40 hours in a workweek at a rate of not less than 1½ times the hourly wage rate at which the employee is employed.” Mont. Code Ann. § 39-3-405(1). 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).

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).

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. An employer need not have authorized work so long as they were aware of it and allowed it to happen: “In general, “hours worked” includes all the time an employee is required to be on duty or on the employer’s premises or at a prescribed workplace, and all time during which he is suffered or permitted to work for the employer.” Admin. R. Mont. 24.16.1002(3).

Simply put, Dunkerson completely failed to present any meaningful testimony or evidence at hearing regarding hours worked and any hourly or overtime wages he was due. While it is an employer's duty to maintain records of hours, the employer did that in this case. The Hearing Officer provided Dunkerson with numerous opportunities to argue his case, provide meaningful testimony, and introduce evidence from the Administrative Record. Dunkerson declined to do any of these things. It was Dunkerson's burden to prove his case. Dunkerson never moved to admit nor pointed to any specific document that was eventually admitted to prove his case. The Hearing Officer cannot deduce from a record what amounts may or may not be owed a claimant when the claimant declines to offer any proof supporting their claim. As such, in the total absence of evidence supporting Dunkerson's claim, it was appropriate to grant Iron Horse's motion to dismiss his claims on the merits relating to Dunkerson's failure to prove his overtime wages. See M. R. Civ. P. 52(c). With the exception of withholdings, as discussed below, Dunkerson has failed to prove he worked for any time he was not properly paid wages or overtime.

B. Paycheck Deductions

Dunkerson asserts Iron Horse improperly withheld \$468.00 (his complaint alleges \$476.00 but, as stated, that amount is incorrect) in reimbursement for traffic ticket expenses from his paychecks. Iron Horse counters that it was permitted under law to deduct this amount from Dunkerson's paychecks. Although Dunkerson also failed to present any evidence regarding his paychecks and whether amounts were improperly withheld, the very existence of his paychecks calls into question the deductions made by Iron Horse on their face.

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 of the United States or checks on banks convertible into cash on demand at the full face value of the checks, 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. *However, reasonable deductions may be made for board, room, and other incidentals supplied by the employer, whenever the deductions are a part of the conditions of employment, or as otherwise provided for by law.*” Mont. Code Ann. § 39-3-204(1) (emphasis added).

While an employer can make deductions when they are a part of the condition of employment, an employer normally cannot deduct monies from wages for damages, shortages, or mistakes. This is in accordance with

Attorney General Opinion No. 17, Volume 36 and Attorney General Opinion No. 11, Volume 25, which states as follows:

It is clear that damage caused by employee negligence, costs of unauthorized mileage, of retrieval of property abandoned, of avoidable cargo losses caused by employee's poor judgement and liability insurance deductibles are not in the category of "board, room and other incidentals supplied by the employer." Nor do I find a provision in the laws of Montana for the deduction of these charges.

The question, then, is whether the monies recovered by Iron Horse from Dunkerson fall into the category of items not recoverable by the employer through wage deductions.

The employer urges that the traffic violation monies be treated as a cash advance. It is clear that the monies paid in cash advances could be lawfully deducted from Dunkerson's paychecks pursuant to Mont. Code Ann. § 39-3-204(1). Dunkerson has failed to show cash advance withholdings are improper. A question remains, however, whether the traffic violation was the responsibility of Iron Horse because the ticket was issued in Iron Horse's name. Alternatively, it may be questioned whether the traffic violation was a cost brought about by Dunkerson's negligence, and should therefore be borne by the employer regardless of how the ticket was written.

The Hearing Officer concludes that the question of whether the cost of the ticket was the responsibility of Dunkerson or Iron Horse hinges on whether the ticket can be characterized as a liability of the employer. Washington's law answers this question. The Washington Code, under which the traffic violation was issued, addresses the issue of driver responsibility for traffic violations of overweight vehicles. Pursuant to the Revised Washington Code, "[a]ny person operating any vehicle . . . is liable for all damages that the public highway, bridge, elevated structure, or other state property may sustain . . . as a result of the operation or moving of any vehicle, object, or conveyance weighing in excess of the legal weight limits allowed by law. . . . *When the operator is not the owner of the vehicle, object, or contrivance but is operating or moving it with the express or implied permission of the owner, the owner and the operator are jointly and severally liable for any such damage.*" RCW 46.44.110 (emphasis added). Therefore, Iron Horse was also liable for this ticket in the normal course of its business.

Although the evidence shows the ticket may have been incorrectly issued to Iron Horse as the driver, Washington's law clearly makes such a traffic violation a joint and several liability of both the operator and the owner when

those two are not the same. As such, the evidence clearly shows the fine falls under the category of a damage caused by employee negligence, which may not be deducted from wages by an employer pursuant to the Opinion of the Montana Attorney General. The fact that Iron Horse had a Driver Violation Fine Contract (see Admin. Ex. 90) with Dunkerson does not allow it to impermissibly shift costs for a ticket such as this one onto the employee, as it would be in violation of Montana law. See Mont. Code Ann. § 39-3-204(1). While Dunkerson may have been jointly and severally liable to the State of Washington, this liability was not determinative of the liability between Dunkerson and Iron Horse.

As discussed above, monies for cash advances could be recovered by Iron Horse without violating the wage and hour laws. See Mont. Code Ann. § 39-3-204(1). The payment of the ticket cannot, however, be characterized as a cash advance. In light of the foregoing, a preponderance of the evidence shows that while other deductions for cash advances and clothing purchases from Dunkerson's paychecks were proper, it was improper to withhold \$468.00 in wages, and Dunkerson has proven his claim with regard to the ticket-related withholdings from his wages. See Mont. Code Ann. § 39-3-204(1).

C. Penalty

Iron Horse has not, at this point, paid anything toward Dunkerson's unpaid wages. As required under the law, a penalty equal to 55% of unpaid regular wages will therefore be imposed. Mont. Code Ann. § 39-3-206(1); Admin. R. Mont. 24.16.7566. A penalty of 55%, or \$257.40, is imposed on the award for improper withholding.

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. With the exception of improper wage withholdings, Dunkerson was fully paid by Iron Horse for all hours he worked, and a judgment on partial findings at hearing on this issue was appropriate pursuant to M. R. Civ. P. 52(c).

3. A preponderance of the evidence shows deductions from Dunkerson's paychecks for the traffic violation at issue herein were improperly made, and he is due \$468.00. See Mont. Code Ann. § 39-3-204(1).

4. A 55% penalty of \$257.40 is owed. Mont. Code Ann. § 39-3-206(1); Admin. R. Mont. 24.16.7566.

VI. ORDER

IT IS THEREFORE ORDERED THAT:

Iron Horse Towing, Inc., is hereby ORDERED to tender a cashier's check or money order in the amount of \$725.40, representing \$468.00 in wage withholdings and penalties in the amount of \$257.40, made payable to Kendal J. Dunkerson. Iron Horse 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 18th day of October, 2022.

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