

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

IN THE MATTER OF THE WAGE CLAIM)	Case No. 681-2022
OF DAVID ALDERMAN,)	
)	
Claimant,)	
)	FINAL AGENCY
vs.)	DECISION
)	
ALDERMAN CONSTRUCTION, INC.,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

Claimant David Alderman (David) filed a wage claim on January 13, 2021, alleging Alderman Construction, Inc. (ACI) owed him a total of \$110,328.00 in wages for work performed during the period beginning January 1, 2019 through December 31, 2020.

On September 16, 2021, the Wage and Hour Unit issued a determination finding David’s claim was without merit. David appealed to mediation, which was unsuccessful. As a result, on November 4, 2021, the Wage and Hour Unit transferred the matter to the Office of Administrative Hearings (OAH).

A hearing was held, via Zoom, in the matter beginning April 4 and 5, 2023. The hearing was continued, and reconvened May 1, 2, and 4, 2023. David represented himself at hearing, with the administrative assistance of his daughter, McKinsey Alderman (McKinsey). David testified on his own behalf, and presented witnesses: McKinsey Alderman, Philip Emmons, Duane Alderman, Brandon Kostelecky, Robert Alderman, Terry Combs, Alina Cazier, Austin Stricker, and Janice Osborne. ACI was represented at hearing by Attorney Eric Nord (Nord). ACI presented witnesses: Robert Alderman, David Alderman, Philip Emmons, Duane Alderman, Austin Stricker, Brandon Kostelecky, and Darron Alderman.

The admitted Exhibits are as follows:

Claimant’s Exhibits:

603-607, 608-979 (Admitted into evidence only for the limited purpose of correlating a bank/credit card line item to an admitted receipt/invoice.), 981-

1097, 1100, 1110 (LT),¹ 1114-1121, 1122 (RT), 1123-1143, 1144 (LT), 1146-1150, 1157 (CTR), 1158 (RT), 1159 (RT), 1161 (LT, Top, and CTR), 1162 (CTR and LT), 1163, 1164 (CTR), 1166 (BOT), 1167, 1168 (LT), 1170 (BOT and Top), 1171 (RT), 1172 (BOT), 1177 (RT), 1178 (RT), 1179-1180, 1181 (Top), 1182 (RT), 1183 (RT), 1184 (LT and CTR), 1189 (LT), 1190-1191, 1220-1221, 1233, 1235 (LT and Top), 1237 (LT), 1241 (LT), 1243-1245, 1308-1319, 1340-1348, 1385, 1427-1449, 1504-1511, 1522-1529, 1532-1534, 1536-1539, 1542-1553. Regarding Exhibits containing receipts/invoices, David submitted copies of receipts/invoices, many of which were incorporated on the same page. The receipts were not organized by date or type. The designations listed here show which receipts/invoices on each copied page were admitted into evidence. Any receipts on any page that are not on the above list were not admitted. For example, the admitted evidence does not include quotes, receipts/invoices that were unsupported because they were not shown to be paid, illegible receipts, duplications, and payments made from Terry Combs' accounts wherein David was not an authorized user.² Further, ACI made a standing objection to receipts/invoices regarding fuel and food. The Hearing Officer hereby sustains the objection as to fuel and food receipts because, as discussed further below, the Hearing Officer found there was no agreement between the parties that such expenditures would be approved by Robert.

Respondent's Exhibits: A-C, D (Admitted into evidence for the limited purpose of identifying three withdrawals made by David.), and E-O.

Any proposed exhibits not included in the above enumerated lists were not admitted into evidence. The exhibits not admitted were due to the parties' failure to motion for admission, or for the reasons stated in the hearing transcript. Neither of the parties made a motion to admit the administrative record. As it is not necessary to the decision, it is not admitted.

The parties were given the opportunity to submit post-hearing briefing. Upon expiration of that timeframe, 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.³

1 Receipt/invoice designation meanings:

LT means Left

RT means Right

CTR means Center

Top means Top

BOT means Bottom

2 Charges made to Terry Combs' accounts, wherein David was not an authorized user, were not established as legitimate ACI expenses.

3 This decision constitutes the Hearing Officer's final decision as to any outstanding or overlapping/conflicting evidentiary issues or rulings.

II. ISSUE

Whether ACI owes David wages for work performed, and owes penalties or liquidated damages, as provided by law.

III. FINDINGS OF FACT

1. David is a construction worker by trade.
2. Robert Alderman (Robert), David's father, incorporated Alderman Construction Incorporated (ACI), a Montana corporation. When Robert incorporated his business, he identified himself as ACI's President and David as ACI's Vice President. David's position as Vice President did not entail specific official duties from Robert or ownership rights.
3. During 2016, Robert and David made an agreement wherein David would be hired to manage the day-to-day operations of ACI. The parties' agreement did not include a wage to be paid to David. There was no wage agreement between the parties. Instead, Robert agreed to relinquish his ownership of ACI to David, once ACI's debts and liabilities were paid in full. The payment of ACI's debts and liabilities would come from work contracts David would establish and perform on behalf of ACI.
4. While working for ACI, David did not keep personal timekeeping records.
5. The parties arranged a reimbursement system, wherein David would deposit ACI's customer payments into bank accounts controlled by Robert. When David made expenditures on behalf of ACI, David would notify Robert. Robert would then write a check to David in the amount identified by David to cover ACI's expenses. David did not provide receipts or documentation to Robert in order to substantiate the amounts David claimed to have personally expended, in order to cover ACI's operating costs.
6. Over the course of the next several years, David provided services on behalf of ACI as a subcontractor on various projects. Primarily, ACI subcontracted siding installation services. ACI did not maintain employees other than David. In order for David to continue working without other employees, Robert purchased several pieces of equipment, including a telehandler and scissor-lift.
7. During 2018, David requested Robert create records to show David received wages during the year. David's request was for the purpose of collecting unemployment insurance benefits during 2019. Robert created the

requisite records, however, the original agreement between David and Robert did not change. Documentation was not provided to show a Form W-2 was filed.

8. David filed for, and received, unemployment insurance benefits during 2019. David received benefits based on the records produced by Robert, as requested by David, and not actual wages paid. David received unemployment benefits approximately beginning January 2019 through March 2019, and again November 2019 through December 2019.

9. During 2019, David requested Robert hire McKinsey Alderman (McKinsey), David's daughter, in order to assist David with administrative tasks and minimal tasks on jobsites. During 2019, McKinsey only provided services for ACI during the summer school break. McKinsey did not receive a wage for her services.

10. During 2019, David again requested Robert create records to show David received wages during the year. David's request was for the purpose of collecting unemployment insurance benefits during 2020. Robert created the requisite records, which included a Form W-2 recording David's total wages as \$55,164.04. However, the original agreement between David and Robert did not change. The wage amount recorded on David's 2019 Form W-2 was based on a tabulation of the checks written directly to David from Robert throughout 2019.

11. David filed for, and received, unemployment insurance benefits during 2020. David received benefits based on the records produced by Robert, as requested by David, and not actual wages paid. David received unemployment benefits approximately beginning January 2020 through March 2020.

12. During 2019, while employed by ACI, David used his personal bank accounts, credit cards, and Terry Comb's bank accounts and credit cards wherein David was an authorized user, to pay for some of ACI's business expenses. David's personal expenditures related to his work with ACI during 2019 are as follows:

Materials & Supplies	Lodging	Food/Meals	Fuel
\$2,678.49	\$657.36	\$53.72	\$562.10

(The calculation of these subtotal amounts is based on admitted receipts and paid invoices connected to David's bank accounts and credit cards, and Terry Combs' bank accounts and credit cards wherein David was an authorized user. The calculations did not include quotes, receipts/invoices that were

unsupported because they were not shown to be paid, illegible receipts, duplications, and payments made from Terry Combs' accounts wherein David was not an authorized user.)

13. During 2019, while employed by ACI, David received payments from ACI. ACI's payments made to David during 2019 are as follows:

Checks Written to David	Checks Written to Others on Behalf of David	Electronic Money Transfers	Total Payments
\$49,965.50	\$0	\$0	\$0

14. During December 2019, Robert hired his son, Duane Alderman, (Duane) to assist David with administrative tasks.

15. At the beginning of 2020, David requested Robert change the business practice from providing subcontractor services to taking direct contractor work. Specifically, David wanted to hire employees, and establish contracts, in order to create ACI's own customer base. Robert agreed to the alteration of the business practice.

16. Over the course of the next several months, David hired between six and 12 employees to work on jobsites, primarily located throughout Montana.

17. During his tenure with ACI, Duane was responsible for payroll and personnel. As part of his responsibilities, Duane instituted a timecard system in order to keep track of work performed by ACI's employees. When Duane requested David personally follow the timecard system, David refused.

18. ACI's employees were paid primarily via checks written from ACI/Robert's bank accounts. Robert did not authorize the payment of employee wages in cash, due to liability concerns. Robert authorized David to pay for employee lodging when employees needed to travel away from home to work on ACI jobsites. However, Robert did not authorize David to pay for employee food/meal expenses. Robert also did not authorize David to pay for employee fuel, except the use of fuel at Alderman Oil Company.

19. In addition to the checks written by Robert, Duane began making electronic money transfers directly from ACI/Robert's bank accounts, in order to directly pay for expenditures David claimed to have made on behalf of ACI. Duane made money transfers to bank accounts/credit cards owned by David, and to Terry Combs' bank accounts/credit cards wherein David was an authorized user. Duane continued this practice for several months, until Robert became aware of the practice. Robert told Duane to cease making

direct transfers when David requested payments. Robert wanted David to personally make the payment requests of Robert, and Robert would continue the practice of writing checks to David.

20. During 2020, David periodically requested Robert pay David's wife's rent (directly or indirectly through JDH Management). David did not reside with his wife during this period.

21. David established several contracts with businesses, for both siding installation and industrial rubber roofing installation. At this time David was certified to install Johns-Manville roofing.

22. Although David contracted for multiple jobs with separate customers, ACI generally only worked on one jobsite at a time. In this way, David would move ACI's employees from one jobsite to another as needed.

23. Duane began to take on new responsibilities within ACI, as he realized David was not attending worksites in order to perform necessary work and manage ACI's employees. Duane, though he did not have prior experience, would attend worksites and act as supervisor over ACI's employees.

24. Duane, and later Robert, became aware David was spending time at casinos gambling during the time he was needed at jobsites. This led to multiple issues with ACI's ability to meet contract deadlines, as well as issues with the quality of the services rendered on behalf of ACI.

25. As an example, the owners of the business identified as Bullwackers contracted with ACI to install an industrial rubber roof. Once the roof was installed, multiple leaks were found. The leaks were extensive and caused damage to the interior of the building. David refused to cure the defects, which were caused by ACI's faulty installation. Instead, another contractor was hired by the owners of Bullwackers in order to repair the roof.

26. Due in part to David's mismanagement of ACI's employees and jobsites, Duane made the decision to resign from his position with ACI during June 2020.

27. Following Duane's resignation, David ceased using the timekeeping system instituted by Duane. David did not implement a timekeeping system to replace the prior process. At this time David began to pay ACI's employees with cash.

28. As with the reimbursement practice between David and Robert, David paid ACI's employees with monies received from Robert, upon David's request. David did not keep timecards or business records to show a roster of

employees, nor did David keep a record of the wage amounts paid to said employees.

29. Over the course of the next several months, David continued his mismanagement of ACI's business matters. David failed to keep proper business records, and further, failed to complete ACI's business contracts.

30. McKenzie, and later David's girlfriend, Janice Osborn (Osborn), took over some administrative tasks on behalf of ACI. However, a timekeeping system was not implemented by either McKenzie or Osborn. Osborn was not an employee of ACI, and she did not receive a wage.

31. During the spring/summer 2020, David pulled ACI's employees from pending contracted jobs, and used ACI's workforce to make repairs to Osborn's residence and yard. Osborn did not pay for either the materials or labor provided by ACI.

32. As ACI continued to default on contracts, Robert became aware of David's actions regarding his mismanagement of ACI. Robert began to make demands of David to repair his relationships with ACI's customers and complete the contracted work. However, ACI was now in debt, and the business did not have the finances necessary to complete the contracted work.

33. Near the end of his tenure with ACI, David lost his Johns-Manville roofing certification. Without certification, ACI could not provide its customers with a warranty, which also impacted ACI's ability to finish contracted roofing jobs.

34. Robert began to sell ACI's assets (including equipment) in order to pay some of ACI's debts. Robert's intervention led to an altercation between David and Robert at the end of October 2020. Due to David's mismanagement, the resulting failure to complete contracted work, and ACI's increased debt/liabilities, David was discharged from his employment with ACI on or about October 30, 2020.

35. Following David's separation from employment, ACI filed a Form 1099-NCE, which recorded payments made to David totaling \$142,519.59 for 2020, and indicated he was an independent contractor for ACI. However, after David filed this wage claim, the underlying administrative proceeding determined David was an employee. That determination was not appealed by ACI. Therefore, for purposes of this proceeding, David was an employee of ACI during the period under review, and not an independent contractor.

36. When David was discharged from ACI in 2020, the business was left with approximately \$40,000.00 in secured debt, approximately \$100,000.00 in unsecured debt, and approximately \$20,000.00 in tax liabilities.

37. During 2020, while employed by ACI, David used his personal bank accounts credit cards, and Terry Comb's bank accounts and credit cards wherein David was an authorized user, to pay for some of ACI's business expenses. David's personal expenditures related to his work with ACI during 2020 are as follows:

Materials & Supplies	Lodging	Food/Meals	Fuel
\$27,227.19	\$3,066.12	\$69.90	\$41.11

(The calculations of these subtotal amounts are based on admitted receipts and paid invoices connected to David's bank accounts and credit cards, and Terry Combs' bank accounts and credit cards wherein David was an authorized user. The calculations did not include quotes, receipts/invoices that were unsupported because they were not shown to be paid, illegible receipts, duplications, and payments made from Terry Combs' accounts wherein David was not an authorized user.)

38. During 2020, while employed by ACI, David received payments from ACI. ACI's payments made to David during 2020 are as follows:

Checks Written to David	Checks Written to Pay David's Wife's Rent	Electronic Money Transfers	Total Payments
\$67,000.00	\$9,075.00	\$65,049.44	\$141,124.44

39. On January 13, 2021, David filed a wage claim for the period beginning January 1, 2019 through December 31, 2020. David stated in his filings:

There is no dispute over the hours worked, the amount of wages to be paid, nor a dispute whether there were checks written to the amount agreed upon. This dispute is solely over whether or not payments were received free and clear or if the employer received kickbacks.

IV. DISCUSSION⁴

A. Burden of Proof for a Wage Claim

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 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).

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. 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.

i. Minimum Wage

The first question to be addressed concerns whether David has a right to wages from ACI. At hearing, both David and Robert provided undisputed evidence to show a wage agreement was never created between the parties. David was initially hired by ACI in 2016. At this time David and Robert made an agreement wherein David would be hired to manage the day-to-day operations of ACI. The parties’ agreement did not include a wage to be paid to David. Instead, Robert agreed to relinquish his ownership of ACI to David, once ACI’s debts and liabilities were paid in full. The payment of ACI’s debts and liabilities would come from work contracts David would establish and perform on behalf of ACI.

⁴ 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.

Mont. Code Ann. § 39-3-201(4) defines an employee as including “. . . any person who works for another for hire, except that the term does not include a person who is an independent contractor.” Following David’s filed wage claim, the underlying administrative proceeding determined David was an employee of ACI. That determination was not appealed by ACI. Therefore, for purposes of this proceeding, David was an employee of ACI during the period under review, and not an independent contractor. Further, David provided services to ACI as an employee during 2019 and 2020.

Wages are governed by Mont. Code Ann. § 39-3-101 *et seq.*, MWPA. Mont. Code Ann. § 39-3-201(6)(a) defines “wages” as “any money due an employee from the employer or employers, whether to be paid by the hour, day, week, semimonthly, monthly or yearly.” Montana’s wage laws obligate an “employer . . . [to] pay to each employee the wages earned by the employee in lawful money.” See Mont. Code Ann. § 39-3-204(1). Mont. Code Ann. § 39-3-208 provides an employee may sue to recover the wages earned under a wage agreement, including statutory penalties. However, absent a specific wage agreement, Mont. Code Ann. § 39-3-404(1) provides: “. . . an 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.” Based on the evidence, and contrary to David’s initial assertion that there was a wage agreement, the Hearing Officer finds no specific agreement concerning an amount of wages was ever established between David and ACI. Therefore, to the extent David established he did work for his due compensation, he is only entitled to minimum wage.

ii. Hours Worked

With an established employer-employee relationship, and the requisite minimum wage requirement, the question remains as to the amount of wages David is owed. As cited above, the burden of proof is on the employee, in an action to recover compensation, to establish 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).

At hearing, David argued he was a full-time employee, and ran the day-to-day operations of ACI. David did not identify himself as a seasonal employee, despite the seasonal nature of his employment in the construction industry. Conversely, ACI argued David was not a full-time employee, as he often failed to attend work while a jobsite was in progress. Contrary to David’s initial assertion that there was no dispute over hours worked, the parties did not agree what hours were worked. At hearing, ACI presented three witnesses who provided evidence to show David was often missing from jobsites, and instead he spent time at casinos gambling or with his girlfriend, Osborn. In order to support its argument, ACI referenced David’s failure to meet contract

deadlines, as well as issues with the quality of the services rendered on behalf of ACI.

David bears the initial burden of proof in this matter, and although he failed to provide any employment records to show his weekly work hours, David did establish he performed work on behalf of ACI. Specifically, David showed he established work contracts with customers, and ordered supplies and materials to complete contracted work. David also attended jobsites when detailed work needed to be performed. David produced witnesses at hearing, including Robert, to substantiate David did provide services on behalf of ACI. Based on the foregoing, David established, as a just and reasonable inference, he performed work for the benefit of ACI during the period under review.

With the establishment of work performed by David, the burden then shifts to ACI to provide “. . . 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. . . .” *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. ACI was unable to produce any business records to show David’s work hours, or the amount of work he performed. However, as the facts of this case are unique, an important distinction must be made regarding ACI’s business records. David managed the day-to-day operations of ACI, and as such, David was responsible for creating and maintaining ACI’s business records. Further, when Duane was employed with ACI and assisting with the employee payroll and personnel issues, he requested David maintain a record of his work hours. David refused to follow the timecard system instituted by Duane. Based on the evidence, David made the choice not to maintain records of his work hours, and as he managed ACI’s day-to-day business, David was equally responsible for creating and retaining such recordkeeping. David cannot place the onerous on ACI for his own volitional act which, in and of itself, is the reason timekeeping records do not exist for David’s term of employment.

Without proper business records from either David or ACI, the Hearing Officer finds David’s claim of full-time employment lacks credibility. The Montana Supreme Court set out a remedy in *Arlington v. Miller’s Trucking, Inc.*, 2015 MT 68, 30, 378 Mont. 324, 343 P.3d 1222. Specifically:

The appropriate remedy when an employee’s claimed hours lack credibility, however, is to reduce those hours to the extent they lack credibility. This is what the Court in *Genao* did. It reduced the plaintiff’s claimed overtime hours to the extent they conflicted with the credible evidence presented by the defense. *Genao*, 2009 U.S. Dist. LEXIS 95787 at 23—24. In light of *Anderson*’s directive that employee’s evidence can be sufficient despite being untrustworthy, the preferred

procedure is to reduce an employee's claimed hours to the extent they lack credibility, not to deny the employee's claims altogether. Similarly, where the employee's evidence is internally inconsistent, the appropriate remedy would be to discredit the greater of the employee's hour calculations, rather than determine the employee may not recover at all.

In order to determine the reduction of David's work hours, several factors must be taken into consideration. Specifically, regarding David's weekly work hours, based on credible evidence presented by three of ACI's witnesses, David often failed to attend work while a jobsite was in progress. When David was missing from jobsites, he would often be found instead spending his time at casinos gambling or with his girlfriend, Osborn. In order to support its argument, ACI referenced David's failure to meet contract deadlines, as well as issues with the quality of the services rendered on behalf of ACI. Based on the evidence, David did not work the 40 hours per week to entitle him to the designation of full-time employment. Therefore, the Hearing Officer finds the number of hours David worked each week approximates 30 hours.

Regarding the nature of David's employment, based on the evidence, David was a seasonal employee as he applied for, and received, unemployment insurance (UI) benefits during 2019 and 2020. David agreed he was in receipt of UI benefits, however he did not provide the dates he was in receipt of said benefits. ACI argued David was paid UI benefits during dates which approximate with the seasonal nature of the construction industry in Montana. Based on the seasonal nature of David's work with ACI, the Hearing Officer finds David received UI benefits approximately beginning January 2019 through March 2019, and again November 2019 through December 2019. David was also paid UI benefits approximately beginning January 2020 through March 2020. This means David was not employed by ACI for approximately five months in 2019, and three months in 2020. Also, David did not work through the end of the 2020 year. ACI severed the employment relationship with David on or about October 30, 2020.

Based on the foregoing, David was a part-time, seasonal employee of ACI. However, ACI is still responsible for the minimum wage David is owed for the work he did perform during the designated months of his seasonal employment. Looking to Mont. Code Ann. § 39-3-409, which provides direction as to how minimum wage is to be calculated. Specifically:

- (1) The minimum wage, except as provided in subsection (3), must be the greater of either:
 - (a) the minimum hourly wage rate as provided under the federal Fair Labor Standards Act of 1938 (29 U.S.C. 206(a)(1)), excluding the value of tips received by the employee and the special provisions for a training wage; or

- (b) \$6.15 an hour, excluding the value of tips received by the employee and the special provisions for a training wage.
- (2) (a) The minimum wage is subject to a cost-of-living adjustment, as provided in subsection (2)(b).
- (b) No later than September 30 of each year, an adjustment of the wage amount specified in subsection (1) must be made based upon the increase, if any, from August of the preceding year to August of the year in which the calculation is made in the consumer price index, U.S. city average, all urban consumers, for all items, as published by the bureau of labor statistics of the United States department of labor.
- (c) The wage amount established under this subsection (2):
 - (i) must be rounded to the nearest 5 cents; and
 - (ii) becomes effective as the new minimum wage, replacing the dollar figure specified in subsection (1), on January 1 of the following year.
- (3) The minimum wage rate for a business whose annual gross sales are \$110,000 or less is \$4 an hour.

The Montana Department of Labor and Industry (MDLI) Employment Standards Division maintains a history of the minimum wage rates in Montana. (See MDLI official website at erd.dli.mt.gov/labor-standards/wage-and-hour-payment-act/minimum-wage-history.) The Hearing Officer takes judicial notice of the MDLI minimum wage rates as they apply to the period under review. Mont. R. Civ. P. § 2-4-612(6) and Mont. R. Evid. 202(b)(6). Based on MDLI's records, the official minimum wage for 2019 was \$8.50 per hour, and 2020 \$8.65 per hour. These are the applicable hourly wage amounts to be used in the calculation of the wage ACI was required to pay David during the two-year period under review.

Therefore, the wage ACI was required to pay David, as required by law, is as follows:

Year	Required Minimum Wage	Hours Worked Per Week	Total Weeks Worked	Total Wage Earned
2019	\$8.50 per hour	30 hours	32	\$8,160.00
2020	\$8.65 per hour	30 hours	33	\$8,563.50

The final calculation of the minimum wage ACI was required to pay David, for wages he earned during 2019 and 2020, totals \$16,723.50.

iii. Business Expenses

With the establishment of the minimum wage ACI was required to pay David, the next question to be addressed concerns the payments ACI already made to David during the two-year period under review.

David argues he expended his personal monies on behalf of ACI to pay for business expenses. Conversely, ACI argues David received payments from ACI above any reimbursement for business expenses, and, therefore, he received any applicable wage he might be due.

Again, based on the burden of proof, David has the initial burden to show business expenses he paid on behalf of ACI. When David filed his wage claim, he asserted: "There is no dispute over the hours worked, the amount of wages to be paid, nor a dispute whether there were checks written to the amount agreed upon. This dispute is solely over whether or not payments were received free and clear or if the employer received kickbacks." The rule of law David cited in this regard is Admin. R. Mont. 24.16.1507, which provides:

(1) Whether in cash or in facilities, "wages" cannot be considered to have been paid by the employer and received by the employee unless they are paid finally and unconditionally or "free and clear." The wage requirements of the Law will not be met where the employee "kicks-back" directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee. This is true whether the "kick-back" is made in cash or in other than cash.

The parties are not in dispute as to whether David used his personal finances to pay for some of ACI's expenses. The parties are in dispute over the amount David actually expended as business expenses, and whether all of the money David already received were reimbursements for business expenses. At hearing, David proved he used his personal money to pay for ACI's business expenses totaling \$33,629.16. This amount includes materials/supplies and lodging. David also claimed to have used his own money to pay for ACI employee food/meals and fuel. However, the Hearing Officer finds Robert did not approve the business expenditure of compensating employees for food/meals or fuel. Robert, as the owner and President of ACI, held the discretion to determine what was and was not an approved expense. David ran the day-to-day operations of ACI, but Robert retained the authority to approve employee expenses. Robert also authorized David to pay for employee lodging when employees needed to travel away from home to work on ACI jobsites. Therefore, the Hearing Officer finds the calculation of expenses David claimed to have personally made in order to cover ACI's business expenses

includes all the materials, supplies, and lodging that David proved he paid through the admitted exhibits, but does not include the food/meals and fuel David proved he paid through the admitted exhibits.⁵

David also referenced personally paying cash for employee wages. However, David did not keep, nor did he provide, any business records to show the amounts he claimed to have personally expended to pay ACI's employees cash wages. Further, while Duane was employed with ACI he instituted an employee time keeping system, which primarily shows ACI paid its employees with checks from ACI's business banking accounts. David chose not to continue utilizing the timekeeping and payment procedures after Duane resigned from ACI. Robert identified he did not approve David paying ACI employees in cash due to the liability, specifically the related tax and workers' compensation issues. Without the proper documentation, and based on Robert's disapproval of paying employees cash wages, David failed to substantiate his claim of expenses related to ACI's employee wages.

David bears the initial burden of proof in this matter, and he did establish by a preponderance of the evidence that he paid some of ACI's business expenses. Specifically, David was able to show he expended \$33,629.16 of his personal monies to pay for materials/supplies and employee lodging. However, David failed to substantiate he made any further expenditures on behalf of ACI. In a wage claim, an employee has the initial burden to show they performed work for which they were not compensated. Here, because David alleges he expended his own money to pay for ACI expenses, and, therefore, kicked back to the business, he still bears the initial burden to prove he made kickbacks such that he was not properly compensated. David did not meet his burden for any amounts above the \$33,629.16.

With the establishment of the expenditures David was able to prove he made on behalf of ACI, the burden then shifts to ACI to prove David was not properly compensated for those expenses. At hearing, ACI proved David received a total of \$49,965.50 in payments (checks) from ACI in 2019. During 2020, David received a total of \$141,124.44 in payments (checks, checks written to pay David's wife's rent, and electronic money transfers). The amount of payments received by David, during the two-year period under review (2019-2020), totals \$191,089.94. David argued the checks written to pay for his wife's rent could not be used in the calculation of his wages. The specific checks David identified related to checks made out to David's wife and/or her residential property management company. David requested Robert make the said payments on David's behalf in lieu of David personally receiving a direct payment. David cannot claim checks written to others, for his own benefit, are not part of compensation from which he personally

⁵ The calculation, of course, also does not include any amounts on the exhibits that were not admitted.

received a benefit. Further, the checks under review total \$9,075.00. Based on the amount in question, the total does not affect the ultimate conclusion of this decision. Therefore, ACI was able to prove \$191,089.94 is the amount of total payments received by David from ACI.

iv. Wage Received

In regard to the wages David earned during 2019 and 2020, the question remains as to whether David received the wages, and if so, were the wages received free and clear.

As shown above, David received payments from ACI, during the period under review, totaling \$191,089.94. Also as shown above, David used his own monies to pay ACI business expenses, during the period under review, totaling \$33,629.16. David argues the money he used to pay for ACI's expenses constitutes a kickback because he did not receive his wages free and clear. David argues he had to reinvest his wages back into ACI in order to keep the business operational. ACI agrees David did use his personal monies to pay some of ACI's business expenses. However, as ACI overcompensated David for any and all expenses David assumed, ACI asserts it also paid David any outstanding claimed wages.

The record in this matter shows David was able to prove he expended \$33,629.16 on behalf of ACI over the course of the 2019-2020 period under review. The record also shows ACI was able to prove it made payments to David totaling \$191,089.94, during the same time period. Therefore, ACI paid David \$157,460.78 in excess of the actual amount David was able to prove he expended on behalf of ACI.

Mont. Code Ann § 39-51-201(6)(a) defines wages, specifically:

“Wages” includes any money due an employee from the employer or employers, whether to be paid by the hour, day, week, semimonthly, monthly, or yearly, and includes bonus, piecework, and all tips and gratuities that are covered by section 3402(k) and service charges that are covered by section 3401 of the Internal Revenue Code of 1954, as amended and applicable on January 1, 1983, received by employees for services rendered by them to patrons of premises or businesses licensed to provide food, beverage, or lodging.”

Mont. Code Ann. § 39-3-204(1) and (2) speaks to the payment of wages as, “. . . 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. . . . Wages may be paid to the employee by electronic funds transfer or similar means of direct deposit if the employee has consented in writing or electronically, if a record is retained, to be paid in this manner.”

The matter on appeal is unique because of the familial relationship between David and Robert. The Hearing Officer finds that neither party completely separated their personal relationship from their professional relationship. This was problematic, because as the record shows, there is an immense amount of missing business records, including proper business recordkeeping by David as the individual responsible for the day-to-day operations of ACI. The evidence shows a course of performance between the parties which demonstrates Robert gave David monies beyond what was necessary to reimburse business expenses. Therefore, even though the agreement between David and Robert did not include a specific wage agreement, David did in fact receive wages, because he received monies above and beyond the business expenses he was able to prove. The payments ACI made to David in excess of the actual amount he was able to prove he expended on behalf of ACI were retained by David and equate to wages.

ACI was required by law to pay David the minimum wage as determined above. Instead, ACI paid David in full for his personal expenditures (\$33,629.16) and paid his wage in full (\$16,723.50). The amount of money David received in excess of these two amounts, which ACI was required by law to pay, are wages paid to David. Therefore, ACI overcompensated David for the wages he was owed under the minimum wage requirements of Montana law. David was paid his wages in full, and free and clear of any kickbacks, for the term of employment under review, and as such, David is not owed wages from ACI.

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. David was an employee of ACI during January 1, 2019 through October 30, 2020. During the period under review, David did not have a wage agreement with ACI. Without a wage agreement ACI is required to pay David the prevailing minimum wage.

3. David earned \$16,723.50 during 2019 and 2020.

4. While employed with ACI, David used his personal finances to pay for some of ACI's business expenses. Specifically, David paid for \$33,629.16 in business expenses.

5. Also while employed with ACI, David received payments from ACI totaling \$191,089.94. David received an excess amount in payments totaling \$157,460.78. Those excess amounts were wages paid to David. Therefore, ACI paid David's wages in full, and as such, David is not owed wages from ACI.

VI. ORDER

IT IS THEREFORE ORDERED THAT:

David received the statutorily required wages for his term of employment with ACI beginning January 1, 2019 through October 30, 2020. Further, any personal monies David expended on behalf of ACI were paid in full to David. Therefore, David's wage claim is dismissed, and judgment is entered in favor of respondent, Alderman Construction Incorporated.

DATED this 21st day of July, 2023.

DEPARTMENT OF LABOR & INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

By: /c/ COLLEEN C. TANNER
COLLEEN C. TANNER
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

