STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

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| IN THE MATTER OF THE WAGE CLAIM OF SHAWN P. ABEL, | ) | Case No. 2072-2012 |
| Claimant, | ) | |
| vs. | ) | **FINAL AGENCY DECISION** |
| SOLO GRAPHICS, INC., a Montana corporation, | ) | |
| Respondent. | ) | |

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## I. INTRODUCTION

In this matter, Claimant Shawn P. Abel has appealed from a determination by the Wage and Hour Unit that found Respondent Solo Graphics, Inc. did not owe him overtime pay as alleged in Abel's May 21, 2012 complaint.

Hearing Officer Gregory L. Hanchett convened a contested case hearing in this matter in Billings, Montana, on March 1, 2013. Daniel Gillespie, attorney at law, represented Abel. Kyle Beach, attorney at law, represented the respondent. Abel and Solo Graphics owner Scott Beach testified under oath. The parties stipulated to the admission of Wage and Hour Documents 1 through 124. In addition, Document 125 was also entered into evidence during the hearing. Based upon the evidence adduced at hearing and the parties' arguments in post-hearing briefing, the following findings of fact, conclusions of law and final decision are made.

## II. ISSUE

Is Abel due overtime wages as he contends in his complaint and penalty as provided by law?

## III. FINDINGS OF FACT

1. Solo Graphics is a business engaged in the production of signs and sign graphics. At all times material to this case, Scott Beach owned Solo Graphics.

2. On January 1, 2010, Solo Graphics hired Abel to work as a digital artist. He was hired through a job training program through the Billings Job Service. Through the program, one half of Abel's hourly wage was covered by the Job Service. Although Abel had training as a digital artist, he had never applied his talents in the context of the sign industry.

3. Beach brought Abel on board with the idea that Abel would at some point become a partner in Solo Graphics. As Abel testified, and the hearing officer finds, Beach and Abel agreed that Abel would spend all hours necessary to complete the work of the business. Beach and Abel considered Abel's hours worked in excess of 40 per week to be "sweat equity" that would constitute Abel's buy-in to the company. For this reason, Abel did not report his overtime hours on the documents submitted for reimbursement.

4. Because he perceived that he was going to become a partner in the business entity, Abel "worked a lot of extra hours doing a lot of extra things well outside the scope of what I was hired to do in order to bolster the business to get it to a point where it was profitable so that I would be a partner in it." Testimony of Abel. Abel would work at least eight overtime hours each week, and probably more, completing the tasks assigned to him. He would frequently be at the office until 7:00 or 8:00 p.m. on weekdays. Sunday would be a six or seven hour day and he would also work on some Saturdays. He sometimes worked "ten, eleven and even twelve hour days." Testimony of Abel.

5. Abel undertook work that required that he remain after normal working hours during the weekdays and that he work on weekends in order to ensure timely completion of the tasks. Among the many tasks that he completed were graphic design, digital file management, script writing, sign fabrication and installation, vehicle wrap installation, sales, printer operation, job estimating, order management system development, rate sheet development, and advertising and public relations. These tasks required Abel to stay after hours and work most Sundays and several Saturdays.

6. Much of the rendering for the design work that Abel completed was done after hours. Other projects had to be completed on Saturday or Sunday due to the

requirements of the specific project. For example, on one occasion, Abel had to do an art piece photo shoot from 5:00 a.m. to 9:00 a.m. because the photo had to be taken during sunrise. On other occasions, Abel had to have a closed shop (i.e., closed to the public) in order to complete a project. Two examples included the Yellowstone Boat Float Banner shoot and a "pin-up" girl shoot, the latter of which was completed on a Sunday evening from 5:00 p.m. until 10:00 p.m. Yet another example of the extra hours he put in involved completing two large vehicle wraps for Billings Carpet Cleaning and a decal application on a 1973 Volkswagen Bug undertaken at a car show. The decal application was undertaken on September 3, 2011 and took about an hour to complete. Abel spent the rest of that afternoon talking with attendees at the car show about Solo Graphics products.

7. Beach was aware that Abel was working overtime completing work. On occasion, Beach was present when Abel was working. In addition, Abel would also advise Beach that he was working on certain jobs and would be staying after hours to complete the work. Documentation of e-mails sent by Abel to various customers (Wage and Hour Documents 67 to 87). These e-mails are all generated after 5:00 p.m., with some of them being as late as 9:30 to 10:17 p.m. (See, e.g., Document 78, e-mail to Natalie Gregor). Abel worked approximately eight hours per week in overtime between hours in excess of 40 each week from the beginning of his employment through May 10, 2012.

8. Abel received a raise up to $10.50 per hour after working for Solo Graphics for about three months (sometime during April 2010). Document 92. He remained at that hourly wage until he was placed on an annualized salary of $24,000.00 per year.

9. Beach would praise Abel for working such long hours to complete tasks. At no time did Beach tell Abel he should not work the extra hours that he was working. Beach told Abel that he had observed that Abel worked harder than the other graphic artists that Solo Graphics had employed.

10. Solo Graphics had no written policy regarding overtime.

11. On May 7, 2012, Abel presented Beach with a letter he had composed that complained of the long hours Abel had been working. Documents 96-100. In summing up the letter, Abel essentially told Beach that he would no longer work more than 40 hours per week because he felt he was not getting paid for the additional hours he was putting in. He essentially told Beach that henceforth he would only be working 40 hours per week. Document 100.

12. As a result of the letter, Beach suspended Abel for one week, finding the letter to be tantamount to insubordination. On May 10, 2012, Beach discharged Abel.

13. Overtime is calculated at a rate of 1 and ½ times an employee's hourly wage. During the time that Abel was employed at an hourly rate, that equates to $15.75 per hour of overtime worked ($10.50 x 1.5 = $15.75). Abel's complaint seeks reimbursement for 87 weeks of overtime pay from May 1, 2010 to December 31, 2011. Eight hours per week of overtime for a period of 87 weeks equates to $10,962.00 of overtime work which Abel earned but for which he was not paid ($15.75 x 8 hours x 87 weeks = $10,962.00).

14. There is no proof in this case that the special circumstances decided in Admin. R. Mont. 24.16.7556 exist such that the maximum penalty permitted by Admin. R. Mont. 24.16.7561 (110%) must be imposed. Under the facts adduced at hearing, imposition of 55% permissible under Admin. R. Mont. 24.16.7561 is appropriate.

15. Penalty on the unpaid overtime amount equates to $6,029.10 ($10,962.00 x .55 = $6,029.10) if the amount found to be due is paid no later than 30 days after service of this decision.

## IV. DISCUSSION[1]

A. *Abel Has Proven That He Is Owed Additional Wages*.

Montana law requires employers to pay overtime at a rate of not less than 1 and ½ times the hourly wage rate when a worker works more than 40 hours in one work week. Mont. Code Ann. § 39-3-405(1). 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.

*Garsjo* is particularly instructive in a case like the one before this hearing officer. In *Garsjo*, the employer hired an employee and for the first month of employment kept time sheets for the hours she worked showing that she worked 14 hours per day. Thereafter, the employee was paid a fixed monthly amount but no

[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.

time records were kept. The employee had not kept any records either but she testified that she had worked approximately 16 hours per day during the time that no records were kept. Under these circumstances, the Montana Supreme Court determined that the proof was sufficient to make the employee's case. *Id.* at 189, 562 P.2d at 477. In doing so, the *Garsjo* Court noted that the United States Supreme Court's decision in *Anderson* discussed the proper framework for accessing the force of the employee's evidence:

> [W]here the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes, a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated . . . . In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient 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;

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, 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.

Here, there is little doubt that Abel's testimony on the number of overtime hours he worked meets the threshold of evidence that creates a just and reasonable inference that he worked that many additional hours each week. The credible evidence here convinces the hearing officer that Abel and Beach were working toward

Abel becoming a partner. Given the workload and the type of work that Abel described (i.e., renderings on deigns and projects that required early morning attendance or completion in a closed shop as noted above) and Abel's desire to help the company grow because of his motivation to become a partner, Abel's testimony establishes that he more likely than not worked approximately eight hours per week of overtime.

To counter this evidence, the employer has argued vociferously that Abel did not complete nearly the number of hours that he claims to have completed in overtime. The employer's records are inadequate in that they reflect only a small portion of the entire time that Abel worked for the employer. Documents 104 through 111 show monthly reports that the employer produced for Montana Job Service in order to seek reimbursement from the State of Montana for Abel's wages as well as time sheets (prepared presumably by Abel) that show hours worked each day. The dates those documents cover are April through July 2010. No other records of the hours worked were kept by the employer for the time period between August 1, 2010 and January 1, 2012, the date that Abel went to salary, or between January 1, 2012 and March 12, 2012, the date that Abel was discharged.

The available documentation does not detract from Abel's credibility under the circumstances of this case. In fact, Beach's testimony to an extent reinforces Abel's testimony about working overtime. For example, Beach conceded at hearing that he was aware that Abel was at the business after hours but Beach did not keep tabs on what Abel was doing. Beach also knew that Abel was in fact working on some Saturdays. In addition, Beach conceded at hearing that during Abel's employment he never reprimanded Abel about working overtime.

The employer has not presented evidence to show the precise number of hours that Abel worked. In light of Beach's candid concessions that (1) he knew Abel was at the office after hours, (2) Abel worked on Saturdays, and (3) Beach was not aware of what Abel was doing at the office after hours, the employer has failed to present sufficient evidence to negate the reasonableness of Abel's evidence that he did work at least eight hours per week in overtime. Under the authority of *Garsjø*, the hearing officer is duty bound to enter judgment in favor of Abel finding that he is due payment for overtime hours.

The employer also argued in closing that the employer did not suffer or permit Abel to work after hours. Beach's testimony does not support this position. Beach conceded that he was there when Abel was working after hours. Beach conceded in testimony that he took no steps to prevent Abel from working after hours. He did not

do so even though he knew or should have known that Abel was working overtime hours. Admin. R. Mont. 24.16.1005 specifically provides that "work not requested but suffered or permitted is work time" and must be compensated as such. By taking no action under the circumstances of this case, Beach suffered or permitted the overtime work and the employer, therefore, was required to pay Abel for that work.

B. *Penalty On Amounts Owed.*

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 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.

In this case, the determination from which the claimant appealed did not impose any penalty upon the overtime claim because the overtime claim was not sustained at the investigative level. Under similar circumstances, the Montana District Court has found that the lesser of the penalties available under the rules should be imposed. *Smith v. TYAD, Inc*, 2007 Mont. Dist. Lexis 348, ¶¶54,55, *aff'd* 2009 MT 180, ¶33, 351 Mont. 12, 209 P.3d 228 (holding that it was error for the agency to impose the higher penalty available under the applicable administrative rule where the agency had not before accorded the employer the opportunity to comply with the rule's requirements for payment of a lower penalty). None of the special circumstances requiring imposition of the maximum penalty of 110% exist in this case. Applying the penalty provisions of Admin. R. Mont. 24.16.7561 as he is required to do, the hearing officer finds that the employer owes a 55% penalty in the amount of $6,029.10.

In the event that the employer does not pay the penalty within the time period specified in the order section of this decision, then a **110% penalty** as mandated in Admin. R. Mont. 24.16.7561(b) must be imposed, raising the penalty amount to $12,058.20.

## V. CONCLUSIONS OF LAW

1. The State of Montana and the Commissioner of the Department of Labor and Industry have jurisdiction over this complaint under Mont. Code Ann. § 39-3-201 et seq. *State v. Holman Aviation* (1978), 176 Mont. 31, 575 P.2d 925.

2. Solo Graphics, Inc. owes Abel $10,962.00 in overtime wages.

3. A 55% penalty amounting to $6,029.10 is due on the unpaid overtime wages if it is paid within the time period specified in the order below. Admin. R. Mont. 24.16.7561.

4. If Solo Graphics, Inc. fails to pay the wages and penalty within the time frame prescribed in the order below, then penalty in the amount of 110%, amounting to $12,058.20, will be due in addition to the unpaid overtime wages.

## VI. ORDER

Solo Graphics, Inc. is hereby ORDERED to tender a cashier's check or money order in the amount of $16,991.10, representing $10,962.00 in unpaid overtime wages and $6,029.10 in penalty, made payable to Shawn P. Abel, 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. In the event that Solo Graphics, Inc. fails to pay the amounts found to be due in this decision within 30 days of the service of this decision as described above, then, in conformity with Admin. R. Mont. 24.16.7561(b), penalty in the amount of 110% of the wages due, a sum of $12,058.20 ($10,962.00 x 1.1 = $12,058.20), will be payable in addition to the amount of overtime wages found to be due.

DATED this 1st day of May, 2013.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ GREGORY L. HANCHETT
GREGORY L. HANCHETT
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.

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.