

STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIMS ) Case Nos. 791-2004  
OF STEVE STRATTON, )  
)  
Claimants, )  
) FINAL AGENCY DECISION  
vs. )  
)  
TIMBERLAND CONSTRUCTION, L.L.C., )  
a Montana limited liability company currently )  
in receivership, )  
)  
Respondent. )

\* \* \* \* \*

**I. INTRODUCTION**

Hearing Examiner Gregory L. Hanchett held a contested case hearing in this matter by telephone on March 24, 2006. Anne Biby, attorney at law represented the claimant Steve Stratton. Michael Black, attorney at law, represented the respondent Timberland Construction, LLC. The parties stipulated to the admission of Documents 1 through 109 contained in the administrative file. The parties also stipulated to the admission of Claimant's Exhibits 1 and 3 through 6 as well as Respondent's Exhibits A through D. Claimant's exhibit 2 was admitted for demonstrative purposes only over the objection of respondent. Stratton and William Mattson testified under oath. Based on the testimony and arguments made at the time of hearing, the following findings of fact, conclusions of law, and final agency decision are made.

**II. ISSUE**

Is Stratton due additional regular and overtime wages as alleged and penalty as provided by law?

**III. FINDINGS OF FACT**

1. Timberland hired Stratton as a general laborer to work at the Don Abbey Project, a large residential construction project located on an island in Flathead Lake and on the nearby shore. At all times material to this proceeding, Abbey was a part owner of Timberland.

2. Stratton began work on November 5, 2001 and resigned from that employment in September, 2003. Initially, Timberland paid Stratton at the rate of \$13.00 per hour of regular time work. On December 10, 2001, his hourly rate was raised to \$14.00 per hour. Then, beginning December 26, 2001 and continuing through January 10, 2003, Timberland paid Stratton \$15.00 per hour. Finally, beginning on January 13, 2003 and continuing through the end of Stratton's employment, Timberland paid him \$17.00 per hour.

3. The Abbey Project encompasses three areas (1)the project headquarters, located on the shore of Flathead Lake, (2) the Shelter Island main house and boat house construction site, which is located on Shelter Island, approximately two miles off shore in the lake, and (3) the Hideaway, which is also located on shore some distance from the project headquarters. Access to the Hideaway can be accomplished either by car or by boat, with each means of travel taking approximately 15 minutes to reach the Hideaway.

4. The project headquarters consists of the project office, a boat house, a shop with storage, and boat ramps from which the projects' two boats shuttled employees back and forth to the island project site. At the project headquarters, a sign containing rules of conduct was conspicuously posted near the project office. Among other things, the rules prohibited employees while anywhere on the project from playing radios or smoking. In addition, the rules required employees while anywhere on the project to wear hard hats and protective footwear and clothing. These regulations also governed conduct on the boat rides to and from the construction site. See Document 82 and 83.

5. Stratton's supervisor, Chance Chacon, required Stratton to be at the project headquarters no later than 6:30 a.m. each day. Upon arrival, the employees, including Stratton, would receive instruction from supervisors about the day's tasks on the island and the tools the employees would need to complete the tasks. They would then load the two transportation boats with both their own tools and tools belonging to Timberland Construction that were needed for the day's work.

6. After loading the boats, the employees got in the boats and were ferried across the water to the construction site. On a good weather day, the trip to the

island took approximately 15 minutes. During rough weather, the trip took longer. On occasion, a boat broke down, extending the length of the trip considerably.

7. At approximately 5:15 p.m. each day, the employees loaded their tools and Timberland's tools back into the boats and were taken back across the lake to the project headquarters. The trip back also took approximately 15 minutes.

8. Upon arrival back at the main office, Stratton and the other employees were charged with putting back the tools. This additional work would result in Stratton not being able to leave the main office work site any earlier than 5:45 p.m. on every day he worked.

9. Between 7:00 a.m. and 5:15 p.m., Timberland employees, including Stratton, were permitted only two breaks, one five minute break in the morning and one ten minute break on the afternoon. No lunch breaks were permitted. Even though Stratton arrived at work and began carrying out his duties by 6:30 a.m. and did not leave until 5:45 p.m., Timberland only paid Stratton for his work between 7:00 a.m. and 5:15 p.m. Stratton was not paid any overtime. At a minimum, Stratton worked at least 60 additional minutes (1 hour) each day that he worked for which he was not paid. With the exception of additional hours worked during the weeks shown below in Finding of Fact Paragraph 14, all of that time was overtime.

10. At the beginning of his employment up through December 6, 2001, Timberland paid Stratton at a regular hourly wage of \$13.00. The substantial evidence in this case demonstrates that Stratton worked but was not paid for the following overtime hours during each those weeks for which he was not paid:

November 1, 2001 to November 8, 2001:	4 hours
November 12, 2001 to November 15, 2001:	4 hours
November 19, 2001 to November 21, 2001:	4 hours
November 26, 2001 to November 29, 2001:	4 hours
December 3, 2001 to December 6, 2001:	<u>4 hours</u>

TOTAL HOURS 20 HOURS

Stratton's overtime hourly rate during these weeks was \$19.50 per hour (\$13.00 x 1.5= \$19.50 per hour). Stratton is thus due \$390.00 (\$19.50 x 20 hours = \$390.00) in unpaid overtime wages for this time period.

11. Starting on December 10, 2001, and continuing through December 20, 2001, Timberland paid Stratton at a regular wage of \$14.00 per hour. The substantial evidence in this case demonstrates that Stratton worked the following overtime hours during those two weeks:

December 10, 2001 to December 13, 2001:	4 hours
December 17, 2001 to December 20, 2001:	<u>4 hours</u>

TOTAL HOURS	8 hours
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Stratton's overtime hourly rate during these weeks was \$21.00 per hour (\$14.00 x 1.5 = \$21.00 per hour). Stratton is thus due \$168.00 (\$21.00 x 8 hours = \$168.00) in unpaid overtime wages for this time period.

12. Starting on December 26, 2001, and continuing through January 3, 2003, Timberland paid Stratton at a regular wage of \$15.00 per hour. The substantial evidence in this case demonstrates that Stratton worked the following overtime hours during each of those weeks:

December 26, 2001 to December 28, 2001	4 hours
December 31, 2001 to January 4, 2002	4 hours
January 7, 2002 to January 10, 2002	4 hours
January 14, 2002 to January 17, 2002	4 hours
January 21, 2002 to January 24, 2002	4 hours
January 28, 2002 to January 31, 2002	4 hours
February 11, 2002 to February 14, 2002	4 hours
February 18, 2002 to February 21, 2002	4 hours
March 4, 2002 to March 7, 2002	4 hours
March 11, 2002 to March 14, 2002	4 hours
March 18, 2002 to March 21, 2002	4 hours
March 25, 2002 to March 28, 2002	<u>4 hours</u>
SUBTOTAL	48 hours

April 1, 2002 to April 4, 2002	4 hours
April 8, 2002 to April 11, 2002	4 hours
April 15, 2002 to April 19, 2002	5 hours
April 22, 2002 to April 25, 2002	4 hours
April 29, 2002 to May 2, 2002	4 hours
May 6, 2002 to May 9, 2002	4 hours
May 13, 2002 to May 17, 2002	5 hours

May 20, 2002 to May 23, 2002	5 hours
May 28, 2002 to May 31, 2002	4 hours
June 3, 2002 to June 6, 2002	4 hours
June 10, 2002 to June 13, 2002	4 hours
June 17, 2002 to June 20, 2002	4 hours
June 24, 2002 to June 27, 2002	<u>4 hours</u>
SUBTOTAL	55 hours

July 8, 2002 to July 11, 2002	4 hours
July 15, 2002 to July 18, 2002	4 hours
July 29, 2002 to August 1, 2002	4 hours
September 3, 2002 to September 6, 2002	4 hours
September 9, 2002 to September 12, 2002	4 hours
September 16, 2002 to September 19, 2002	4 hours
September 23, 2002 to September 26, 2002	4 hours
September 30, 2002 to October 3, 2002	<u>4 hours</u>
SUBTOTAL	32 hours

October 7, 2002 to October 10, 2002	4 hours
October 14, 2002 to October 17, 2002	4 hours
October 21, 2002 to October 24, 2002	4 hours
October 28, 2002 to October 31, 2002	4 hours
November 4, 2002 to November 7, 2002	4 hours
November 11, 2002 to November 14, 2002	4 hours
December 2, 2002 to December 5, 2002	4 hours
December 9, 2002 to December 12, 2002	4 hours
December 16, 2002 to December 19, 2002	4 hours
December 23, 2002 to December 27, 2002	4 hours
December 30, 2002 to January 3, 2003	4 hours
January 6, 2003 to January 10, 2003	<u>4 hours</u>
SUBTOTAL	48 hours

TOTAL ( December 26, 2001 to January 10, 2003) 183 HOURS

Stratton's overtime hourly rate during these weeks was \$22.50 per hour (\$15.00 x 1.5 = \$22.50 per hour). Stratton is thus due \$4117.50 (\$22.50 x 183 hours = \$4117.50) in unpaid overtime wages for this time period.

13. Starting on January 13, 2003 and continuing through June 11, 2003, Timberland paid Stratton at a regular wage of \$17.00 per hour. The substantial

evidence in this case demonstrates that Stratton worked the following overtime hours during each of those weeks:

January 13, 2003 to January 16, 2003	4 hours
January 20, 2003 to January 23, 2003	4 hours
February 10, 2003 to February 14, 2003	5 hours
February 17, 2003 to February 20, 2003	4 hours
February 24, 2003 to February 27, 2003	4 hours
March 3, 2003 to March 6, 2003	4 hours
March 10, 2003 to March 14, 2003	5 hours
March 17, 2003 to March 20, 2003	5 hours
March 31, 2003 to April 3, 2003	<u>4 hours</u>
SUBTOTAL	39 hours

April 7, 2003 to April 10, 2003	4 hours
April 14, 2003 to April 17, 2003	4 hours
April 28, 2003 to May 1, 2003	4 hours
May 5, 2003 to May 8, 2003	4 hours
May 19, 2003 to May 21, 2003	4 hours
June 2, 2003 to June 5, 2003	4 hours
June 9, 2003 to June 11, 2003	<u>4 hours</u>
SUBTOTAL	28 hours

TOTAL ( January 13, 2003 to June 11, 2003) 67 HOURS

Stratton's overtime hourly rate during these weeks was \$25.50 per hour (\$17.00 x 1.5= \$25.50 per hour). Stratton is thus due \$1708.50 (\$25.50 x 67 hours = \$1708.50) in unpaid overtime wages for this time period.

14. There were also several weeks were Stratton worked additional hours but did not enter into an overtime situation. He worked the following regular hours during the following weeks for which he was not paid:

December 17, 2001 to December 20, 2001	3 hours
December 26, 2001 to December 28, 2001	<u>3 hours</u>
SUBTOTAL	6 HOURS
February 4, 2002 to February 7, 2002	4 hours
February 25, 2002 to February 28, 2002	4 hours
July 1, 2002 to July 3, 2002	4 hours

July 22, 2002 to July 25, 2002	4 hours
August 5, 2002 to August 8, 2002	4 hours
August 12, 2002 to August 15, 2002	4 hours
August 19, 2002 to August 22, 2002	4 hours
August 26, 2002 to August 28, 2002	3 hours
November 18, 2002 to November 21, 2002	4 hours
November 25, 2002 to November 27, 2002	<u>4 hours</u>
SUBTOTAL	39 HOURS

January 27, 2003 to January 30, 2003	4 hours
February 3, 2003 to February 6, 2003	4 hours
May 12, 2003 to May 14, 2003	3 hours
May 28, 2003 to May 30, 2003	3 hours
June 9, 2003 to June 11, 2003	3 hours
July 11, 2003	1 hours
July 29, 2003	<u>1 hours</u>
TOTAL	19 HOURS

15. Between December 17, 2001 and December 28, 2001, Stratton worked an additional 6 hours for which he was not compensated. At \$13.00 per hour, he is owed an additional \$78.00 in regular wages for this work. Between February 4, 2002 and November 27, 2002, Stratton worked an additional 39 regular hours for which he was not compensated. At \$14.00 per hour, he is owed an additional \$546.00 in regular wages for this work. Between January 27, 2003 and July, 2003, Stratton worked an additional 19 hours for which he was not compensated. At \$17.00 per hour, he is owed an additional \$323.00 in regular wages for this work. The total additional regular wages due to Stratton are \$947.00.

16. Pursuant to Montana District order, Timberland withheld child support from Stratton's wages in the amount of \$666.96. This amount was to be paid into district court. The amount was not paid into district court and as result, a contempt proceeding was initiated against Stratton for the failure to pay the child support. Stratton resolved this by paying the district court \$666.96. Timberland did not reimburse Stratton for the \$666.96 that it withheld from his pay check but did not pay over to the district court.

17. The total of Stratton's unpaid overtime wages is \$6384.00 (\$390.00 + \$168.00 + \$4117.50 + \$1708.50 = \$6384.00). A penalty of 110% on that amount equals \$7022.40 (110% of \$6384.00 = \$7022.40). The total of Stratton's unpaid

regular wages is \$1613.96 (\$947.00 + 666.96 = \$1613.96). 55% penalty on that amount equals \$887.68 (55% of \$1613.96=\$887.68).

#### IV. DISCUSSION<sup>1</sup>

##### A. *Timberland owes Stratton Additional Overtime And Regular Wages.*

The appellant challenges the claimant's contention that he is owed additional wages. The substantial evidence in this matter demonstrates that Stratton is due both additional overtime and regular wages as well as 110% penalty on the overtime and 55% penalty on the regular wages as required by the applicable rules.

Montana law requires employers to pay wages when due, and in no event later than 15 days following termination of employment. Mont. Code Ann. §§ 39-3-204 and 39-3-205. Montana law also requires employers to pay an overtime premium of 1½ times the regular hourly rate when employees work more than 40 hours in a work week. Mont. Code Ann. §39-3-405, MCA.

The only issue in this case whether Stratton worked the additional number of overtime and regular hours that he claims he worked.<sup>2</sup> 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 that lower court properly concluded that 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

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<sup>1</sup>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.

<sup>2</sup>Timberland did not contest the legal issue of whether the boat ride was compensable time in this case. Even if it had, however, the respondent would have been collaterally estopped in this case from relitigating the issue. Under substantially identical facts, Timberland had an opportunity to fully and fairly litigate before this tribunal the identical legal issue. The respondent lost that issue in the matter of the wage claim of *Beitl v. Timberland Construction, LLC*, 1255-2003, and did not appeal. Beitl was one of Stratton's co-workers at the Abbey Construction project.

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.

Stratton's testimony is sufficient to meet his burden to show that he was not paid for the overtime and regular hours of work that he is claiming. Timberland's records do not refute Stratton's position as the records themselves reflect only the pay Stratton received and the hours he actually worked. Those records do not adequately refute Stratton's prima facie showing and thus the hearing examiner finds that Stratton has proven by a preponderance of the evidence that he is owed the additional overtime and regular wages as stated in Finding of Fact Paragraph 17.

Stratton's testimony also demonstrates by a preponderance of the evidence that Timberland failed to pay over to district court \$666.96 that it had withheld pursuant to a district court order of child support. Stratton then had to pay that amount out of his own pocket in order to resolve a contempt proceeding against him for failure to pay that amount. Montana Code Annotated §39-3-204 permits an employer to make only those deductions "provided for by law." The deduction provision of this statute is strictly construed because the law does not favor forfeiture of wages. 25 Op. Att'y Gen. Op. 11 (1953). Timberland's failure to pay over Stratton's garnished wages to the district court and failure to reimburse those withheld wages to Stratton was not permitted by law. Timberland's conduct amounted to an unlawful withholding of wages and Stratton is thus due this amount in regular wages.

#### B. *Timberland Owes Penalty on The Unpaid Wages*

Montana law assesses a penalty when an employer fails to pay wages when they are due. Mont. Code Ann. §39-3-206. For cases involving overtime claims, a penalty of 110% must be imposed in the absence of certain circumstances, none of which are applicable to this case. Admin. R. Mont. 24.16.7561. For claims involving compensation other than minimum wage and overtime compensation, a penalty of 55% must be imposed in the absence of certain circumstances, none of which apply to this case. Admin. R. Mont. 24.16.7566. Where a claim involves a failure to pay both overtime and regular wages, the penalties to be assessed must be calculated by applying the appropriate penalty to each component of the claim. Admin. R. Mont. 24.16.7569.

Applying these three regulations, Timberland owes penalty in the amount of \$7022.40 (110% of \$6384.00) for the unpaid overtime wages due to Stratton. Timberland also owes penalty in the amount of \$887.68 (55% of \$1613.96=\$887.68) for the unpaid regular wages due to Stratton.

## 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. Timberland owes Stratton additional overtime wages in the amount of \$6384.00 and additional regular wages in the amount of \$1613.96. In addition, Timberland owes Stratton penalty of \$7022.40 on the unpaid overtime wages and \$887.68 on the unpaid regular wages.

## VI. ORDER

Timberland Construction, LLC, is hereby ORDERED to tender a cashier's check or money order in the amount of \$15,908.04, representing \$7997.96 in wages and \$7910.08 in penalty, made payable to Steve Stratton, and mailed to the Employment Relations Division, P.O. Box 6518, Helena, Montana 59624-6518, no later than 30 days after service of this decision.

DATED this 12th day of June, 2006.

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 service of the 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.