

**STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
HEARINGS BUREAU**

<b>IN THE MATTER OF THE WAGE CLAIM</b>	)	<b>Case No. 1283-2002</b>
<b>OF DAVID J. WILCOX,</b>	)	
<b>Claimant,</b>	)	
	)	
<b>vs.</b>	)	<b>FINDINGS OF FACT;</b>
	)	<b>CONCLUSIONS OF LAW;</b>
	)	<b>AND ORDER</b>
<b>T BAR S ENTERPRISES, INC.,</b>	)	
<b>a Montana corporation</b>	)	
<b>Respondent.</b>	)	

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**I. INTRODUCTION**

The hearing officer convened an in-person hearing on the above claimant's wage claim on October 9, 2002. The claimant, David Wilcox, represented himself and testified under oath. The hearing officer attempted to contact the respondent's president and registered agent, Ted Brosam, at the only number provided by the respondent, (406) 251-5995. The female voice that answered the telephone line indicated that neither Mr. Brosam nor the respondent corporation was at that number anymore, but she did provide Mr. Brosam's cellular phone number. The hearing officer called that number. Cindy Brosam, Mr. Brosam's wife, answered. The hearing officer informed Mrs. Brosam that the hearing was scheduled to proceed. After taking a short recess to allow Mrs. Brosam to contact an attorney, Mrs. Brosam indicated that Mr. Brosam would not be appearing at the hearing as he had other, more pressing business. Mrs. Brosam also indicated that she could not represent the respondent because she was not an officer of the respondent.

The respondent agent was duly notified of the time and place for hearing. A notice was sent to the registered agent by certified mail, return receipt requested. The notice of hearing was delivered to Mr. Brosam and signed for by Mrs. Brosam on September 16, 2002. As the respondent and its registered agent were properly notified of the date and time of hearing, and the respondent elected not to participate, the hearing proceeded in the absence of the respondent.

Exhibits numbered 000001 through 000243 were admitted into evidence without objection. The claimant then testified and presented evidence regarding the basis for his overtime wage claim.

**II. ISSUE**

The issue in this case is whether T Bar S Enterprises, a Montana corporation (hereinafter employer), owes wages for overtime work performed, as alleged in the complaint filed by David Wilcox (hereinafter claimant).

### III. FINDINGS OF FACT

1. The claimant was employed by the employer during the time period of July 2000 through November 11, 2001.
2. During this time, the claimant spent over 75% of his time on the job as a laborer (*see* Exhibits 000118 through 000146, in addition to the claimant's testimony). The claimant was not employed as an administrator or supervisor.
3. The claimant and the employer agreed that the claimant would be paid by an annual salary. During his period of employment, the claimant had a "fluctuating work week." In other words, during some weeks of work, the claimant would work very few hours and sometimes not at all. During other weeks, especially during the employer's busy spring and summer months, the claimant would work in excess of 40 hours during some weeks.
4. The claimant was not paid any overtime compensation during those work weeks during which he worked in excess of 40 hours. The employer failed to pay the claimant for the overtime because it believed that it could average the claimant's hours from week to week. It was the employer's intention to pay for all hours worked, but because the employer erroneously believed that it could average the work week hours, it failed to properly compensate the claimant for overtime hours that he worked.
5. As demonstrated by a review of the claimant's time sheets (Exhibits 000118 through 000146) as well as the spread sheet created by the claims examiner, the claimant worked in excess of 40 hours during the following weeks:
  - 8/14/00 to 8/20/00 (12.5 overtime hours)
  - 8/21/00 to 8/27/00 (15.0 overtime hours)
  - 8/28/00 to 9/3/00 (19.5 overtime hours)
  - 9/11/00 to 9/17/00 (14.0 overtime hours)
  - 11/13/00 to 11/19/00 (7.5 overtime hours)
  - 1/8/01 to 1/14/01 (1.0 overtime hours)
  - 2/12/01 to 2/18/01 (10.5 overtime hours)
  - 4/16/01 to 4/22/01 (5.0 overtime hours)
  - 4/30/01 to 5/6/01 (21.5 overtime hours)
  - 5/7/01 to 5/13/01 (16.5 overtime hours)
  - 5/14/01 to 5/20/01 (15.0 overtime hours)
  - 6/11/01 to 6/17/01 (8.0 overtime hours)
  - 7/23/01 to 7/29/01 (8.0 overtime hours)
  - 9/17/01 to 9/23/01 (18.5 overtime hours)

6. At the hearing in this matter, the claimant testified under oath that the amount calculated by the claims examiner as due to him for overtime, \$1,910.61, was correct.

7. The employer's objection to the determination that the claimant was due overtime (Exhibits 000003 and 000004) stemmed from the employer's belief that the claimant was exempt from the overtime wage requirements. In fact, the claimant was not exempt from the overtime wage requirements and was entitled to overtime pay.

8. The employer in its appeal contended that it paid a bonus of \$4,786.54 to the claimant. The claimant under oath denied that he had ever been paid the bonus amount. Therefore, no such bonus was paid to the claimant.

#### IV. OPINION

An employer may not employ an employee for a work week longer than 40 hours unless the employer compensates the employee at one and one-half times his hourly wage for hours that are worked in excess of 40 hours during that week. § 39-3-405, MCA. An employer is not obligated to pay overtime if an employee is either exempt or excluded from the overtime compensation statute. *See generally*, §§ 39-3-405, 39-3-406, MCA. The fact that the employee may be salaried instead of paid on an hourly basis is of no consequence. Even when an employee is salaried, he is still entitled to overtime compensation where he works in excess of 40 hours in one work week, provided he is not exempt from the overtime pay requirements. 24.16.2504 and 24.16.2512, A.R.M.

24.16.2512(e)(i) A.R.M. provides the method for determining overtime compensation for "fluctuating work week" employees like the claimant. In essence, the employee's salary covers his straight time pay for whatever hours he works. He is also entitled to an additional one-half his regular rate of pay for each hour of overtime worked for the week during which he accrues the overtime. In this way, the requirements of § 39-3-405, MCA, are met.

In his appeal, the employer asserted that the claimant was exempt from the overtime pay requirements, contending that the claimant was an administrative employee. The evidence adduced at the hearing is to the contrary. The claimant testified under oath that he performed all the physical labor involved in the employer's business and that the physical labor work accounted for 75% of his entire work. He denied that he had any supervisory control over other employees. This uncontroverted testimony demonstrates that the claimant did not fall into the administrative personnel exception (§ 39-3-406(j), MCA) to the overtime pay requirement.

The exhibits admitted in evidence show that the claimant had certain work weeks where he worked in excess of 40 hours during that one week but was not compensated as required by ARM 24.16.2512(e)(i). Comparison of the time card documentation produced by the claimant (Exhibits 000118 through 000146) to the figures contained in the spread sheets produced by the claims examiner (Exhibits 000016, 000017) shows that the claimant worked overtime during certain weeks but was not properly compensated for that overtime. Based on the claimant's testimony at the hearing, the total amount of overtime compensation due the claimant but not paid to him is \$1,910.61.

The circumstances of this case do not justify a maximum penalty. The employer intended to compensate the claimant for all hours worked, even though it was not adequately compensating the claimant for overtime under the regulations. Accordingly, imposition of the 55% penalty is appropriate. 24.16.7551, 24.16.7556 and 24.16.7561 A.R.M.

## 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 § 39-3-201 et seq. MCA. *State v. Holman Aviation*, 176 Mont. 31, 575 P.2d 925 (1978).
2. The employer owes the claimant compensation for overtime wages due and unpaid in the amount of \$1,910.61.
3. The employer is liable to the claimant for a statutory penalty of 55% of the wages due and unpaid, which is \$1,050.83.

## VI. ORDER

The respondent, T bar S Enterprises, IS HEREBY ORDERED to tender a cashier's check or money order in the amount of \$2,961.44, representing \$1,910.61 in unpaid overtime wages and \$1,050.83 in penalty due to the claimant, David Wilcox, and delivered to the Employment Relations Division, P.O. Box 6518, Helena, Montana 59604-6518 no later than November 25, 2002.

DATED this 23rd day of October, 2002.

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 § 39-3-216(4), MCA, by filing a petition for judicial review in an appropriate district court within 30 days of service of the decision. See also § 2-4-702, MCA.

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 § 39-3-212, MCA. Such an application is not a review of the validity of this Order.