STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM OF BRIAN ROCHE, Claimant, vs. TIMBERLAND CONSTRUCTION, L.L.C., a Montana limited liability company currently in receivership, Respondent.	)	Case No. 527-2004 **FINAL AGENCY ORDER GRANTING SUMMARY JUDGMENT AND DISMISSING CLAIM**

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The respondent has filed a motion to dismiss this matter indicating that the claimant failed timely to appeal the determination of the Wage and Hour Unit as prescribed by Admin. R. Mont. 24.16.7534.[1] Though directed to do so, the claimant has failed to respond to the motion. Accordingly, the hearing examiner now proceeds to rule on the motion in the absence of any response from the claimant.

I. FINDINGS OF FACT

1. On September 12, 2003, Roche filed a complaint with the Wage and Hour Unit of the Department of Labor and Industry alleging that the respondent owed him additional wages. Roche claimed that he was due a total of $5,639.04 in additional wages between April, 2001 and August 20, 2003 for time spent in completing a boat ride to the Timberland Construction site in Flathead Lake.

2. On October 14, 2003, the Wage and Hour Unit issued an amended determination dismissing Roche's complaint after a finding that the complaint lacked merit. The Wage and Hour Unit determined that the time spent in the boat was not

[1] Although the respondent has styled this motion as a motion to dismiss, it is more properly treated as a motion for summary judgment, since resort to facts outside the "four corners" of the wage complaint is necessary in order to resolve the motion . *See Xin Xu v. McLaughlin Research Institute*, 2005 MT 209, 328 Mont. 232, 119 P.3d 100.

compensable time and dismissed the case. Documents 54 through 57. The determination further required the claimant to file an appeal or request a redetermination no later than November 3, 2003.

3. The October 14, 2003 Order of Dismissal was sent to Roche at the only address that he had on file with the Wage and Hour Unit. Roche neither filed an appeal nor sought a redetermination of the October 14, 2003 Order of Dismissal. Instead, on December 3, 2003, he filed a new claim against the respondent, asserting as a basis for his new complaint the same facts as he had previously alleged in his September 12, 2003 claim, with the exception that he now sought more money.

4. There are no facts that would excuse the untimely filing of the September, 2003 appeal.

5. The Wage and Hour Unit refused to process Roche's December 3, 2003 claim as it had previously been adjudicated and no appeal had been filed from that adjudication. Document 47. Instead, the Wage and Hour Unit treated Roche's case as an untimely appeal from the amended October 14, 2003 Order of Dismissal.

II. ISSUE

A. Is the appeal of the September 12, 2003 claim untimely?

B. Is the December 3, 2003 claim barred under principals of *res judicata*?

III. DISCUSSION[2]

The respondent seeks dismissal of the instant claim on the basis that it was not timely appealed. In fact, the record shows that the appeal is untimely and no basis has been demonstrated to set aside the untimely appeal.

A. *Propriety of Summary Judgment in Administrative Proceedings*

Summary judgment is an appropriate method of dispute resolution in administrative proceedings where the requisites for summary judgment otherwise exist. *Matter of Peila* (1991), 249 Mont. 272, 815 P.2d 139. Summary judgment is appropriate where "the pleadings . . . and admissions on file . . . show that there is no

[2]Statements of fact in this discussion are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), Mont. R. Civ. P.

The party seeking summary judgment has the initial burden of establishing the absence of any genuine issue of material fact and entitlement to judgment as a matter of law. Once the moving party meets this burden, the burden then shifts to the party opposing the motion to establish otherwise by more than mere denial or speculation. *Ravalli County Bank v. Gasvoda* (1992), 253 Mont. 399, 883 P.2d 1042. Reasonable inferences from the proof must be drawn in favor of the party opposing summary judgment. *Sherrad v. Prewett* (2001), 306 Mont. 511, 36 P.3d 378.

In this matter, the claimant has not disputed any of the salient points of the respondent's motion. Indeed, despite this tribunal's admonition of the consequences of not responding to the respondent's motion, the claimant has failed to respond at all. The administrative file shows that the claimant filed a claim, the claim was dismissed for lack of merit, and the claimant failed to appeal that claim at all. Instead, he filed a new complaint identical to the original complaint. As there is no dispute of fact, the only question here is whether the moving party is entitled to judgment as a matter of law.

B. *Roche's Appeal is Untimely.*

Admin. R. Mont. 24.16.7537 (1) provides that a party who receives an adverse decision may request a formal hearing within 15 days of the date of the determination or redetermination. That request must be in writing. Admin. R. Mont. 24.16.7537(2). Roche failed to comport with these requirements and has shown no cause, much less good cause, for excusing the requirement of timely filing. Accordingly, the October 14, 2003 determination must stand.

C. *Roche's December, 2003 filing is Barred by Principles of Res Judicata.*

The doctrine of *res judicata* "bars a party from relitigating a matter that the party has already had an opportunity to litigate." *Xin Xu v. McLaughlin Res. Inst.*, 2005 MT 209, ¶33, 328 Mont. 232, ¶33, 119 P.3d 100, ¶33. *Res judicata* applies if the following four elements have been satisfied: 1) the parties or their privies are the same; 2) the subject matter of the present and past actions is the same; 3) the issues are the same and relate to the same subject matter; and 4) the capacities of the persons are the same in reference to the subject matter and to the issues between them. *Id*.

In the *Xin Xu* case, the plaintiff filed a complaint against the respondent seeking damages for wrongful termination. The district court ultimately dismissed that complaint as a sanction against the claimant for discovery violations. The claimant then filed a second complaint against the same respondent alleging the same factual and legal basis of the wrongful termination. The district court dismissed the second complaint on the basis that its was barred on principles of *res judicata* as the first complaint had been adjudicated on the merits. The Montana Supreme Court affirmed the district court's dismissal of the second complaint, finding that both principals of *res judicata* and collateral estoppel applied to preclude the second suit. *Xin Xu*, ¶35.

Applying these principles to Roche's claim demonstrates that the subject matter of this complaint is *res judicata*. Roche's first claim identified the same party (Timberland Construction) and the same issue and same subject matter (a claim of wages due to him between April 2001 and August 2003 for time spent on the boat ride to and from the construction site) as found in the second claim. The capacity of the parties in each of the claims is identical (Roche the employee and Timberland the employer). Roche lost on the merits in the first claim and did not appeal from that decision. Instead, he filed the December, 2003 claim. Because all four elements of *res judicata* exist in this matter, application of the doctrine is appropriate here and Roche's December, 2003 claim should be barred.

IV. CONCLUSIONS OF LAW

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

2. Roche's September 12, 2003 is untimely and no basis has been shown to permit an untimely appeal of that claim.

3. Roche's Dcember 3, 2003 claim in this case is barred by principles of *res judicata*.

4. Because his September, 2003 claim is untimely and his December, 2003 claim is barred, summary judgment in favor of the Respondent is appropriate.

5. Roche's claim must be dismissed. Admin. R. Mont. 24.16.7541(3).

V. ORDER

Summary judgment in favor of respondent Timberland Construction, Inc., is granted and Roche's claim is dismissed. The previously set pre-hearing schedule, final pre-hearing date and hearing date are hereby vacated.

DATED this 3rd day of March, 2006.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

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