



### III. FINDINGS OF FACT

1. Timberland hired Collins 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. Collins began work on November 25, 2002 and resigned from that employment on August 13, 2003. Initially, Timberland paid Collins at the rate of \$12.00 per hour of regular time work. On January 13, 2003, his hourly rate was raised to \$14.00 per hour. Beginning June 16, 2003, Timberland paid Collins \$15.00 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 from project headquarters.

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 Documents 82 and 83.

5. During his first 5 months of employment on the project, Collins worked as a laborer on the project, arriving no later than 6:45 a.m. in order to be prepared to take the boat ride out to the project on Shelter Island. Collins's supervisor, Chance Chacon, required Collins to be at the project headquarters no later than 6:45 a.m. each day. Upon arrival, all employees, including Collins, would receive instruction from supervisors about the day's tasks on the island and the tools the employees would need to complete the tasks. The employees would then load the two transportation boats with both their own tools and tools belonging to Timberland that were needed for the day's work. In addition, Collins was charged with getting

the laser system disconnected from its charging station and placed in the boat for the ride over to the Shelter Island construction site.

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, Collins and the other employees were charged with putting back the tools. In addition, Collins had to return the laser to its charging station. This additional work would result in Collins not being able to leave the main office work site until 5:30 p.m. on every day he worked.

9. Starting in early May, 2003, Collins was moved to the project headquarters and promoted to the position of assistant project foreman. In this position, he continued to arrive at 6:45 a.m. or earlier because Chacon required him to be there. Upon arrival, he would immediately begin his administrative duties. At the end of the day, he was required to continue working until the boat shuttling the employees returned from the island construction site to the mainland. When the boat returned, he would have to collect the laborers daily time sheets (time sheets maintained

by the laborers to show what they had spent their time doing that day) and then make sure those documents were filed. After becoming assistant project foreman, Collins always worked until at least 5:45 p.m.

10. Between 7:00 a.m. and 5:15 p.m., Timberland employees, including Collins, were permitted only two breaks, one five minute break in the morning and one ten minute break in the afternoon. No lunch breaks were permitted. Even though Collins arrived at work and began carrying out his duties by 6:45 a.m., and did not leave until 5:45 p.m., Timberland only paid Collins for his work between 7:00 a.m. and 5:15 p.m. Collins was not paid any overtime. At a minimum, Collins worked at least 45 additional minutes each day that he worked for which he was not paid. With the exception of additional hours worked during the week of March 31 to April 3, 2003, all of that time was overtime.

11. Timberland's computer-generated records of pay logs themselves show that Timberland did not pay Collins in accordance with the Montana Wage and Hour Act. By way of example, Respondent's Exhibit A-5 for the dates of July 28, 29, and 30, 2005 show that Collins worked 10.25, 10.75 and 11.50 hours respectively on those days but he was paid only his regular wage of \$15.00 per hour.

12. At the beginning of his employment up through the week of January 6 through January 9, 2003, Timberland Construction, LLC, paid Collins at a regular hourly wage of \$12.00. The substantial evidence in this case demonstrates that Collins worked the following overtime hours during each those weeks for which he was not paid:

December 2, 2002 to December 5, 2002:	3 hours
December 9, 2002 to December 12, 2002:	3 hours
December 16, 2002 to December 19, 2002:	3 hours
December 23, 2002 to December 27, 2002:	3 hours
December 30, 2002 to January 3, 2003:	3 hours
January 6, 2003 to January 9, 2003:	<u>3 hours</u>

TOTAL HOURS 18 HOURS

Collins' overtime rate during these weeks was \$18.00 per hour ( $\$12.00 \times 1.5 = \$18.00$  per hour). Collins is thus due \$324.00 ( $\$18.00 \times 18 \text{ hours} = \$324.00$ ) in unpaid overtime wages for this time period.

13. Starting on January 13, 2003, and continuing through June 12, 2003, Timberland paid Collins at a regular wage of \$14.00 per hour. The substantial evidence in this case demonstrates that Collins worked the following overtime hours during each of those weeks:

January 13, 2003 to January 16, 2003:	3 hours
January 20, 2003 to January 23, 2003:	3 hours
January 27, 2003 to January 30, 2003:	3 hours
February 3, 2003 to February 6, 2003:	3 hours
February 10, 2003 to February 13, 2003:	3 hours
February 17, 2003 to February 20, 2003:	3 hours
February 24, 2003 to February 27, 2003:	3 hours
March 3, 2003 to March 7, 2003:	3 hours
March 10, 2003 to March 13, 2003:	3 hours
March 17, 2003 to March 20, 2003:	3 hours
March 24, 2003 to March 27, 2003:	3 hours
April 7, 2003 to April 10, 2003	3 hours
April 14, 2003 to April 17, 2003	3 hours
April 21, 2003 to April 24, 2003	3 hours
April 28, 2003 to May 1, 2003	3 hours
May 5, 2003 to May 8, 2003	3 hours
May 12, 2003 to May 15, 2003	3 hours
May 19, 2003 to May 21, 2003	3 hours
May 27, 2003 to May 30, 2003	3 hours
June 2, 2003 to June 7, 2003	3 hours
June 9, 2003 to June 12, 2003	<u>3 hours</u>
<b>TOTAL HOURS</b>	<b>63 hours</b>

Collins' overtime rate during these weeks was \$21.00 per hour ( $\$14.00 \times 1.5 = \$21.00$  per hour). Collins is thus due \$1,323.00 ( $\$21.00 \times 63 \text{ hours} = \$1,323.00$ ) in unpaid overtime wages for this time period.

14. Starting on June 16, 2003, and continuing through the end of his employment, Timberland paid Collins at a regular wage of \$15.00 per hour. The

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

June 16, 2003 to June 19, 2003	3 hours
June 23, 2003 to June 26, 2003	3 hours
June 30, 2003 to July 3, 2003	3 hours
July 7, 2003 to July 10, 2003	3 hours
July 14, 2003 to July 18, 2003	3 hours
July 21, 2003 to July 24, 2003	3 hours
July 28, 2003 to August 1, 2003	3.75 hours
August 4, 2003 to August 7, 2003	3 hours
August 11, 2003 to August 13, 2003	<u>3 hours</u>
TOTAL	27.75 hours

Collins' overtime rate during these weeks was \$22.50 per hour ( $\$15.00 \times 1.5 = \$22.50$  per hour). Collins is thus due \$624.37 ( $\$22.50 \times 27.75$  hours = \$624.37) in unpaid overtime wages for this time period.

15. During two weeks, November 25, 2002 to November 27, 2002 and March 31 to April 3, 2003, Collins worked 2.25 additional hours during each of those weeks for which he was not paid. These were regular and not overtime hours. As previously stated, his regular hourly wage in November, 2002 was \$12.00 and his regular hourly wage in March, 2003 was \$14.00 per hour. He is due an additional \$27.00 ( $\$12.00 \times 2.25 = \$27.00$ ) for his work during the week of November, 2002 and he is due an additional \$31.50 ( $\$14.00 \times 2.25 = \$31.50$ ) for his work during the week of March 31 to April 3, 2003. He is thus due total additional regular hourly wages of \$58.50 ( $\$27.00 + \$31.50 = \$58.50$ ).

16. The total of Collins' unpaid overtime wages is \$2,271.37 ( $\$324.00 + \$1323.00 + 624.37 = \$2,271.37$ ). 110% penalty on that amount equals \$2,498.50. The total of Collins' unpaid regular wages is \$58.50. 55% penalty on that amount equals \$32.17.

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

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

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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.

Timberland challenges Collin's contention that he is owed additional wages. The substantial evidence in this matter demonstrates that Collins 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 Collins 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 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

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<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 Collins' co-workers at the Abbey Construction project and his and Collins' time on the boat ride was compensable under Admin. R. Mont. 24.16.1010 (5).

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.

The substantial testimony here (most notably Collins' own testimony) shows that he worked at least 45 extra minutes during each day of his employment for which he was not compensated. Timberland's records actually support Collins' position as the records themselves show that Timberland failed to pay overtime in certain instances when it should have been paid. *See, e.g.*, Finding of Fact Paragraph 11. Those records do not adequately refute Collins' prima facie showing and thus the hearing examiner finds that Collins 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 16.

#### 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 \$2,498.50 (110% of \$2,271.37) for the unpaid overtime wages due to Collins. Timberland also owes penalty in the amount of \$32.17 (55% of \$58.50) for the unpaid regular wages due to Collins. Timberland thus owes total penalty of \$2,530.67 (\$2498.50 + \$32.17 = \$2,530.67).

## 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 Collins additional overtime wages in the amount of \$2,271.37 and additional regular wages in the amount of \$58.50. In addition,

Timberland owes Collins penalty of \$2,498.50 on the unpaid overtime wages and \$32.17 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 \$4,860.54, representing \$2,329.87 in wages and \$2530.67 in penalty, made payable to Fred Collins, 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.