

STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM ) Case No. 428-2007  
OF GREGORY J. BRATCHER, )  
)  
Claimant, ) **FINDINGS OF FACT;**  
) **CONCLUSIONS OF LAW;**  
vs. ) **AND ORDER**  
)  
TOM BOVINGTON, INDIVIDUALLY )  
AND/OR D/B/A CONCENTRIC ENVIRO, )  
)  
Respondent. )

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**I. INTRODUCTION**

On September 5, 2006, Claimant Gregory J. Bratcher (Bratcher) filed a claim with the Montana Department of Labor and Industry, contending that Respondent Tom Bovington d/b/a Concentric Enviro (Bovington) owed him \$1,580.51 in wages, vacation pay and other costs. On October 10, 2006, the Department issued a determination holding that Bovington owed Bratcher \$137.07 as a penalty for issuing an insufficient funds check, \$480.00 for vacation and a \$72.00 penalty on the unpaid wages. On November 6, 2006 the Department issued an Amended Determination to Correct Penalty Default Amount Due. The amended determination had some different figures in it, but ultimately held that Bovington owed the same amount as in its previous determination. On December 6, 2006, the Department issued an Order on Default that ordered Bovington to pay the claimant \$881.07 in wages and penalty. On December 7, 2006 the Department received Bovington's appeal of its order and determination.

On January 2, 2007, the Department transferred the case to the Hearings Bureau for a contested case hearing. Hearing Officer David Scrimm conducted a hearing in the case on March 21, 2007. Bratcher appeared and represented himself. Bovington appeared and was represented by Cort Harrington, attorney at law. Bratcher and Bovington testified. Documents 1-73 from the Department's investigative file, Document 74 and Respondent's Exhibit A were admitted into evidence. Following the hearing, the case was deemed submitted for decision.

## II. ISSUE

The issue in this case is whether Bovington owes wages for work performed and specifically whether it owes vacation pay, as alleged in the complaint filed by Bratcher, and owes penalties or liquidated damages, as provided by law.

## III. FINDINGS OF FACT

1. Bratcher began his employment with Bovington on Wednesday, June 7, 2006. His last day of work was Friday, September 1, 2006. His length of employment was 12 weeks and two days.

2. Bovington told Bratcher that he would earn one week's vacation paid after he completed 12 weeks of work.

3. In late June, Bovington increased Bratcher's rate of pay from \$10.00 per hour to \$12.00 per hour based on his job performance.

4. On or about August 29, 2006, Bovington wrote a check to Bratcher in the amount of \$350.00 for wages due from a prior pay period. This check was cashed without any problem. On September 1, 2006 Bovington wrote another check to Bratcher in the amount of \$124.04 which was the balance of wages due on August 29, 2006. Bratcher presented this check to Bovington's bank for payment two times before it was paid on September 7, 2006. This check was not an insufficient funds check because it was not returned by the bank for lack of sufficient funds and because it was paid within the 10-day statutory requirement.

5. Bovington owes Bratcher \$480.00 for his earned and unpaid vacation pay and a penalty in the amount of \$264.00 for a total owed of \$744.00.

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

*Bovington owes wages and penalties.*

##### UNPAID WAGES

Montana law requires that employers pay employees wages within 10 days of when they become due in accordance with the employment agreement. Mont. Code Ann. § 39-3-204. “Vacation pay which has been earned and is due and owing must be considered in the same category as wages and is collectible in the same manner and under the same statutes as are wages.” 23 Op. Att’y Gen. 151, 153; *In re the Wage Claim of Sharon Langager*, 1998 MT 44, ¶24, 287 Mont. 445, ¶24, 954 P. 2d 1169, ¶24.

Here, the respondent disputes that it owes Bratcher payment for vacation pay, because he did not earn it. However, the testimony adduced at hearing and Exhibit 5 make clear that if Bratcher stayed, Bovington would provide him one week of paid vacation so that he might go hunting when the season opened. Bratcher did not have to work until hunting season began to earn the vacation pay. Bovington’s December 7, 2006 appeal letter indicates that Bratcher was not entitled to vacation pay because he had not worked the full twelve weeks. This statement was simply not the case-- Bratcher had worked 12 weeks and two days when he was fired – and it underscores the fact that the agreement was indeed that Bratcher had to only work 12 weeks to earn his vacation pay.

Bratcher worked the required twelve weeks to earn the vacation pay. Bovington failed to prove that other conditions must be met in order for Bratcher to earn the vacation pay or that Bratcher failed to meet them. Accordingly, Bovington owes Bratcher \$480.00 for unpaid vacation pay.

##### PENALTY

Montana law assesses a penalty when an employer fails to pay wages when they are due. Mont. Code Ann. § 39-3-206. By failing to pay Bratcher for his earned vacation time, Bovington failed to pay his wages when they were due. The respondent is, therefore, subject to penalty. The penalty is 55% on the unpaid wages, or \$264.00. Admin. R. Mont. § 24.16.7551(2), Admin R. Mont. § 24.16.7566 (1)

Bratcher is not entitled to receive the 110% penalty on the \$124.04 check that the bank was only able to cash on the third attempt. This check was issued for wages due and payable on August 29, 2006 and it cleared on September 7, 2006, nine days later. Thus, Bratcher was paid

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<sup>1</sup>Statements of fact in this discussion and analysis are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

for wages due within the statutory requirement of Mont. Code Ann. § 39-3-204 and no penalty for this check is owed.

## 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. Bovington owes Bratcher \$480.00 in unpaid wages. Mont. Code Ann. § 39-3-204.

3. Bovington owes a penalty in the amount of \$264.00 Admin. R. Mont. § 24.16.7566.

## VI. ORDER

Bovington, d/b/a Concentric Enviro, IS HEREBY ORDERED to tender a cashier's check or money order in the amount of \$744.00, representing \$480.00 in unpaid wages and \$264.00 in penalties, payable to the claimant, Gregory J. Bratcher, and delivered to the Wage and Hour Unit, Employment Relations Division, P.O. Box 6518, Helena, Montana 59604-6518 no later than July 30, 2007. Bovington may deduct applicable withholding from the wage portion but not the penalty portion.

DATED this 29th day of June, 2007.

DEPARTMENT OF LABOR AND INDUSTRY

By: /s/ DAVID A. SCRIMM  
David A. Scrimm, Chief  
Hearings Bureau

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.

Bratcher FOF dsp