

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM)	Case No. 611-2009
OF ERIK W. OTTERBECK,)	
)	
Claimant,)	FINDINGS OF FACT;
)	CONCLUSIONS OF LAW;
vs.)	AND ORDER
)	
LARRY BUSH, D/B/A LB TIMBER,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION:

LB Timber appeals from a determination by the Wage and Hour Unit which found it owed unpaid wages and penalty to Erik Otterbeck. Hearing Officer Gregory L. Hanchett held a contested case hearing in this matter on April 21, 2009. Erik Otterbeck represented himself. Leslie Bush, co-owner of LB Timber, represented the employer. Otterbeck, James Sounders, Trina Otterbeck, James Gullickson, Larry Bush, Joe Turk, Tim Howard, and Steve Shanor all testified under oath.

The parties agreed to the admission of Wage and Hour Documents 1 through 122. In addition the parties stipulated to the admission of Otterbeck's Exhibits 1 through 10 and LB Timber's Exhibits B, C, D, E, F, G, and H. Based on the evidence and argument adduced at hearing, the following findings of fact, conclusions of law and recommended decision are made.

II. ISSUES:

Is Otterbeck due additional wages as alleged in his complaint and penalty as prescribed by law?

III. FINDINGS OF FACT

1. LB Timber hired Otterbeck to skid logs at a large burn site located near Big Timber, Montana. Otterbeck's agreement called for LB to pay him \$1.25 per processed ton of logs culled from the burn site. In addition, LB agreed to pay Otterbeck a per diem. The payment of the per diem is not at issue in this case.

2. Otterbeck worked a total of 15 days at the site gathering logs before he quit on May 16, 2008. Otterbeck worked with James Sounders. The relative skidding distances of the logs were very short, 50 to 60 yards, which enabled Otterbeck and Sounders to very efficiently gather logs and stack them (known as decking the logs). In addition, Otterbeck and Sounders worked together with one skid and used a choker, which further enhanced their efficiency in gathering the logs and decking them.

3. Otterbeck kept a daily log of the number of logs he gathered. Sounders kept a similar book. The following table shows the date and number of logs gathered during each day of work completed between April 28, 2008 and May 13, 2008.

<u>DATE</u>	<u>NUMBER OF LOGS</u>
April 28, 2008	200+
April 29, 2008	400
April 30, 2008	282
May 1, 2008	366
May 2, 2008	166
May 3, 2008	380
May 4, 2008	207
May 6, 2008	313
May 7, 2008	402
May 8, 2008	100
May 9, 2008	215
May 13, 2008	350
May 14, 2008	350
May 15, 2008	350

4. Some of the log's Otterbeck gathered were loaded on trucks and shipped to the sawmill where they were weighed and then processed. Some, however, were never loaded up and shipped. Indeed, as recently as March, 2009 some of those logs (as shown, for example, in Otterbeck's Exhibits 1, 2, 3 and 4) have not yet been shipped to a sawmill.

5. During the time Otterbeck was working at the site, some of the processed logs were trucked out by Pete Cooper. Other loads were trucked out by Steve Shanor. Cooper stayed over one night in the logging camp. This permitted Otterbeck to see both the weight of the load being trucked out and to count the number of logs that were being carried on each load. Otterbeck counted approximately 80 logs on the load. The load itself weighed about 37 tons.

6. Otterbeck has substantial experience in logging. As demonstrated by the testimony of both Otterbeck, Sounders and LB's own witness, Joe Turk, it is possible for experienced loggers to approximate the tonnage of wood being hauled by sizing up the loads and adjusting for heavier or lighter loads. In fact, Turk conceded during his testimony that if a logger knows

exactly what he skidded in the way of logs, it is possible to get a rough estimate of the weight of the logs.

7. Utilizing his knowledge of logging, taking into consideration the number of logs that he skidded, and calculating the tonnage of each load based on what he knew to be the weight of the load Cooper trucked out, Otterbeck conservatively estimated that approximately 58 loads of logs he gathered were trucked out. Calculating each load at 40 tons, Otterbeck concluded in his original complaint that he was underpaid \$2,000.00. After LB paid him an additional \$503.79 on September 25, 2008, Otterbeck, having credited LB for the \$503.79, calculated that LB still owed him approximately \$1,260.00.

8. Larry Bush was not on the logging site at all times that Otterbeck was there. Bush was not in a position to know how many logs Otterbeck gathered.

9. At hearing, Larry Bush conceded that not all of the logs that Otterbeck had gathered had yet been processed at the sawmill. Bush agreed that Otterbeck's photo exhibits 1, 2, 3, and 4 showed a number of logs that Otterbeck had gathered. Bush also indicated that in order to determine Otterbeck's final paycheck, he estimated the number of logs remaining that had not yet been taken to the mill. Bush conceded that if the logs not yet taken to the mill weighed more than what he had estimated, he would owe Otterbeck additional money.

10. LB paid Otterbeck the following amounts on the following dates:

Amount	Date
\$262.46	May 10, 2008
\$ 28.39	May 12, 2008
\$413.98	May 27, 2008
<u>\$503.79</u>	September 25, 2008

The total paid to Otterbeck, which includes per diem, totals \$1,208.62.

11. Crediting the entire amount of wages paid (including the per diem) against the amounts Otterbeck would be due based on the tonnage of logs he stacked, Otterbeck is due at least \$1,260.00 for logs that he decked but for which he remains unpaid. Penalty on that amount is \$693.00($\$1,260.00 \times .55 = \693.00).

IV. DISCUSSION

A. *LB Timber Owes Otterbeck Unpaid Wages.*

Montana law requires employers to pay wages when due in conformity with the employment agreement but no later than 15 days following termination of employment. Mont.

Code Ann. §§ 39-3-204 and 39-3-205. Except to set a minimum wage, the law does not set the amount of wages to be paid.

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.

Once an employee has shown as a matter of just and reasonable inference that he 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 approximation.” * * *.” *Garsjo*, 172 Mont. at 189, 562 P.2d at 477, quoting *Purcell*, *supra*, 359 Mich. at 576, 103 N.W. 2d at 497.

Bush had a duty to pay Otterbeck all wages he was due no later than 15 days after Otterbeck quit. Otterbeck’s testimony is credible as to the number and approximate tonnage of logs that he decked. He has the experience to roughly estimate the amount of logs that he decked. Indeed, it appears that he has actually underestimated the amount due to him based on the number of logs that he decked and the tonnage that he estimated on those logs. Otterbeck has carried his initial burden to prove a reasonable basis for the wages he seeks.

LB Timber has failed to negate Otterbeck’s proof. Larry Bush conceded that he could have underestimated the tonnage that remains unprocessed and, commendably, he indicated that additional wages would be due if he underestimated the weight of the logs remaining to be processed. In addition, Otterbeck was in the best position to know how many logs he decked since he and his co-worker were directly responsible for stacking those logs while Bush was not on site at all times nor could he have been aware of all the logs that Otterbeck decked.

LB’s efforts to undermine Otterbeck’s testimony by showing that he could not have been at the work site as much as he said he was (by showing, for example, receipts showing Otterbeck was fueling up at a site several miles away) are unpersuasive. Otterbeck credibly testified that fuel for the log skidding apparatus was available on the work site. His testimony that the logs were easily reached and stacked also helps to refute LB’s evidence. Taking the evidence as a whole, Otterbeck has proven that he is due \$1,260.00 in additional wages for which he remains unpaid.

B. LB Timber 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. Applying these three regulations, LB Timber owes Otterbeck \$693.00.

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. LB Timber owes Otterbeck an additional \$1,260.00 in unpaid wages and \$693.00 in penalty.

VI. ORDER

Larry Bush, d/b/a LB Timber, is hereby ORDERED to tender a cashier's check or money order in the amount of \$1,953.00, representing \$1,260.00 in wages and \$693.00 in penalty, made payable to Erik Otterbeck 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. LB Timber may deduct applicable withholding from the wage portion but not the penalty portion of the amounts due.

DATED this 5th day of June, 2009.

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.

Otterbeck.FOF. ghp