

STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM	)	Case No. 1214-2010
OF JEFFREY S. RAPP,	)	
	)	
Claimant,	)	
	)	<b>ORDER GRANTING</b>
vs.	)	<b>MOTION TO DISMISS</b>
	)	
SCHLAUCH BOTTCHER CONSTRUCTION,	)	
INC., a Montana corporation,	)	
	)	
Respondent.	)	

\* \* \* \* \*

**I. INTRODUCTION**

Respondent Schlauch-Bottcher Construction (SBC) seeks to dismiss this matter, alleging that the limitation on filing a wage claim contained in Mont. Code Ann. § 39-3-207(1) prohibits Claimant Jeffrey S. Rapp’s (Rapp) claim. Neither party having requested oral argument on the motion to dismiss, the hearing officer, based on the parties’ respective briefs and affidavits, finds respondent’s motion is well taken.

**II. FACTS THAT ARE NOT IN DISPUTE**

1. Rapp last worked for SBC on or about October 6, 2008.
2. SBC issued its final paycheck to Rapp on or about November 26, 2008. In its letter to Rapp, SBC enclosed a “final paycheck” and indicated that it assumed if Rapp cashed the check, he was in agreement with the calculations outlined in the letter.
3. Rapp filed his claim for unpaid wages on January 20, 2010.
4. Rapp seeks unpaid wages for the time period between January 22, 2007 and October 6, 2008.

### III. DISCUSSION

#### A. *Rapp's Claim Is Untimely*

Mont. Code Ann § 39-3-207 provides:

(1) An employee may recover all wages and penalties provided for the violation of 39-3-206 by filing a complaint within 180 days of default or delay in the payment of wages.

Reading the plain language of the statute compels the hearing officer to conclude that the legislature imposed a 180-day statute of limitations on filing a claim for recovery of unpaid wages. Rapp last worked for SBC on October 6, 2008 and filed his claim on January 20, 2010.

Rapp argues that he was continuing to negotiate with SBC and that therefore the statute of limitations should not begin running until October 2009. However, Rapp has provided no evidence that negotiations were ongoing. Accordingly, the limitation period began running on November 26, 2008 when SBC issued Rapp his final paycheck.

Rapp further argues that SBC withheld documents from him that prevented him from filing his claim. However, nothing in the Wage Payment Act requires that Rapp have every document he might need to prove his claim prior to filing it. This is evidenced in this matter by the department's January 26, 2010 request for payroll records from SBC as part of its investigation of Rapp's claim. Even if SBC intentionally delayed providing documents to Rapp, it simply does not provide a basis for tolling the 180-day statute of limitations. In this matter, the parties do not dispute any material facts necessary to determine whether Rapp's claim is time barred. Rapp claims overtime wages which were not paid to him between January 22, 2007 and October 6, 2008. He did not file this wage claim until January 20, 2010, 470 days after he left work. Even extending the date for when wages were due and owing to November 28, 2008 when SBC paid Rapp his final paycheck, Rapp's claim was filed 419 days later, more than six months later than the statute allows. Accordingly, Rapp's claim is time barred and must be dismissed, unless he can demonstrate that SBC should be estopped from asserting the statute of limitations defense to Rapp's claim.

Rapp appears to be asserting an equitable estoppel argument that SBC should be barred from asserting a statute of limitations defense to his claim because it withheld material information from Rapp.

We have repeatedly stated that “the doctrine of equitable estoppel operates to prevent a party from unconscionably taking advantage of a wrong while asserting a strict legal right” and that, generally, “estoppel arises when a party through its acts, conduct, or acquiescence, has caused another party in good faith to change its position for the worse.” Arthur, P 30 (quoting Selley v. Liberty Northwest Ins. Corp., 2000 MT 76, PP 9-11, 299 Mont. 127, PP 9-11, 998 P.2d 156, PP 9-11) v. Liberty Northwest Ins. Corp., 2000 MT 76, PP 9-11, 299 Mont. 127, PP 9-11, 998 P.2d 156, PP 9-11).

*Let the People Vote v. Bd. of County Comm’rs*, 2005 MT 225, P22 (Mont. 2005)

Equitable estoppel is not favored and a party asserting equitable estoppel has the affirmative duty to establish the following six elements by clear and convincing evidence: (1) the existence of conduct, acts, language, or silence amounting to a representation or concealment of material facts; (2) the party estopped must have knowledge of these facts at the time of the representation or concealment, or the circumstances must be such that knowledge is necessarily imputed to that party; (3) the truth concerning these facts must be unknown to the other party at the time it was acted upon; (4) the conduct must be done with the intention or expectation that it will be acted upon by the other party, or have occurred under circumstances showing it to be both natural and probable that it will be acted upon; (5) the conduct must be relied upon by the other party and lead that party to act; and (6) the other party must in fact act upon the conduct in such a manner as to change its position for the worse.

*Let the People Vote v. Bd. of County Comm’rs*, 2005 MT 225, P23 (Mont. 2005)

Rapp alleges that SBC failed to provide him with payroll records that were material to his filing a claim for unpaid wages, and therefore SBC should be estopped from asserting a statute of limitations defense. The first element of equitable estoppel requires Rapp to show by clear and convincing evidence that SBC concealed material facts. To be material the information concealed must be an essential fact required in order to file a claim for unpaid wages. Rapp alleges that the withheld documents “clearly show Claimant was not compensated.” While such documents may be material to *proving* his claim, they are not required to file his claim.

The facts may establish the second and third elements of equitable estoppel. SBC clearly had knowledge of the withheld documents as they told the Wage & Hour unit that they would not provide them because Rapp’s claim was untimely. The exact details of Rapp’s payroll records was unknown to him at the time Rapp delayed filing his claim.

The fourth element, that the withholding of the documents must have been done with the intention or expectation that Rapp would delay filing his wage claim, has not been proven at all, let alone by clear and convincing evidence.

The fifth element, that Rapp relied on SBC's withholding of the payroll records and therefore deferred the filing of his claim, is not met because Rapp has not provided clear and convincing evidence that he had to have these documents in order to file a claim or that he even asked for them. He asserted that he made phone calls on wholly unspecified dates, as have several affiants, but these assertions fall far short of clear and convincing evidence. Simply stating "many requests were made" is legally insufficient to fulfill this element.

Finally, Rapp has failed to provide clear and convincing evidence that he delayed filing his claim because SBC withheld the payroll records. To prove this sixth element Rapp would have to show that he knew the deadline for filing his claim, but failed to do so because he needed the payroll records. A review of Rapp's claim filed with the Wage & Hour Unit fails to show that any essential information is absent.

Rapp has thus failed to prove at least four of the six essential elements necessary to estop SBC from asserting a statute of limitations defense to his claim.

#### **IV. ORDER**

Rapp's claim is time barred and SBC has timely raised the issue in its motion to dismiss. Accordingly, SBC's motion is granted and this matter is dismissed.

DATED this 8th day of July, 2010.

DEPARTMENT OF LABOR & INDUSTRY  
HEARINGS BUREAU

By: /s/ DAVID A. SCRIMM  
DAVID A. SCRIMM  
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.