

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

IN THE MATTER OF THE WAGE CLAIM)	Case No. 1280-2014
OF GARY S. HUFF,)	
)	
Claimant,)	
)	
vs.)	FINAL AGENCY DECISION
)	
OPTISOUND HEARING US, INC.,)	
a Nevada corporation registered with)	
Montana Secretary of State,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

On January 30, 2014, Gary S. Huff filed a claim with the Wage and Hour Unit of the Montana Department of Labor and Industry alleging the respondent, Optisound Hearing US, Inc., a Nevada corporation registered with the Montana Secretary of State (Optisound), owed him a total of \$10,997.65, which included a claim for \$3,000.00 in unpaid salary; \$2,871.60 in unpaid commissions; \$5,000.00 in unpaid sales; and \$126.05 for fuel expenses, for the period of November 15, 2013 through January 15, 2014. On February 18, 2014, Barry D. Finlay, Optisound President, submitted a written denial that Huff was owed any additional wages.

On May 12, 2014, the Wage and Hour Unit issued a determination finding Optisound owed Huff a total of \$5,121.25. The Wage and Hour Unit rightly concluded it did not have jurisdiction to address Huff's claim for fuel expenses, as fuel expenses are not considered "wages." The Wage and Hour Unit found Optisound owed Huff \$1,987.38 in unpaid salary (taking into account amounts found to be improperly withheld from Huff's pay during the period in question) and \$3,088.10 for unpaid commissions.

Following mediation efforts, the Wage and Hour Unit transferred the case to the Office of Administrative Hearings (OAH) on July 9, 2014.

On July 24, 2014, a telephone scheduling conference was held at which the claimant, Gary Huff, and the employer through its attorney, Thomas Orr, appeared. The parties agreed to a schedule of proceedings in this matter, which included a final pre-hearing conference set for November 24, 2014 and a hearing set for December 8, 2014. On July 25, 2014, a Scheduling Order was sent to the parties outlining the schedule of proceedings. Neither mailing was returned as undeliverable.

On November 24, 2014, Huff failed to appear for the final pre-hearing conference. OAH made arrangements with the Missoula Job Service to allow Huff to appear from California via Skype.

On November 26, 2014, Huff contacted OAH and requested a continuance. Huff was directed to contact Orr to inquire as to whether the respondent opposed his request. Huff refused. Huff was directed to submit a written request for a continuance and to send a copy of his request to the respondent.

On December 5, 2014, Huff submitted a written request for a continuance arguing he needed additional time to obtain counsel. Huff sent his request to the respondent's corporate office rather than to its attorney of record. Hearings staff forwarded a copy of Huff's request to Orr's office. Orr submitted written notice of his opposition to Huff's motion later that same day.

On December 5, 2014, Hearing Officer Holien issued an order denying Huff's request for continuance finding Huff's failure to secure legal counsel within the 11 months following the filing of his wage and hour claim and four months following the first scheduling conference did not constitute good cause for continuing the hearing.

The Hearing Officer conducted a hearing in this matter on December 8, 2014 from the Missoula Job Service Office. The Hearing Officer contacted Huff via telephone. Huff indicated he was not prepared to go forward with the hearing and declined to participate. President Barry D. Finlay appeared telephonically. Attorney Thomas Orr appeared personally and represented Optisound.

Documents 15 through 23, which included the Wage and Hour Unit's determination, and Documents 96 through 98, which included Huff's wage claim, were admitted without objection. Respondent's Exhibits A through Q were also admitted without objection.

Optisound declined the opportunity for post-hearing briefing. The case was deemed submitted at the close of the evidentiary hearing. Based upon the evidence

and argument adduced at hearing, the Hearing Officer makes the following findings of fact, conclusions of law, and final agency decision.

II. ISSUE

Whether Optisound Hearing US, Inc., a Nevada corporation registered with the Montana Secretary of State, owes wages, commissions and sales, and fuel expenses, as alleged in the complaint filed by Gary S. Huff, and owes penalties or liquidated damages, as provided by law.

III. FINDINGS OF FACT

1. Optisound Hearing US, Inc., which operates in Missoula and Kalispell, employed Gary S. Huff as a Hearing Care Provider beginning on or about December 2, 2013 through January 15, 2014. Huff typically worked six days per week.

2. Optisound President Barry D. Finlay and Huff had known each other for several years. Finlay had assisted Huff when he experienced issues in his own business. Huff had also worked for Finlay for a period as a consultant. Huff learned Finlay was expanding operations in Missoula and Kalispell and offered to move from California to Montana to work for Finlay. Finlay agreed, and the two men discussed what Huff would require to complete his relocation.

3. On November 4, 2013, Finlay and Huff executed a “semi-formal document” outlining the parties’ agreement regarding the terms of Huff’s employment as a Hearing Care Provider.

4. The parties agreed Huff would receive a base salary of \$3,000.00 during the first two months of his employment, paid semimonthly, with a 5% commission on all completed sales. The parties also agreed Huff would receive a 17% commission on all completed sales effective January 1, 2014 assuming he obtained proper licensure. It was specifically noted that “break-even” must first be met. Exhibit A. Huff’s monthly break-even point would be \$60,000.00 ($\$60,000.00 \times 5\% = \$3,000.00$). Optisound pays commissions to Hearing Care Providers only after full payment is received from the client. Optisound typically pays commissions within 30 days of the completed sale.

5. Huff’s semimonthly rate of pay was \$1,384.62 ($\$3,000.00 \times 24 \text{ pay periods} / 52 \text{ weeks}$). Huff’s weekly salary for the first two months of employment

was \$692.32 (\$1,384.62/2 weeks). Huff's regular hourly rate was \$17.31 (\$692.32 / 40 hours). Optisound owed Huff a total of \$5,192.39 in wages for work performed from December 2, 2013 through January 15, 2014.

6. Finlay agreed to provide Huff with \$3,000.00 in moving expenses under their "semi-formal agreement." The parties agreed that any moving expenses paid by Optisound on behalf of Huff in excess of \$3,000.00 would be deducted from Huff's paycheck over the 12 months immediately following the incurrence of those expenses. Exhibit A.

7. Optisound paid \$1,592.25 for Huff's hotel stay in Missoula from November 25, 2013 through December 14, 2013. Optisound also paid \$4,330.20 for Huff's U-Haul rental. Exhibit E. Optisound paid a total of \$5,922.45 for Huff's moving expenses, which amounted to a monthly withholding of \$243.54 ($\$5,922.45 - \$3,000.00 = \$2,922.45 / 12 \text{ months} = \243.54) and a weekly withholding of \$56.20 ($\$243.54 \times 12 \text{ months} / 52 \text{ weeks} = \56.20).

8. On November 4, 2013, Optisound transferred \$1,500.00 into Huff's personal account to cover any personal expenses he incurred related to his relocation to Missoula. Exhibit D. There was no agreement between the parties as to whether Huff would be required to repay this amount to Optisound.

9. Huff was unable to secure housing in Missoula due to his credit history. Finlay agreed to have Optisound as Huff's co-signor on a residential lease, which provided for a monthly rent of \$1,800.00 and all utilities paid by the lessee. The parties orally agreed the amounts Optisound paid for Huff's rent (at a rate of \$900.00 per paycheck) and utilities would be deducted from Huff's wages.

10. Optisound paid the following amounts related to Huff's residential lease pursuant to the parties' oral agreement:

12-13-13	\$3,185.16	December 2013 prorated rent and deposit Exhibit G
01-08-14	\$1,875.00	January 2014 rent and utilities Exhibit J
TOTAL:	\$5,060.16	

11. On December 5, 2013, Optisound paid Huff a gross amount of \$1,750.00 as a payroll advance. Exhibit F.

12. On December 20, 2013, Optisound paid Huff \$1,500.00 for work performed from Huff's first day of work, which was on or about December 2, 2013, through December 15, 2013. The entire amount of the check was withheld to cover the amount paid for Huff's December rent and deposit. Exhibit B.

13. On January 6, 2014, Optisound paid Huff a gross amount of \$600.00 in wages for work performed from December 16, 2013 through December 31, 2013. Exhibit H. Optisound withheld \$900.00, as per the parties' agreement, to cover Huff's rent.

14. On December 13 and December 20, 2013, Huff had two completed sales for a total of \$12,480.00. On December 11, 2013, Huff had one completed sale for a total of \$5,490.00. Exhibit B. Huff's monthly sales did not exceed \$60,000.00, so he was not eligible for commission.

15. On January 10, 2014, Huff had two completed sales for a total of \$12,880.00. Exhibit B. Huff's monthly sales did not exceed \$60,000.00, so he was not eligible for commission.

16. Huff had three lost sales on November 25, 2013; December 11, 2013; and December 12, 2013 that totaled \$7,490.00. Exhibit B. Huff's lost sales reduced his total sales for each month in question.

17. On January 15, 2014, Optisound terminated Huff's employment due to performance issues. On January 21, 2014, Optisound tendered what it considered to be a final payment owed to Huff for all work performed in the amount of \$854.93. Exhibit K. Optisound later determined that it only owed Huff \$645.07 and had overpaid Huff by \$209.86.

18. Optisound paid Huff a total of \$2,954.93 in wages during the period of December 2, 2013 through January 15, 2014, in addition to advances in the amount of \$1,500.00 on November 4, 2013 and \$1,750.00 on December 5, 2013. Optisound also expended a total of \$5,060.16 on Huff's behalf to secure him suitable housing.

19. Huff continued to reside in the rental property after his termination. The Hearing Officer lacks the jurisdiction to address any amounts potentially owed to

Optisound for any costs incurred due to Huff remaining in the rental after January 15, 2014 as those amounts were incurred after the end of Huff's employment.

IV. DISCUSSION¹

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 the 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 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.

Huff contended in his wage claim that he was owed a total of \$10,997.65, which included \$3,000.00 in unpaid salary; \$2,871.60 in unpaid commissions; \$5,000.00 in unpaid sales; and \$126.05 for fuel expenses, for the period of November 15, 2013 through January 15, 2014. As previously noted by the Wage and Hour Unit, fuel expenses are not considered “wages” and will not be addressed in this decision. Optisound contended during the adjudication process and at the time of hearing that Huff was paid all amounts due to him.

¹ 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.

- A. Optisound does not owe Huff additional money for unpaid wages or commissions.

An employer and an employee are free to enter into their own employment agreement so long as the employee's regular rate of pay is equal to or greater than the applicable minimum wage under Admin. R. Mont. 24.16.2512, which provides:

(2) The regular rate is an hourly rate. The "regular rate" under the Law is a rate per hour. The Law does not require employers to compensate employees on an hourly rate basis; their earnings may be determined on a piece-rate, salary, commission, or other basis, but in such case the overtime compensation due to employees must be computed on the basis of the hourly rate derived therefrom and, therefore, it is necessary to compute the regular hourly rate of such employees during each workweek. The regular hourly rate of pay of an employee is determined by dividing his total remuneration for employment in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid. The following subsections give some examples of the proper method of determining the regular rate of pay in particular instances: (The maximum hours standards used in these examples is 40 hours in a workweek.)

(d) Salaried employees - general.

(i) Weekly salary. If the employee is employed solely on a weekly salary basis, his regular hourly rate of pay, on which time and a half must be paid, is computed by dividing the salary by the number of hours which the salary is intended to compensate. If an employee is hired at a salary of \$105 and if it is understood that this salary is compensation for a regular workweek of 35 hours, or \$3.00 an hour, and when he works overtime he is entitled to receive \$2 for each of the first 40 hours and \$4.50 (one and one-half times \$3.00) for each hour thereafter. If an employee is hired at a salary of \$105 for a 40 hour week, his regular rate is \$2.625 an hour.

(ii) Salary for period other than workweek. Where the salary covers a period longer than a workweek, such as a month, it must be reduced to its workweek equivalent. A weekly wage by multiplying by 12 (the number of months) and dividing by 52 (the number of weeks). A semimonthly salary is translated into its equivalent weekly wage by

multiplying by 24 and dividing by 52. Once the weekly wage is arrived at, the regular hourly rate of pay will be calculated as indicated above. The regular rate of an employee who is paid a regular monthly salary of \$346.67, or a regular semimonthly salary of \$173.34 for 40 hours a week, is thus found to be \$2.00 per hour.

Huff performed work for Optisound beginning on or about December 2, 2013 through January 15, 2014. The parties agreed Huff's monthly base salary would be \$3,000.00 for the first two months of his employment. Huff's semimonthly rate of pay would be \$1,384.62 ($\$3,000.00 \times 24 \text{ pay periods} / 52 \text{ weeks}$). Huff's weekly salary for the first two months of employment was \$692.32 ($\$1,384.62 / 2 \text{ weeks}$). Huff's regular hourly rate would be \$17.31 ($\$692.32 / 40 \text{ hours}$).

Huff worked seven full weeks and three days for Optisound. Therefore, Optisound owed Huff \$5,192.39 in wages for work performed during that period ($\$692.32 \times 7 \text{ weeks worked} + \$692.31/6 \text{ day work week} \times 3 \text{ days worked}$).

The definition of "wages" also includes money an employer owes an employee for sales commissions. Mont. Code Ann. § 39-3-201(6); *Delaware v. K-Decorators, Inc.*, 1999 MT 13, 293 Mont. 97, 104-105, 973 P.2d 818.

The parties executed a "semi-formal agreement" allowing for the payment of commissions only when Huff's sales exceeded his monthly base salary of \$3,000.00. Optisound submitted sales records for the period in question showing Huff's commissions totaled \$17,970.00 for December 2013 and \$12,880.00 for January 2014. The parties' agreement required Huff's sales to meet the break-even point, which required Huff's monthly salary to be at least 5% of the sales made that month. In this case, Huff was required to have sales in excess of \$60,000.00 to hit the break-even point, which was never achieved by Huff. The evidence shows Optisound does not owe Huff sales commissions on sales made in December 2013 and January 2014.

B. Optisound properly withheld money from Huff's pay pursuant to the parties' written and oral agreements to cover his moving expenses, rent, and utilities.

1. Moving Expenses

Finlay and Huff agreed Optisound would pay up to \$3,000.00 in moving expenses and any expenses that exceeded \$3,000.00 would be deducted from Huff's pay. Optisound paid \$4,330.20 for the rental of a U-Haul truck and \$1,592.25 for 20 days spent at the Holiday Inn Express while Huff sought housing in Missoula for

a total amount expended of \$5,922.45. This would amount to a withholding of \$56.20 per week ($\$243.54 \times 12 \text{ months} / 52 \text{ weeks} = \56.20). Considering Huff worked only seven full weeks, the evidence shows Optisound was authorized to withhold a total of \$393.40.

2. Huff's living expenses, including rent and utilities

The Wage and Hour Unit found there was no formal agreement between the parties that Optisound would make withholdings from Huff's paychecks to cover the costs incurred by Optisound associated with Huff's living expenses.

An employer may make reasonable deductions for board, room, and other incidentals supplied by the employer, whenever the deductions are a part of the conditions of employment or other deductions provided for by law. Mont. Code Ann. 39-3-204(1). Attorney General Opinion No. 25, Volume 11 dated March 25, 1953 noted:

An employer cannot withhold the wages or any portion thereof due and owing to an employee as wages earned, and apply such wages to an account which the employee has with the employer unless the account existing between the employer and employee is for board, room or other incidentals, which the employee has agreed may be deducted as a condition of the employment.

Finlay testified he assisted Huff in securing housing by having Optisound act as a co-signor on Huff's residential lease. Finlay testified the parties agreed \$900.00 would be deducted from Huff's semimonthly check to cover his monthly rent. Finlay indicated the parties agreed Optisound would withhold money from Huff's pay to cover at least part of the amount paid for the security deposit and first month's rent.

It makes little sense that an employer would pay an employee's security deposit, rent, and utilities without an agreement being in place that the amounts paid on the employee's behalf would be deducted from the employee's pay. Further, given Huff apparently accepted Optisound's withholding of his first paycheck that was issued on December 20, 2013 in its entirety to cover the security deposit and first month's rent suggests Huff had willingly entered into the agreement outlined by Finlay. Finlay's testimony that he and Huff agreed Optisound would withhold money from Huff's pay to cover Huff's housing expenses is deemed credible.

The evidence shows the parties agreed Optisound would make withholdings from Huff's pay to cover his security deposit, first month's rent, and each month's rent thereafter. Optisound expended \$5,060.16 to secure housing for Huff during the term of Huff's employment (\$3,185.16 security deposit/first month's rent + \$1,875.00 January 2014 rent and utilities). The evidence further shows the parties agreed Optisound would withhold Huff's first paycheck issued on December 20, 2013, as well as \$900.00 from each paycheck thereafter to cover Huff's monthly living expenses. Therefore, it is determined that Optisound was authorized to withhold \$5,060.16 to cover the costs associated with Huff's housing.

Therefore, Optisound was authorized pursuant to the parties' written and oral agreements to withhold a total \$5,453.56 from Huff's pay during the period December 2, 2013 through January 15, 2014 to cover his moving expenses and costs associated with his housing (\$393.40 total withholdings for moving expenses + \$5,060.16 for security deposit/rent/utilities = \$5,453.56).

3. Other payments made to or on behalf of Huff

The evidence shows Optisound made a cash advance to Huff of \$1,500.00 on November 4, 2013 and \$1,750.00 on December 5, 2013. There was no evidence offered showing the parties agreed Huff would repay those specific amounts to Optisound. Further, the evidence does not show withholdings were made from Huff's pay to cover those amounts. Therefore, these payments were not considered in this decision.

Optisound submitted evidence showing it continued to pay Huff's rent and utilities after the employment relationship ended on January 15, 2014. Given those payments were made after the employment relationship ended, the Hearing Officer did not consider those payments when coming to her decision.

Huff has failed to show by a just and reasonable inference that Optisound owes him additional wages for work performed during the period of December 2, 2013 through January 15, 2014. Optisound owed Huff a total of \$5,192.39 in wages for work performed during that period. Optisound paid Huff a total of \$2,954.93 in wages during that period and expended a total of \$5,060.16 for Huff's housing. Optisound made the proper withholdings for Huff's moving expenses and housing pursuant to the parties' written and oral agreements. Further, Huff was not owed anything for commissions for the reasons stated above. The evidence shows Huff has received all wages owed to him and Optisound owes him nothing more. Therefore, Huff's wage claim is hereby dismissed.

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. Huff has not shown he is owed additional wages for work performed during the period beginning December 2, 2013 through January 15, 2014.

VI. ORDER

Based on the foregoing, the wage claim of Gary Huff is hereby dismissed.

DATED this 12th day of January, 2015.

DEPARTMENT OF LABOR & INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ CAROLINE A. HOLIEN
CAROLINE A. HOLIEN
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 the date of mailing of the hearing officer's decision. See also Mont. Code Ann. § 2-4-702.