

STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM	)	Case No. 1031-2007
OF MARGO E. SWARTWOOD,	)	
	)	
Claimant,	)	<b>FINDINGS OF FACT;</b>
	)	<b>CONCLUSIONS OF LAW;</b>
vs.	)	<b>AND ORDER</b>
	)	
ABC SEAMLESS OF BILLINGS, INC.,	)	
	)	
Respondent.	)	

\* \* \* \* \*

**I. INTRODUCTION**

Claimant Margo Swartwood appealed from a Wage and Hour Unit determination that found she had failed to show that she was due additional commissions from respondent ABC Seamless, Inc.

Hearing Officer Gregory L. Hanchett held a contested case hearing in this matter on July 6, 2007. Swartwood represented herself and testified under oath. Larry Grayson appeared on behalf of ABC Seamless. Swartwood, Grayson, Roger Hill, Jill Hill, Tyler Schiltz, Carol Mick, Sally Lashley, Bill Blackburn, Lottie Eaton, Curt Starr, Kara Berumen, Henry Gonzales, and Elliot Grayson all testified under oath.

The parties stipulated to the admission of Wage and Hour Documents 1 through 283. Based on the evidence and argument presented at the hearing, the following findings of fact, conclusions of law, and final order are made.

**II. ISSUE**

Is Swartwood due additional commissions as alleged in her complaint and penalty as prescribed by law?

**III. FINDINGS OF FACT**

1. ABC Seamless (ABC) is a roofing and siding contractor located in Billings, Montana. On August 29, 2006, ABC hired Swartwood to sell their products. Prior to working

for ABC, Swartwood had operated her own siding and roofing company in Alabama and she was familiar with the sales commissions practices in the industry. Swartwood left her employment with ABC on December 15, 2006.

2. The terms of the employment agreement between ABC and Swartwood provided that ABC would pay her up to an 18% commission on the actual materials sold and used on any particular job. If Swartwood sold the job at full retail price, she would receive up to 18% of the sales price. If she sold the job at a discount, her commission would be reduced according to the amount of the discount. For a sale at a 1% to 5% discount of the full retail price, she would receive a 16% commission. For a sale at a 6% to 10% discount, she would receive a 14% commission. For a sale at an 11% to 15% discount, she would receive a 12% commission. For a sale at a 16% to 20% discount, she would receive a 10% commission. For a sale at a 20% to 25% discount, she would receive 8% commission.

3. Upon approval by ABC, a salesperson could offer greater discounts to customers, and a corresponding reduction in commission (from 5% down to 0%) could be earned by the salesperson ( Exhibit 56). In addition, for any sales above retail price, ABC pays a commission of 40% on the portion of the contract exceeding the retail price sale.

4. ABC also paid its salespersons a flat fee for sales leads, that is, a fee for any job where the salesperson provided a sales lead to ABC but did not sell the materials for the job.

5. In order to be entitled to a sales commission, the employment agreement requires a salesperson to do four things (1) obtain a completed, signed contract, (2) the customers financing (if required), must be approved, (3) the customer must make a down payment that is large enough to equal the total commission, and (4) the job start date must not be more than 6 months after the date of the sale ( Exhibit 56).

6. An integral part of a sale, and the thing which triggers a sales commission as opposed to a lead fee, is estimating and measuring the job. This requires a salesperson to actually take the measurements of the siding or roofing materials or windows to be used or at least work off a blueprint. This serves as the basis for estimating the initial commission which is generated from a figure known as the "Representative's Tentative Breakdown (RTV). See Exhibit 19. After the final payment is received, ABC generates a number called the Representative's Final Breakdown (RFB) which represents the actual amount that the job was sold for. It is out of this RFB that the salesperson's final commission amount is paid.

7. A salesperson is paid 50% of the projected commission based on the RTB up front and then the balance due upon completion of the job and receipt of payment from the customer. If there are extra expenses incurred in completing the job after the job is started, or if the salesperson underestimates the amount of materials needed to complete the job, this will reduce the commission that the salesperson would receive. If the job is cancelled by the client or not completed, the salesperson will receive no commission.

8. Both parties testified, and the Hearing Officer finds, that the commission agreement described above is common in the industry.

9. Swartwood sold or served as a lead on the following jobs and should have been paid the following commission amounts on those jobs:

<u>JOB</u>	<u>COMMISSION</u>
(1) Copeman	\$365.24
(2) Trevino	\$153.00
(3) Noe	\$641.18
(4) Jordan	\$376.32
(5) O'Hara	\$780.19
(6) Leaf	\$461.25
(7) Dotson	\$266.54
(8) Corcoran	\$34.86
(9) Ferguson	\$286.86
(10) Mick	\$2,519.30
(11) Starr-Eaton	\$6,000.00 (lead fee)
(12) Schiltz	\$574.39
(13) Lee	\$117.97
(14) Larson	\$78.90
(15) Kenyon	\$165.44
(16) New	\$2,068.80
(17) Steele	<u>\$2,580.00</u>
TOTAL	\$17,470.24

10. Swartwood also sold the following jobs and could have earned the following commissions had those jobs come to fruition:

<u>JOB</u>	<u>COMMISSION</u>
(1) Hawley	\$75.60
(2) Strecker	\$109.28
(3) Burns	\$136.56
(4) Stahl	\$433.80
(5) Bailey	\$2,105.28
(6) Parks	<u>\$507.84</u>
TOTAL	\$3,368.36

At least one of these jobs, the Bailey job, was not done. Under the terms of her employment agreement, Swartwood was not entitled to this commission because the contract was never paid.

11. The maximum due to Swartwood for all commissions is \$20,838.60. Subtracting the amount of the Bailey contract, Swartwood would only have been entitled to \$18,733.32 in commissions.

12. ABC paid Swartwood the following amounts while she was employed by them:

<u>Date</u>	<u>Check Number</u>	<u>Amount</u>
9/08/06	47914	\$850.00
9/22/06	48105	\$1000.00
"	48137	\$418.00
10/06/06	48254	\$500.00
"	48411	\$980.00
"	48414	\$3,000.00
"	48519	\$5,000.00
10/17/06	48534	\$55.00
10/20/06	48554	\$557.46
"	48555	\$1,055.48
11/02/06	48716	\$100.00
11/03/06	48742	\$1,850.00
"	48766	\$315.02
11/08/06	48780	\$3,000.00
11/17/06	48980	\$2,000.00
11/28/06	49022	\$400.00
12/01/06	49078	\$1,529.22
12/15/06	49275	<u>\$2,000.00</u>

TOTAL \$24,610.18

13. \$3,799.70 of the payments made to Swartwood was reimbursement for mileage expenses. Deducting these amounts from ABC's total payments to Swartwood shows that ABC paid Swartwood a total of \$20,810.48 in commissions while she was employed there. This amount exceeds the amount of commissions she was due.

14. At a local home improvement show, Swartwood obtained a lead for a customer (on a form provided to the customer by ABC at the home show) which enabled Swartwood to contact Curtis Starr regarding siding and metal roofing (Exhibit 62). Swartwood met with Starr at his home on September 9, 2006. During this meeting, she showed Starr ABC Seamless literature and an ABC Seamless video. She did not complete measurements for roof, windows

or siding. Instead, Swartwood asked Grayson to complete the measurements (Exhibit 62), noting:

Larry  
Needs to be measured for roof, windows and siding. Need three separate prices.

Thanks.  
M.S.

Swartwood further noted that Grayson needed to complete the measurement on September 20, 2006 at 6:30 p.m.

15. Grayson went out to the Starr residence on September 20, 2006 and did all of the measuring for the roof, siding and windows. Grayson then obtained a written contract from Starr for providing and installing the roofing, siding and windows. The contract totaled \$116,857.00. The retail price for the job was \$104,510.00. The job sold for \$12,346.90 above the retail price.

16. Since Grayson did all of the measurements and obtained the contract, ABC paid Swartwood a finders fee of \$6,000.00. Some weeks later, Swartwood (as demonstrated by her own testimony at the hearing), asked the ABC bookkeeper about the Starr contract. When the bookkeeper showed Swartwood the contract, Swartwood placed her name on the contract along with Grayson's as having obtained the contract.

17. On the Tyler Schiltz job, Swartwood originally wrote the job at a contract value of \$7,157.00. The contract that Swartwood prepared did not include costs for tearing off old siding, for replacing soffit, and for adding new flashing which the job required. After entering into the contract, Schiltz decided that he did not need all the siding he had originally requested. This resulted in the contract between Schiltz and ABC being reduced to \$5,743.90. Swartwood's commission was decreased from \$1,495.61 on the original contract price to \$574.39 because of the reduced contract price (which brought the contract down due to the increased cost of overhead for the removal of old siding and placement of the new soffit). ABC paid Swartwood \$574.39 commission on this job, the proper amount of commission due to her based on the employment agreement.

18. Swartwood also estimated and sold the Giles New roofing job in Wyoming. She estimated the job based on blue prints provided by New. The measurements she made were wrong. Instead of calling for 24 squares, the job actually required 27 squares, 3 more squares than Swartwood had estimated. After deducting the costs of these additional squares from the contract, Swartwood's commission was properly reduced to \$2,068.80.

19. Swartwood also sold a three part job to Carol Mick. The first job entitled Swartwood to a commission of \$2,519.30. The second and third parts of the job were cancelled by Mick. Therefore, Swartwood, under the terms of her employment agreement, was not entitled to commissions on the second and third parts.

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

Montana law requires that employers pay wages when due, in conformity with the employment agreement. Mont. Code Ann. § 39-3-204. Except to set a minimum wage, the law does not set the amount of wages to be paid. That determination is left to the agreement between the parties. “Wages” are money the employer owes an employee, including 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.

Swartwood bears the burden of proof in this matter to show by a preponderance of the evidence that she was entitled to the commissions she claims she is due. *Berry v. KRTV Communications* (1993), 262 Mont. 415, 426, 865 P.2d 1104, 1112. *See also, Marias Health Care Services 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 the plaintiff failed to meet her burden of proof to show that she was not compensated in accordance with her employment contract).

Swartwood’s main contention in this case is that she is due far more additional commissions because she in fact sold the Starr-Eaton job and other jobs. The Graysons contest this, arguing that Swartwood was only a sales lead on the Starr-Eaton job and that Swartwood has been paid all commissions she is owed on all other jobs. The preponderant evidence fails to convince the Hearing Officer that Swartwood has not been paid all commissions she is due. To the contrary, the evidence suggests that Swartwood was paid all commissions she was due.

The substantial evidence in this matter (testimony of the Graysons, Curt Starr and Lottie Eaton, and the checks and documents provided by ABC) show that Swartwood received all payment for commissions due to her during the time periods in question. The clear gist of Lottie Eaton’s testimony (a witness called by Swartwood at the hearing) was that Larry Grayson, not Swartwood, completed the substantive measuring and sale of the Starr-Eaton job. This is corroborated by Swartwood’s note to Grayson (Exhibit 62) requesting Grayson to do the measurements. The credible evidence shows that Swartwood in fact was the sales lead for the job but did not sell the job. The monies paid out to Swartwood show that she was paid her sales lead money of \$6,000.00 for that job.

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

Likewise, the preponderant evidence shows that Swartwood was due \$574.39 on the Schiltz job. She received all of that money. Swartwood was also paid all commissions she was due on the New job. Finally, it also appears that Swartwood was paid for the portion of the Carol Mick contract that came to fruition. In short, the evidence does not show that Swartwood has been shorted on commissions she is owed. Because she has not carried her burden of proof in this case, her claim must fail.

**V. CONCLUSIONS OF LAW**

1. The State of Montana and the Commissioner of the Department of Labor and Industry have jurisdiction over this complaint. Mont. Code Ann. § 39-3-201 *et seq.* *State v. Holman Aviation* (1978), 176 Mont. 31, 575 P.2d 925.

2. Swartwood has failed to prove by a preponderance of the evidence that ABC failed to pay her the commissions she was due as alleged in her complaint.

**VI. ORDER**

Based on the foregoing, Margo Swartwood's complaint is dismissed.

DATED this 17th day of August, 2007.

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.