

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM) Case No. 1589-2007
OF WILLIAM C. SCOBIE,)

Claimant,)

vs.)

EMERGENCY PREPAREDNESS SYSTEMS,))
L.L.C., a Nevada limited liability corporation)
not registered in Montana,)

Respondent.)

**FINDINGS OF FACT;
CONCLUSIONS OF LAW;
AND ORDER**

* * * * *

I. INTRODUCTION

In this matter, the Respondent appeals from a determination of the Wage and Hour Unit that found William Scobie was due unpaid commissions and penalty. The matter was, pursuant to the request of the parties, stayed pending a determination of the Workers' Compensation Court regarding whether Scobie was an independent contractor. After the Workers' Compensation Court issued its ruling that Scobie was in fact an employee, this matter proceeded to hearing on November 24, 2009. Geoffrey Angel represented Scobie. Oliver Goe and Jason Jewett appeared on behalf of Tom Roberts. Scobie, Nels Sandel and Roberts all testified under oath. ERD Documents 1-167, 174 through 192, 214 through 432, 434, and Exhibits A, B6, B7, B13, B14, B41, B42, B48, and B49, and C through J were admitted into evidence.

After the conclusion of the hearing, the parties were permitted to submit post hearing briefs, the last of which was timely received on February 1, 2010, at which time the record in this matter closed. One of the issues which was to have been briefed, namely, the question of whether this matter could proceed while an appeal from the Workers' Compensation Court was pending, was mooted prior to the time of the briefing when the respondent's appeal from the Workers' Compensation Court determination was dismissed.

The claimant also moved to strike two attachments to the respondent's opening post hearing brief, arguing that the attachments amounted to new evidence. The hearing officer declines to strike the attachments as they are not offered and will not be considered as evidence. Rather they were submitted to simply summarize facts alleged by the respondent at hearing and in his closing brief.

Based on the evidence submitted at hearing and the arguments of counsel in their post hearing briefs, the following findings of fact, conclusions of law and order are rendered.

II. ISSUES

Is Scobie due additional commissions as alleged in his complaint and penalty as prescribed by law?

III. FINDINGS OF FACT

1. Scobie has been involved in the sale of medical products for many years. Throughout all times material to this case, in addition to his association with Emergency Preparedness Systems, he sold medical products in his own right through his sole proprietorship known as Norsco Medical Products.

2. Sandel developed a unique knockdown patient gurney. The gurney filled a burgeoning demand among hospitals and first responders/emergency preparedness organizations for temporary beds that could be easily stored and quickly deployed during a mass casualty event.

3. Scobie and Roberts were acquainted with each other through their work in the medical products field. In 2003, Scobie informed Roberts about Sandel's gurney. Soon thereafter, Scobie, Roberts and Sandel began discussing producing, marketing and selling the gurney which Sandel had developed.

4. Roberts created a sole proprietorship which was called Emergency Preparedness Systems, to produce and market the gurney. They called the gurney the TEMPS bed. Roberts hired Scobie to act as the business director for the entity. Scobie's duties were to utilize his medical sales industry contacts to sell the beds and all associated products.

5. After a period of product development, in 2004 EPS finally determined the pricing at which the TEMPS bed would be sold. After the pricing was developed, Scobie and Roberts entered into an oral agreement in late 2004 that Scobie's compensation for his work would consist of a commission for each bed the company sold. The structured commission system that the parties agreed upon called for Scobie to be paid 7% for each bed sold at the full list price. If a bed sold at the dealer list price (the wholesale price given only to retail dealers of the product), Scobie would receive a 5% commission. Scobie's commission was tied only to sales and was not contingent on the company making a profit.

6. Initially, the parties agreed that Scobie's commission was to be paid on a monthly basis. They subsequently modified that agreement to provide that Scobie would be paid on a quarterly basis.

7. Scobie began receiving commissions from sales in January, 2005. Roberts did not pay Scobie commissions for sales that occurred after the 1st Quarter of 2006 even though sales of TEMPS beds continued. Scobie repeatedly inquired about his commissions, but Roberts would put him off. In February, 2007, Roberts promised to pay Scobie the commissions he was due. Roberts never paid Scobie any further commissions and after working for several months without being paid the commissions he was due, Scobie resigned on March 30, 2007.

8. Scobie was underpaid \$50,944.00 in commissions during the time between January 1, 2005 and December, 2005. For the time period between January 1, 2006 and December, 2006, Scobie was underpaid \$81,294.00 in commissions. For the time period between January 1, 2007 and March 30, 2007, Scobie was due \$15,513.00 for which he was not paid. Testimony of Scobie, Exhibit N.

9. One of the distributors that bought TEMPS beds from EPS for the purpose of resale was ARAMSCO. In 2006, EPS filed a lawsuit against ARAMSCO in Florida Federal District Court as a result of ARAMSCO's alleged unauthorized attempt to copy and market a TEMPS bed look alike. Roberts sought an injunction and damages against ARAMSCO. EPS and ARAMSCO settled the lawsuit in July, 2006.

10. In January, 2007, Roberts provided Scobie with a printout showing total sales for 2005 and 2006. At this time, Scobie realized for the first time that he had been significantly underpaid in the commissions that he was due. In March, 2007, Scobie provided a letter to Roberts, while the two were attending a conference in

Tennessee, which specified the amounts that Scobie believed he was underpaid. At this time, Roberts unilaterally decided that he would only pay Scobie 2% commission on several sales even though the parties' agreement provided that Scobie was to be paid either a 5% or 7% commission.

11. Scobie filed the instant complaint against EPS on April 1, 2007, naming as the business Emergency Preparedness Systems and as his employer Tom Roberts. ERD Document 232. In response to the complaint, Tom Roberts identified the business as Emergency Preparedness Systems, LLC. In the response, Roberts initially noted himself as the owner if the entity was not incorporated, but then scratched out that information. ERD Exhibit 227.

12. EPS did not become a limited liability company until January, 2007 in Nevada. In its lawsuit against ARAMSCO in 2006, Roberts filed suit as "Thomas Roberts d/b/a Emergency Preparedness Systems."

13. During the investigation phase of this case, the Wage and Hour investigator sent a letter to the respondent along with a copy of Scobie's complaint. As requested in the investigator's letter, Roberts responded in a timely fashion with an explanation of what he asserted to be the commission agreement with Scobie. On April 27, 2007, the investigator sent Roberts a second letter asking Roberts to "submit any additional information you wish. . . ." DOL docs 221-224. There was no requirement in the letter that Roberts submit additional documentation. Nonetheless, Roberts responded by May 7, 2007 clearly delineating in detail what he asserted to be the parties' commission agreement. DOL Document 248-250.

14. During the investigation, the Wage and Hour investigator also requested detailed information from the parties to submit to the Independent Contractor's Central Unit (ICCU) for determination of Scobie's independent contractor status. In compliance with this directive, Roberts timely submitted detailed information regarding the background of Scobie's employment. DOL Documents 206-211.

15. On August 10, 2007, the Wage and Hour investigator requested that within 10 days, Roberts provide a breakdown of the commission policy, the commissions earned and paid and any pending payment due to the Petitioner. DOL Document 167. Within the time prescribed, Roberts responded by letter stating :

As I related to commissions, I previously provided all the commission documentation requested and again have included a history of commissions paid to Mr. Scobie . . . Our policy, as previously provided, clearly indicates that after the firm began operations in 2005, we paid Mr. Scobie a 7% Commission on Full Suggested List Pricing, a 5% Commission of Full Dealer Pricing and a 2% Commission on all discounted pricing. As of April 1, 2006, ALL commissions under the previous program stopped . . .
Id. (Capitalization in original)

16. Roberts reasonably complied with the requests of the Wage and Hour investigator. Because he did so, the penalty to be applied in this case is the 55% penalty. Penalty on the unpaid commissions of \$147,751.00 is \$81,263.00 (\$147,751.00 x .55= \$81,263.00).

IV. DISCUSSION¹

A. Wages Which Scobie Seeks From January 1, 2005 through March 31, 2005 Are Recoverable.

As a preliminary matter, the Respondent contends that Scobie's claim for unpaid commissions between January 1, 2005 and March 31, 2005 is outside the two year recovery remedy provided in Mont. Code Ann. §39-3-207(2) and cannot be recovered. Scobie argues that the three year remedy provided by Mont. Code Ann. §39-3-207(3) controls because Roberts, though required to pay commission quarterly, failed to pay commissions for a period of at least four consecutive quarters. Where an employer fails repeatedly to make wage payments when they are due, he has engaged in "repeated wage violations" as that term is contemplated under Mont. Code Ann. §39-3-207. *Clouse v. Lewis and Clark County*, 2008 MT 271, ¶51,345 Mont. 208, 190 P. 3d 1052.

As noted in the facts, Scobie's wage agreement called for him to be paid at least quarterly for the commissions he was due. As discussed in the facts above and in the section that follows, Roberts failed to pay Scobie the commissions he was due for at least 4 consecutive quarters of his employment, April, 2006 through March 31, 2007. This is the type of repeated violation which permits a claimant to seek three years of pay under Mont. Code Ann. §39-3-207(3). *Clouse, supra*.

¹Statements 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 .

B. The Proper Respondents Are Tom Roberts and Emergency Preparedness Systems, LLC.

The Respondent contends that only Emergency Preparedness Systems, LLC has any liability in this matter and that Roberts has no liability in this matter because the caption of the decision issued by the Wage and Hour Unit does not reflect Roberts as a named respondent. The claimant quite correctly points out that the complaint which he filed named Roberts as the employer d/b/a Emergency Preparedness Systems. The indisputable facts show that Roberts hired Scobie and entered into the commission agreement that became the subject of this complaint. The indisputable facts also show that Emergency Preparedness Systems did not become an LLC until January 25, 2007 at a point which came *after* the time where most of the disputed commissions (all of 2005, all of 2006 and one month of the 1st quarter of 2007 commissions) had become due but were not paid. Roberts was on notice from the time of the filing of the complaint that the claimant considered him to be the employer. In light of this, both Roberts d/b/a Emergency Preparedness Systems and Emergency Preparedness Systems, LLC have liability.

It is clear that the purpose of naming a defendant in a complaint is to put the defendant on notice that he is the intended target of the complaint. *See, e.g., LaForest v. Texaco, Inc.*, 179 Mont. 42, 46, 585 P.2d 1318, 1320 (1978). Courts in Montana have unhesitatingly permitted amendments changing the party against whom a complaint is filed where the new defendant received timely notice of the action and knew or should have known that he was the intended defendant. *LaForest, supra*. *See also*, Mont. Code Ann. § 25-20 Rule 15(c), Rules of Civil Procedure. For purposes of a contested case hearing before this tribunal, a party to a contested case hearing is “a person *named* or admitted as a party . . .” Mont. Code Ann. §2-4-102 (10)(emphasis added). In addition, once a wage claim determination is appealed, “all of the issues framed by the complaint, including those upon which the claimant did not prevail, are on the table.” *Wage Claim of Kenney*, Case Number 284-2007. *See also*, Mont. Code Ann. § 39-3-216 (3) (which provides that when a party timely appeals a wage determination a hearing must be conducted according to case procedures under Title 2, Chapter 4, part 6) and Mont. Code Ann. § 2-4-612 (which provides that where a contested case hearing is required, “[o]ppportunity shall be afforded all parties to respond and present evidence and argument on all issues involved.”)

In this case, Scobie named Roberts in the complaint as his employer. This was correct since Roberts entered into the employment relationship with Scobie and in fact remained in that relationship throughout the time of the disputed commissions. Roberts has thus been on notice since the inception of the complaint that Scobie was seeking unpaid commissions from him d/b/a Emergency Preparedness Systems. Since Roberts is both a named party and in fact has been on notice since the inception of the complaint that he was the intended target of the complaint, the only question that remains is one of fact as to whether Roberts is a proper defendant. The facts show that Roberts entered into the commission agreement with Scobie, employed Scobie and failed to comport with the wage agreement. Therefore, the claimant's argument that Roberts is liable to Scobie for the unpaid commissions is correct.

Roberts argument that Scobie must pierce the corporate veil of Emergency Preparedness Systems, LLC in order for liability to attach to Roberts is superfluous. The argument assumes incorrectly that Roberts was not named as a party to this matter or was not on notice of the litigation and cannot, therefore, now be added as a party. In fact, Roberts was named in the complaint as a party to this matter and has been on notice since the filing of the complaint that Scobie sought unpaid commissions from him. Piercing the corporate veil, therefore, is unnecessary since Roberts is a party to this litigation.

C. Scobie Is Owed Unpaid Commissions.

The real fight in this case relates to the terms of the compensation agreement. Scobie contends that his compensation agreement as national sales manager called for him to be paid 7% on products sold at full list price and 5% commission on products sold at dealer list price. Roberts argues that Scobie agreed to a 7%, 5% and 2% commission structure depending on the type of sale. Roberts further asserts that after the first quarter, 2006, he and Scobie agreed that Scobie would no longer receive any commissions because the cost of the lawsuit against ARAMSCO prohibited paying Scobie his commissions.

Scobie's claim falls under the provisions of the Montana Wage Payment Act. Montana law requires that employers pay wages when due, in accordance with the employment agreement, pursuant to § 39-3-204, MCA. 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. § 39-3-201(6), MCA; *Delaware v. K-Decorators, Inc.*, 1999 MT 13, 293 Mont. 97, 104-105, 973 P.2d 818.

The amount of commissions due from an employer to an employee is generally a matter of contract. *Keneally v. Orgain*, 186 Mont. 1, 5, 606 P.2d 127 (1980). Here, Scobie has presented credible evidence that the agreement between him and Roberts called for Scobie to be paid either a 7% commission or a 5% commission depending on whether the sale was for full list price or at dealer list price. Robert's contention that the commission structure also included a 2% commission is not credible, especially in light of the documentary evidence in this matter. In reality, Roberts unilaterally and after the fact decided to inject a 2% commission level to justify underpaying or not paying Scobie. Scobie was never notified of the institution of a 2% commission and he certainly never agreed to such a reduction in commission. Scobie has demonstrated by a preponderance of the evidence that the commission structure called for a 7% or 5% commission as he testified.

Equally incredible is the notion that Scobie agreed to stop receiving commissions after the ARAMSCO lawsuit occurred. Scobie had no part in the lawsuit and was never told that the lawsuit would result in Roberts not paying commission. Scobie would not have agreed to essentially work for free for Roberts. His testimony is buttressed by the fact that Scobie's commission was tied only to sales and was not contingent on the company making a profit. Scobie's testimony is further corroborated by the credible testimony of Nels Sandel who also testified that he never heard of any condition being placed on commissions after the ARAMSCO lawsuit. The hearing officer thus finds that the 7% or 5% commission structure was in place throughout the entirety of Scobie's employment with Roberts.

Scobie has also demonstrated preponderantly that he is due the amounts he claims to be due in underpaid commissions for 2005, 2006 and the first quarter of 2007. Scobie's testimony that he determined the amounts due by reviewing Exhibit L and that he excluded shipping charges and sales of demo products from the amounts he is owed is highly credible. His numbers are corroborated by Exhibits L and N. Based on this, the hearing officer concludes that Scobie's calculations of the amounts he is due for all three years is credible and accurate. The hearing officer therefore concludes that Scobie has shown by a preponderance of the evidence that he is due an additional \$50,944.00 in unpaid commissions for 2005, \$81,294.00 in unpaid commissions for 2006 and \$15,513.00 in unpaid commissions for 2007. All together, Scobie is due \$147,751.00 in unpaid commissions.

D. *EPS Owes a Penalty.*

The parties disagree as to which penalty is applicable in this case. The claimant argues that the 110% penalty applies because Roberts failed to provide information requested by the department and/or did not cooperate in the department's investigation of the wage claim. The respondent argues that he complied with all requests of the Wage and Hour investigator. For the reasons noted in the Respondent's Final Post Hearing Brief, the hearing officer agrees that the imposition of maximum penalty is not merited in this case. Roberts did not fail to cooperate or fail to provide information and there is no basis to impose the maximum penalty provided for in Admin. R. Mont. 24.16.7556. For valid wage claims other than minimum wage and overtime compensation claims, a penalty of 55% must be imposed in the absence of a finding of the aggravating circumstances described in Admin. R. Mont. 24.16.7556. Admin. R. Mont. 24.16.7566. The penalty due in this case is \$81,263.05 ($\$147,751.00 \times .55 = \$81,263.05$).

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. Scobie can recover for a period of 3 years prior to the end of his employment as Roberts' failure to pay his commissions at least quarterly (particularly from the 2nd quarter of 2006 through the first quarter of 2007, a total of 4 consecutive failures to pay quarterly commissions) amounted to repeated violations under Mont. Code Ann. §39-3-207(3).

3. Scobie's wage agreement with EPS provided that EPS would pay him a 7% or 5% commission on sales of products.

4. EPS owes \$147,751.00 in unpaid commissions to Scobie.

5. EPS owes Scobie a 55% penalty in the amount of \$81,263.05.

VI. ORDER

Based upon the foregoing, Tom Roberts and/or Emergency Preparedness Systems, LLC are hereby ORDERED to tender a cashier's check or money order in the amount of \$229,014.05, representing \$147,751.00 in unpaid wages and \$81,263.05 in penalty, made payable to William S. Scobie and mailed to the Employment Relations Division, P.O. Box 201503, Helena, Montana 59620-1503, no later than 30 days after service of this decision. The respondents may deduct applicable withholding from the wage portion but not the penalty portion of the amount due.

DATED this 22nd day of April, 2010.

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.