

STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM	)	Case No. 1677-2007
OF LINDA L. OLSON,	)	
	)	
Claimant,	)	<b>FINDINGS OF FACT;</b>
	)	<b>CONCLUSIONS OF LAW;</b>
vs.	)	<b>AND ORDER</b>
	)	
JACK LOVE, D/B/A BARRETT WHITMAN,	)	
	)	
Respondent.	)	

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**I. INTRODUCTION**

In this matter, Linda Olson appeals the determination of the Wage and Hour Unit that she is not due additional wages from Jack Love, d/b/a Barrett Whitman.

Hearing Officer Gregory L. Hanchett convened a contested case hearing in this matter on February 4, 2008 in Great Falls, Montana. Olson represented herself and Love represented himself. Olson, Love, Pamela Vandernick, Elaine Hartman, Sheri Smith, Cathleen McGregor, Julie Crittendon, Logan Love, and Colleen Paduano testified under oath. The parties stipulated to the admission of claimant's Exhibits 19, 24, 56-58, 61-67, 70, 73, 76, 79, 81, 83, 85, 87-89, 209, 237, 239, 241-244, and 267. The parties further stipulated to the admission of all of the respondent's Exhibits A through CE and DA. Based on the evidence and argument presented at hearing, the hearing officer makes the following findings of fact, conclusions of law and final decision.

**II. ISSUES**

Is the claimant due additional wages as alleged in her complaint and penalty as provided by law?

### III. FINDINGS OF FACT

1. Jack Love hired Linda Olson in February 2005 to sell advertising and to assist in clerical duties for the Montana Senior News, a newspaper geared toward the elderly. Olson quit her position in February 2007 due to sensitivities she had to newspaper ink. The Montana Senior News is produced by Love's company, Barrett-Whitman Publishing. Barrett-Whitman also publishes the Idaho Senior news that is distributed in Idaho. Both periodicals and the employees who work on both papers are housed at one location located in Great Falls, Montana.

2. The Montana Senior news is published bimonthly (a total of six times each year). Advertisers who purchase advertisements can have ads run in only one issue only, three issues, or six issues. If an advertiser purchases multiple ads, an advertiser can prepay for all six ads if it chooses to do so. An advertiser can also choose to pay for only one ad and then pay each time.

3. Olson's duties for selling advertising included obtaining sales leads, following up on those leads, providing advertisers with advertising proofs, and then following up with advertisers during the time that the purchased advertisement runs. Obtaining sales leads involves looking through previous editions of the newspaper and utilizing other sources and contacting potential leads by telephone to determine if the leads have any interest in advertising.

4. With respect to commission on sales of advertising, it is customary in the business for salespersons to get commissions on what has run, not on what has been booked. That is, each time an ad is run, the sales person gets paid. If a sales person leaves his or her position during the time segment that an ad is running, he or she or she will not be paid for those ads that have not yet run. By way of example, if a sales person books an advertiser who chooses to run ads in six subscriptions, the sales person will be paid as each ad runs in each edition. If that person leaves prior to the completion of the run of ads, he or she will not be paid for those ads that have not yet run. Instead, the successor who comes into the position will get the commission on those ads which have not yet run.

5. Olson's verbal contractual agreement with Love with respect to her commissions was no different from what has been described in Finding of Fact number 4. When Olson was hired, she was informed that she would be receiving the commission on each ad as it ran on those accounts established by her predecessor which Olson assumed responsibility for when she took over the accounts. She was also informed that she would not be entitled to commission on accounts she landed for ads on those accounts that ran after she left her employment. Finally, she was informed that her commissions would not be due to her until payment was received for the ads from the customer.

6. Olson does not claim that Love did not pay her in accordance with the commission agreement. Rather, Olson contends that she is due commission on all of her sales, not just the commission on the ads that ran while she was employed.

7. In addition to selling advertising, Olson also conducted certain clerical tasks such as proofreading editions for typographical errors, doing “tear” sheets and doing lay ups of editions. The tasks of doing lay ups and proofreading were not related to sales and were strictly clerical work. In order to alert Love to the fact that she was due wages for non-sales work, Olson was supposed to fill out her time card and note that she was doing “circle time,” that is, time for non-sales work for which she was to be paid a straight hourly wage. For her non-sales clerical work, Olson was to receive \$11.00 per hour.

8. Olson relied on Love to tell her when to mark down her work as “circle time.” Unless he told her to count time as circle time, Olson did not mark her time as circle time. Olson’s failure to count work as circle time, however, does not mean that she did not complete the clerical non-sales work that she claims to have worked in complaint. Olson did the circle time work that she claims to have undertaken. She did not correctly note the work as circle work on her time card.

9. Because the newspaper is published bimonthly, Olson’s sales and clerical duties ran in an eight-week cycle. During the first two weeks, she was primarily involved in her clerical duties of laying up the paper and doing tear sheets and proofreading. She was unable to effectively pursue sales during this time. During the last six weeks of the cycle, Olson was able to focus on her sales duties.

10. During her tenure of employment, Olson spent approximately seven hours during each eight-week cycle for each issue engaging in non-sales clerical activity. In addition, she worked on one mailing of issues for a period of seven hours where she performed solely clerical duties in helping to ship out the newspaper. For each of the 13 issues during the time she was employed, she worked at least a total of 91 hours (13 issues x 7 hours=91 hours). At her rate of \$11.00 dollars per hour, this equated to a total she was due of \$1,001.00 ( $\$11.00 \times 91 \text{ hours} = \$1,001.00$ ) for the thirteen issues. In addition, she was due \$77.00 for the one mailing she worked on ( $7 \text{ hours} \times \$11.00 = \$77.00$ ). She was thus due a total of \$1,078.00 for the non sales work that she did. Olson was not paid for this time.

11. Love also has a practice of holding back commissions in order to even out commissions over time. While there is no evidence that Love’s conduct violated the tenants of Mont. Code Ann. 39-3-204 (which requires that wages dues and payable to an employee be paid within 10 business days after the wages are due and payable), there is a danger that his conduct could result in such a violation in the future.

12. In addition to the compensation for the clerical and sales work, Love offered Olson a weekly bonus of \$35.00, earned for each week in she worked more than 32 hours.

13. Love provided Olson with one week of paid vacation each year. Instead of actually giving her the time off, Love would pay Olson an additional 1/52 of her annual pay over and above her hourly work for circle pay and her commission. There is no evidence to indicate that the parties' employment arrangement contemplated any relationship between the requirement that a salesperson work at least 32 hours per week to get the \$35.00 bonus and the vacation pay.

14. During one week of employment, Olson had to take some time off in order to attend a medical appointment. Her time off was pre-approved. Because she attended this appointment, Olson did not work her 32 hours and did not receive her bonus for that week.

15. 55% of the amount of unpaid wages amounts to \$592.90 ( $\$1078.00 \times .55 = \$592.90$ ).

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

##### A. *Olson is Due Additional Wages for Her Hourly Work.*

Montana law requires that employers pay wages when due, in accordance with the employment agreement, pursuant to 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 any money due an employee by the employer. Mont. Code Ann. § 39-3-201(6).

An employee seeking unpaid wages has the burden of proving work performed without proper compensation. *Anderson v. Mt. Clemens Pottery Co.* (1946), 328 U.S. 680; *Garsjo v. Dept. 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." *Garsjo* 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; *Marias Health Care Srv. v. Turenne*, 2001 MT 127, ¶¶13, 14, 305 Mont. 419, 28 P.3d 494.

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*, *supra*, 359 Mich. at 576, 103 N.W. 2d at 497.

Olson's testimony is sufficient to meet her burden to show that she is due additional wages in the amount she claims for her clerical work. She has demonstrated as a matter of just

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

and reasonable inference that she is entitled to that additional amount. Love has failed to rebut this with any meaningful evidence. Olson, whose testimony is credible, is the only person in a position to know whether she worked the number of hours of clerical work that she claims to have worked. Other than to suggest that the circle time she turned in does not reflect the number of hours she is now claiming for that work, Love, who was not watching over Olson's work every minute, simply is not in a position to dispute Olson's claim. While in other circumstances Olson's undenominated circle time might provide a basis to undercut her testimony on this issue, in this case it provides no such basis because Olson did not know that she should have been turning in her additional amounts of circle time. Under these circumstances, Olson's testimony on this issue has not been effectively rebutted and the hearing officer finds that she is due \$1,078.00 in unpaid wages for her clerical/circle time.

*B. Olson Is Not Due Any Additional Commissions or Bonuses.*

Olson also contends that she is due commissions on all accounts that she established, not just those ads that ran while she was employed by Love. Olson agrees that she was paid, in conformity with the terms of her employment agreement, on all ads that ran during her employment, but argues that she is nonetheless entitled to commissions on ads that ran after she left her employment with Love. Olson also contends that she is due a \$35.00 bonus for one week where she did not work at least 32 hours. Her argument here is based on her contention that during that week she used vacation time and this vacation time should count toward the 32-hour minimum required to receive the bonus. Neither of her positions is correct.

With respect to additional commissions, it is clear that she is not due any additional wages. An employee is due all wages that have been "earned" by that employee. Mont. Code Ann. § 39-3-204 (1). An employee may be considered to have "earned" commissions on sales made after the employee leaves employment if the employee is the procuring cause of the sale. This rule applies unless the employment agreement between the parties specifically provides when commissions will be paid. In that event, the terms of the employment agreement will control. See, e.g., *Tech. Rep., Inc., v. Richardson-Merrell, Inc.*, (1982), 107 Ill. App. 3d. 830, 438 N.E. 2d 744, citing *Richard v. Koury Brothers*, 341 F. 2d 34 (7<sup>th</sup> Cir. 1965) (holding that a salesperson who was the procuring cause of sales occurring after leaving his employment with the defendant employer was not due those commissions where the employment agreement provided that the employee was due only those commissions earned while the employee was employed by the employer). See also, *Schackleton v. Federal Signal Corp.*, (1989), 196 Ill. App. 3d. 437, 554 N.E. 2d. 244.

In the case before this hearing officer, the parties' employment agreement specifically provided that commissions did not belong to Olson unless she was employed at the time those ads were run. Love's testimony establishes that Olson was aware of this agreement from the time she was employed. Indeed, Olson must have been aware of this part of the agreement since she herself benefitted from this by receiving commissions from the person she replaced when those commissions came in during Olson's tenure. Olson does not dispute that she was paid in

accordance with this agreement. The hearing examiner can find no policy basis in the Montana Wage and Hour Act that would preclude the parties from entering into such an agreement. Accordingly, there is no contractual or legal basis from which the hearing officer can find that Olson is due any additional commissions.

Olson contends that she is due a \$35.00 bonus for one week wherein she took a vacation day and failed to work at least 32 hours. Her employment agreement, however, clearly provided that unless she worked at least 32 hours each week, she would not be entitled to the \$35.00 weekly bonus. There is no evidence that the agreement provided that vacation time taken could count toward accrual of the minimum 32 hours needed in order to get the weekly bonus. In the absence of such an agreement, there is no basis in the contract to find that Olson is due the \$35.00 bonus she seeks because she did not meet the requirements for earning the weekly bonus.

*C. Love Owes a Penalty on the Unpaid Hourly Wages.*

Montana's Administrative Rules applicable to wage and hour cases require imposition of a penalty when wages are found to be due and unpaid. Where regular wages are found to be due, the applicable administrative rules require the imposition of a 55% penalty. Admin. R. Mont. 24.16.7566. Here, Love owes Olson a 55% penalty in the amount noted in Finding of Fact Number 14.

## **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. Love owes Olson regular wages in the amount of \$1,078.00 and penalty of \$592.90 on the unpaid regular wages.
3. Olson is not due additional commissions.
4. Olson is not due the \$35.00 bonus that she seeks.

## **VI. ORDER**

Jack Love, d/b/a Barrett Whitman, is hereby ORDERED to tender a cashier's check or money order in the amount of \$1,670.90, representing \$1,078.00 in unpaid regular and \$592.90 in penalty, made payable to Linda Olson, 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. Love may deduct applicable withholding from the wage portion but not the penalty portion of the amount due.

DATED this 20th day of March, 2008.

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.