

**STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
HEARINGS BUREAU**

<b>IN THE MATTER OF THE WAGE CLAIM )</b>	<b>Case No. 1256-2000</b>
<b>OF PENNY L. MASSA, )</b>	
<b>Claimant, )</b>	
	<b>HEARING OFFICER</b>
<b>vs. )</b>	<b>ORDER ON REMAND</b>
	<b>FROM BOARD OF</b>
<b>FOX LUMBER SALES, INC., )</b>	<b>PERSONNEL APPEALS</b>
<b>a Montana Corporation, )</b>	
<b>Respondent. )</b>	

\*\*\*\*\*

On December 18, 1999, Penney L. Massa filed a wage claim with the Department of Labor and Industry pursuant to § 39-3-201, et seq., MCA. She alleged she was owed wages in the form of commissions for work performed during the period from January 1997 to December 1997.

Hearing Officer Michael T. Furlong conducted a hearing in the matter on November 28, 2000. The Hearing Officer issued a decision on January 8, 2001, holding that Massa was not entitled to wages under the Montana Wage Payment Act and dismissing the claim. Massa filed a timely appeal in the matter to the Board of Personnel Appeals. The Board reviewed the matter and heard argument from the parties on March 15, 2001. After a review of the record and consideration of the arguments, the Board concluded and ordered as follows:

1. IT IS HEREBY ORDERED that this case is remanded to the Hearing Officer to redraft the Discussion/Rationale; Conclusion of Law #2; and his Order in accordance with the following directive:

A. In the absence of a written contract, policy, or direct oral communication with claimant firmly establishing the terms of reconciliation, and considering the evidence of record, the employer failed in its burden of establishing that a meeting of the minds occurred between the parties regarding this term of the employment contract.

B. Since the terms of the reconciliation portion of the employment contract cannot be established, the employer is responsible for paying the claimant commissions due on the collected accounts addressed in this action.

C. Consider whether the claimant received direct payment of \$300.00 on the Prairie West Wood account and, if so, offset the wages due claimant by this figure.

D. The Hearing Officer is further directed to consider the case of Delaware v. K-Decorators, Inc., 293 Mont. 97, 973 P.2d 818 (1999), to determine whether a penalty is due and owing in this case.

In accordance with the Board's directive, the Hearing Officer issues the following:

### ORDER

The record shows that Massa was employed by Fox from March 13, 1989 to November 24, 1997. Fox conducted its final reconciliation with Massa on January 27, 1998. Sometime after conducting Massa's final reconciliation, but before the hearing on November 28, 2000, Fox received payment of \$3,346.24 for sales orders Massa placed for Prairie West Wood Products and Evans Forest Products, which she serviced during her employment. Pursuant to the Remand Order, Fox owes Massa commission on the Prairie West Wood Products and Evans Forest Products accounts.

Massa had placed one of the above orders with the Prairie West Woods account with an invoice date of September 2, 1997. The invoice sales amount on that transaction was \$1,300.00. Prairie West Wood Products issued two checks, one for \$1,000.00 to Fox, and one for \$300.00 directly to Massa, as payment for the order. Massa indicated she received the \$300.00 check from Prairie West Wood Products. Pursuant to the Board of Personnel Appeals remand Order, that amount is to be deducted from the amount of commissions still owed after her employment ended and final reconciliation was completed.

Pursuant to the Board's Remand Order, the Hearing Officer orders that Fox is responsible for paying Massa commissions on the collected accounts from Prairie West Wood Products and Evans Forest Products. Fox owes Massa \$3,046.24 in wages for unpaid commissions on the two accounts (\$3,346.24 total commission minus \$300.00 commission received). At the date of the hearing held on November 28, 2000, Massa had not received payment for unpaid commissions (\$3,046.24).

Regarding the question of whether Massa is owed penalty, the Board directed the Hearing Officer to consider Delaware v. K-Decorators, Inc., 293 Mont. 97, 973 P.2d 818 (1999).

Section 39-3-206, MCA, establishes that an employer who fails to pay an employee as provided in Part 2, Chapter 3, Title 39, MCA, or who violates any other provision of Part 2, Chapter 3, Title 39, MCA, is subject to a penalty not to exceed 110% of the wages due and payable. As noted above, the failure to pay the commissions in this case was a violation of § 39-3-204, MCA, which is a provision of Part 2, Chapter 3, Title 39, MCA.

The Delaware case holds that the failure to pay commissions which became due after the claimant's employment terminated was not a violation of § 39-3-205, MCA. As a result, the Supreme Court held that no penalty was due. The Court did not consider whether there was a violation of § 39-3-204, MCA, or any other provision of Part 2, Chapter 3, Title 39, MCA, apparently because the parties did not present that argument to the Court. See Delaware, 293 Mont. at 106. The Delaware case does not preclude the award of a penalty to the claimant.

The rules of the Department provide that in cases other than minimum wage and overtime, the penalty imposed should be 55%, unless certain special circumstances apply. ARM 24.16.7566(1). The special circumstances operate to increase the penalty if the employer fails to cooperate in the Department's investigation, has false or misleading payroll records, has previously violated wage and hour laws, or has issued an insufficient funds paycheck. There is no evidence that any factors are present which would require enhancement of the penalty. Therefore, the appropriate penalty is 55% of \$3,046.24 or \$1,675.43.

Fox Lumber Sales, Inc., is hereby ORDERED to tender a cashier's check or money order in the amount of \$4,721.67 representing \$3,046.24 in wages and \$1,675.43 in penalty, made payable to Penny L. Massa, and mailed to the Employment Relations Division, P.O. Box 6518, Helena, Montana 59624-6518, no later than the date stated on the following notice.

DATED this 28th day of August, 2001.

DEPARTMENT OF LABOR & INDUSTRY  
HEARINGS BUREAU

By: /s/ MICHAEL T. FURLONG

Michael T. Furlong  
Hearing Officer

NOTICE: You are entitled to review of this Order pursuant to §§ 39-3-216 and -217, MCA. Review may be obtained by filing a written notice of appeal postmarked no later than September 17, 2001. This appeal time includes the 15 days provided for in § 39-3-216(3), MCA, and the additional 3 days mandated by Rule 6(e), M.R.Civ.P., as service of this Order is by mail.

The notice of appeal shall consist of a written appeal of the decision of the hearing officer. It must set forth the specific errors of the hearing officer and the issues to be raised on appeal. Notice of appeal shall be mailed to: Board of Personnel Appeals  
Department of Labor and Industry  
P.O. Box 6518  
Helena, MT 59624-6518

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 § 39-3-212, MCA. Such an application is not a review of the validity of this Order.