

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM)	Case No. 1257-2000
OF PATRICIA A. KIRKENDALL,)	
Claimant,)	
)	
vs.)	HEARING OFFICER
)	ORDER ON REMAND
)	FROM BOARD OF
FOX LUMBER SALES, INC.,)	PERSONNEL APPEALS
a Montana Corporation,)	
Respondent.)	

On December 9, 1999, Patricia Kirkendall filed a wage claim with the Department of Labor and Industry pursuant to § 39-3-201, et seq., MCA. She alleged she was owed \$1,220.00 wages in the form of commissions for work performed during the period from January 1994 to October 1998.

Hearing Officer Michael T. Furlong conducted a hearing in the matter on November 28, 2000. The Hearing Officer rendered a decision on January 8, 2001, holding that Kirkendall was not entitled to wages under the Montana Wage Payment Act. Kirkendall filed a timely appeal in the matter to the Board of Personnel Appeals. The Board reviewed the matter on March 15, 2001. Patricia Kirkendall, claimant, and Howard Recht, attorney for respondent, appeared before the Board by telephone. After a review of the record and consideration of the arguments, the Board issued the following order on March 27, 2001:

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. 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 Kirkendall was employed by Fox Lumber Sales, Inc., from January 17, 1994 until October 14, 1998, when the employment relationship ended. Fox conducted a final reconciliation of Kirkendall's commissions on December 11, 1998, and she received a check for commissions from all invoices deemed earned after all payments, costs, and set-off's on her accounts had been paid. During the course of her employment, Kirkendall had transacted sales of company products to Green River Log Sales and Twin River Hardwood. Kirkendall did not receive commissions for those accounts because the accounts remained unpaid at the time of final reconciliation on December 11, 1998.

Following Kirkendall's termination and final reconciliation, Fox received payments from Green River Log Sales on December 23, 1998 and Twin River Hardwood on December 18, 1998 for the sales accounts in the amount of \$3,050.00.

Pursuant to the Board's Remand Order, Fox is responsible for paying Kirkendall a commission of 40% on the collected accounts from Green River Log Sales and Twin River Hardwood received. Pursuant to § 39-3-204, MCA, Fox was responsible to make the payment within ten business days. The failure to pay Kirkendall her commission within ten business days of receipt of the payment is a violation of § 39-3-204, MCA.

Fox Lumber Sales, Inc., is hereby ordered to pay commissions in the amount of \$1,220.00 for commissions earned (\$3,050.00 x 40%).

Regarding the question of whether Kirkendall 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 \$1,220.00 or \$671.00.

Fox Lumber Sales, Inc., is hereby ORDERED to tender a cashier's check or money order in the amount of \$1,891.00 representing \$1,220.00 in wages and \$671.00 in penalty, made payable to Patricia Kirkendall, 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.