

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

IN THE MATTER OF THE WAGE CLAIM)	Case No. 180-2002
OF EDWARD E. CLEAVENGER,)	
Claimant,)	AMENDED
)	FINDINGS OF FACT;
vs.)	CONCLUSIONS OF LAW;
)	AND ORDER
JUSTIN, INC., a Montana corporation,)	
d/b/a JUSTIN DODGE CHRYSLER)	
DAEWOO JEEP formerly d/b/a JUSTIN)	
DODGE CHRYSLER PLYMOUTH JEEP,)	
Respondent.)	

I. INTRODUCTION

This matter came to hearing before David H. Frazier on April 12, 2002 at 10:45 a.m., MDT. Both parties stipulated to proceeding by telephone. The claimant was present. Brian Atcheson, Attorney at Law, represented him. Justin Todd, president, represented the respondent. Lacie Forsman, former office manager, appeared as a witness for the respondent.

Exhibits 1 through 68, provided to the parties with the Notice of Pre-hearing Conference, were admitted into the record without objection.

II. ISSUES

1. Whether Justin Inc., d/b/a/ Justin Dodge Chrysler Daewoo Jeep, owes wages to Edward Cleavenger for work performed in May and June of 2001, pursuant to §39-3-204, MCA.

2. Whether Justin Inc., d/b/a/ Justin Dodge Chrysler Daewoo Jeep, owes Edward Cleavenger a penalty for unpaid wages pursuant to §39-3-206, MCA.

III. FINDINGS OF FACT

1. Justin Inc., employed the claimant as a salesman during the period beginning August 1, 2000, and ending June 28, 2001.

2. In the year 2000, Daimler Chrysler Motors Corporation made an offer to the employer to pay each sales person a \$50.00 program bonus for each new Chrysler sold. Daimler agreed to prepare a check payable to the individual sales person and to mail the check to the dealership to be provided to the sales person by the dealer. The agreement required that the employer verify the sale by Internet and stipulated that Daimler would provide one check to one salesman designated by the employer, in those situations where more than one salesman were involved in the sale (a "split" bonus).

3. Until June 6, 2001, Todd paid the claimant a 25% commission on each vehicle sold. On

June 6, 2001, Todd changed the claimant's pay plan to a volume bonus plan (Exhibit 30) which provided for a \$150.00 payment for every car sold over seven cars in a month, with a scale of increasing bonuses based upon the number of cars over ten sold in a month. During the month of June, 2001, the claimant earned \$1,200.00 in commissions for new car sales based upon the volume bonus plan. He also earned \$300.00 in Spiffs@ which are cash bonuses paid by the dealer every week on special deals offered by the general sales manager.

4. The employer establishes a receivable account for each salesperson and adds spiffs, draws, and the sales person's half of "bird dog" fees to it. A bird dog fee is a fee paid by the dealer, to a non employee who brings in a customer who purchases a vehicle. The employer pays the \$50.00 fee directly to the non- employee and charges the sales person \$25.00 of that fee by adding it to the sales person's receivable account.

5. When Lacie Forsman, former office manager for the employer, did the payroll, she added spiffs and any draws, or advances, the sales person may have received to the income of sales persons. She added the spiffs to the sales person's receivable account, and calculated taxes based upon the total gross income represented by commissions, draws and spiffs. After the taxes on gross income were calculated, she deducted the spiffs from the receivable account and from gross income (Exhibit 26).

6. On or about April 26, 2001, the claimant purchased a 1995 Dodge Dakota from the employer, who financed the vehicle for the claimant through Household Auto. The claimant made a \$1,000.00 down payment and traded in his 1995 Hyundai Accent, which the employer sold two days later. On June 27, 2001, the general sales manager told the claimant that Household Auto had not paid them for the truck and that he would have to return it. The claimant refused and sought legal advice. On June 28, 2001, Todd discharged the claimant because he had not returned the truck.

7. On July 3, 2001, the employer mailed the claimant a check for his June, 2001, wages (Exhibit 26). The check stub indicates that the claimant earned \$1,200.00 in commissions for new car sales, \$50.00 in commissions for new car sales, and \$300.00 in spiffs, yielding gross pay of \$1,550.00. From this, the employer deducted \$370.00 for state and federal taxes and \$1,180.00 for unidentified accounts receivable, yielding a net pay of \$0.00.

8. On July 6, 2001, the employer issued a check to the claimant in the amount of \$134.59 which was the claimant's share of a split commission on a sale which he had started but which was completed by another salesman.

9. On July 30, 2001, the claimant filed a claim with the Wage and Hour Unit of the Montana Department of Labor and Industry alleging that the employer owed him a \$150.00 in commission for selling a new car and \$600.00 from Daimler Chrysler for 6 new Chrysler sales during the period beginning June 1, 2001, and ending June 28, 2001. The claimant assumed at that time that he was entitled to a \$100.00 commission from Daimler for each Chrysler sold because the employer had met a monthly quota.

10. On July 31, 2001, the claimant went to Todd and asked for the commission on a car he had sold which had not been paid. There had been some confusion because the claimant had sold two vehicles to the same customer and the claimant had been paid a commission on only one of the vehicles. Following the discussion, Forsman gave the claimant a check for \$150.00 for the commission on one vehicle.

11. The claimant has subsequently received three checks from Daimler Chrysler for \$50.00 each for sales of 3 new Chryslers and is now seeking \$150.00 from the employer for the sale of 3

Chryslers for which Daimler Chrysler has not paid him.

IV. DISCUSSION

A. COMMISSIONS FROM DAIMLER CHRYSLER

Montana law requires employers to pay wages when due and in no event more than 15 days following termination of employment. '39-3-204 and 39-3-205, MCA. The law also prohibits an employer from withholding amounts from wages except for deductions provided for by law and for board, room, and incidentals provided as part of the conditions of employment.

The claimant gets payment from the employer for commissions from Daimler Chrysler. The commissions paid by Daimler Chrysler are the liability of Daimler Chrysler, not of Justin Inc., who only facilitated the payment of those commissions. The claimant must seek any unpaid commissions by Daimler Chrysler from Daimler Chrysler.

B. UNPAID WAGES

The employer has not submitted any evidence to verify that \$880.00 of the \$1,180.00 deducted from the claimant's July 3, 2001, paycheck (Exhibit 26) for accounts receivable was properly deducted. The only sum listed under earnings which would appropriately be deducted from the claimant's gross pay based upon the employer's accounting practices is the \$300.00 in spiffs, which the claimant acknowledged receiving. The employer has not shown that the remaining \$880.00 was appropriately deducted from the claimant's wages.

C. PENALTY

Montana law assesses a penalty of up to 110% when an employer fails to pay wages when they are due. §39-3-206, MCA. However, ARM 24.16.7556 provides for a 55% penalty unless there are special circumstances. The special circumstances include: failure of an employer to cooperate in the wage complaint process, false or misleading payroll records, prior violations of the wage laws by the employer, and issuance of insufficient funds paychecks.

Because the employer did not pay the claimant a \$150.00 vehicle commission until July 31, 2001, the claimant is entitled to a 55% penalty, or \$82.50.

Although it is interesting that the employer arrived at an exact sum to deduct from the claimant's final paycheck in order to tender a net pay of zero, there is no substantial credible evidence that the employer's payroll records were falsified or intentionally misleading. However, by failing to pay the claimant \$880.00 in wages when they were due, the employer owes the claimant those wages and a 55% penalty, or \$484.00. ARM 24.16.7566.

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 § 39-3-201 et seq. MCA. State v. Holman Aviation, 176 Mont. 31, 575 P.2d 925 (1978).

2. Based upon the foregoing discussion, Justin Dodge Chrysler Daewoo Jeep owes Cleavenger \$880.00 in unpaid wages and \$566.50 in penalty, or \$1,446.50.

VI. ORDER

Justin Dodge Chrysler Daewoo Jeep is hereby ordered to tender a cashier's check or money order in the amount of \$1,446.50, representing \$880.00 in unpaid wages and \$566.50 in penalty, made payable to Edward Cleavenger, 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.

DATED this 30TH day of August, 2002.
DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ DAVID H. FRAZIER
DAVID H. FRAZIER
Hearing Officer

NOTICE: You are entitled to judicial review of this final agency decision in accordance with §39-3-216(4), MCA, by filing a petition for judicial review in an appropriate district court within 30 days of service of the decision. See also §2-4-702, MCA.

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.