

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

IN THE MATTER OF THE WAGE CLAIM)	Case No. 2077-2001
OF BENJAMIN J. MAYER,)	
Claimant,)	
)	
vs.)	FINDINGS OF FACT;
)	CONCLUSIONS OF LAW;
)	AND ORDER
GALE AND/OR AMY BERRY,)	
individually and/or as partners and)	
BERRY'S CHERRIES, INC.)	
d/b/a BERRY'S AUTO, an assumed business name)	
Respondent.)	

I. INTRODUCTION

Michael T. Furlong conducted a hearing in this matter in Billings, Montana, on August 20 and 21, 2002. Benjamin J. Mayer, Claimant, appeared and was represented by Steven Lehman, Attorney at Law. Adrienne Mayer (Claimant's wife), Scott Olson, Jordon Romero, and Stuart Jones testified as Claimant witnesses. The Respondent was represented by Peter T. Stanley, Attorney at Law. Gale Berry, Amy Berry (co-owner), DeAnna Workman, Larry Hamilton, and Mitch Neumiller testified as Respondent witnesses.

Claimant's Exhibits 1 through 23 and Respondent's Exhibits A through H were admitted into evidence. Prior to the hearing, the parties stipulated to the admission of department case file documents marked 000001 through 000095.

The Claimant claims that he is owed the following amounts:

1. \$1,000.00 per month for lot attendant service performed from March 15, 2000 to April 5, 2001;
2. \$950.00 in unpaid commissions for cash sales in February and March 2001;
3. \$1,158.00 deducted from Mayer's final paycheck;
4. \$7,596.00 in unpaid commissions for cars he had sold; and
5. \$19,075.40 in penalties for late payment of wages.

II. ISSUE

Whether the Respondent owes wages and statutory penalties to the Claimant pursuant to the law.

III. FINDINGS OF FACT

1. Berry's Auto is a used car dealership in Billings, Montana, which has had a dealer's license in Montana for five years. The business was formed by Amy and Gale Berry (husband and wife). Gale Berry oversees the used car lot, supervises the sales staff and contacts the major dealers to purchase the cars to be sold. Amy Berry manages the business records operation. On August 26, 1999, the business formed a corporation registered as Berry's Cherries, Inc. d/b/a Berry's Auto.

2. Berry's Auto buys cars to sell in groups of 10 from larger dealerships at an average cost of \$2,000.00 per car. The average retail price for each car ranges from \$3,995.00 to \$4,995.00.

3. Berry's Auto incurs costs to repair and clean the cars before they are placed on the lot for sale. To adjust for those expenses, the business deducts \$300.00 from the sale price of the car, referred to as a "pack", before calculating a salesperson's commissions.

4. The business has rapidly grown from having an inventory of 5 to 10 cars in 1998 to its current inventory of 100 to 150 cars.

5. Berry's Auto hired Benjamin J. Mayer as a commissioned car salesman in February 1998. His weekly work schedule was Monday through Saturday. Initially, Berry's Auto paid Mayer on an agreed commission basis. On each sale of a vehicle, Mayer and Gale Berry would determine the amount of sales commission owed and Berry would pay Mayer accordingly.

6. At some point, Mayer agreed to accept a set commission of 30% of the net profit from each sale. Mayer and Berry's Auto also entered into an oral agreement that Berry's Auto would pay Mayer a guaranteed monthly minimum of \$1,000.00 in any month Mayer's sales commissions did not reach a minimum of \$1,000.00.

7. Mayer was responsible to help with the process of collecting payment from customers for time pay sales he made. Berry's Auto gave him a list of customers to contact to collect payments on unpaid balances from car sales he made.

8. When Mayer sold a car on a time pay plan, Berry's Auto required him to have the customer fill out paperwork providing certain necessary information, power of attorney, lien paperwork, duplicate title requests, repossession authorizations, and other appropriate documents. Berry's Auto also required him to have an extra set of keys made for each vehicle to enable Berry's Auto to repossess the vehicle if the customer defaulted.

9. Prior to October 1999, Berry's Auto employed a lot attendant to set out vehicle keys, and to make certain that the vehicles were clean and arranged on the lot in an orderly manner. In October 1999, the lot attendant's employment ended. As a result, Berry's Auto asked Mayer to perform the duties previously performed by the lot attendant. Mayer accepted Berry's offer for which he was to receive a monthly salary of \$1,000.00 that was to be separate from the commissions he earned from car sales.

10. Mayer continued to receive \$1,000.00 per month for lot duties until March 15, 2000, when Berry announced that the lot work would thereafter be the responsibility of all the commissioned sales staff. As a result, Berry's Auto would no longer pay Mayer a salary for that work. Following Berry's March 15, 2000 announcement, Berry's Auto discontinued paying Mayer the additional salary for lot maintenance.

11. Mayer agreed to a straight monthly salary for the month of June 2000. At the beginning of July 2000, Berry's Auto hired another commission salesperson and decided to pay sales people on a commission basis with a guaranteed base salary. On or about July 1, 2000, Gale Berry met with Mayer and presented the pay plan which was to become effective in July 2000.

12. On August 1, 2000, Berry's Auto gave Mayer a memo which set forth the following terms of the new pay plan (Exhibit 000047). The memo stated:

Per our meeting, you will be paid as follows:

1. You will be paid 30% of each payment once we have enough down to cover the cost of the car plus the \$300.00 pack. Your commission will be paid as we collect the payments.

2. You are guaranteed to make \$1,000.00 per month on commission. You'll receive your commissions on cash deals or \$1,000.00 minimum for the month, whichever is more.

13. Berry's Auto paid Mayer in accordance with the August 1, 2000 pay plan thereafter.

14. In the fall of 2000, Mayer's attitude toward his work began deteriorating. On January 15, 2001, Berry's Auto gave Mayer a memo which addressed some confusion Mayer had expressed about his job duties and company procedures. The memo stated that Mayer was being placed on 90 day probation at which time his performance would be reviewed. The January 15, 2001 memo, in part, stated:

Your pay is based on commissions. We've said that no matter what, you would make \$1,000.00 per month. This is not for commission, this is for the time you put in at the lot regardless of how much your commissions are. During this time, you are expected to perform the duties that have been discussed. While you are there, you have the opportunity to sell the customers and make commissions which should exceed the \$1,000.00 per month. Salary is not an option, your pay will depend on how many cars you sell and the gross you hold. This is standard to most car lots. You may take a \$750.00 draw on the 15th of each month. However, no second draw will be allowed unless there are extenuating circumstances, which I will approve. Your commission check will be to you no later than the 6th of the month from here on out.

15. In February 2001, Mayer's commissions were \$555.00 and in March 2001 were \$395.00. Berry's Auto paid Mayer \$1,000.00 for each of those months based on the guarantee.

16. Prior to January 15, 2001, Berry's Auto paid Mayer commissions from sales even when he failed to complete the required paperwork or have the extra set of keys made. Beginning January 15, 2001, when he was placed on probation, Berry's Auto advised him that he would not receive sales commissions unless he completed the paperwork and had a extra set of keys made for cars he sold.

17. Berry's Auto continued to be dissatisfied with Mayer's performance and attitude after January 15, 2001. On April 5, 2001, Berry's Auto presented Mayer with another memo setting forth a new pay procedure which stated as follows:

After review of the payment deals for February and March, Berry's Auto is implementing the following pay plan retroactive to February sales:

1. \$25.00 writeup fee to be paid in your monthly paycheck
2. Pack is \$300.00.
3. A \$100.00 license fee is mandatory. If there is no room this comes out of the gross.
4. Commission is 20% of the gross, which is to be paid after we are out of the car and as payments come in.
5. The maximum commission is \$400.00 per deal.
6. As discussed previously, your commission is not owed to you at the time of sale. It is contingent upon you making collection calls and the payments coming in. If we have to turn this over to someone else for collection, your commission is forfeit to pay collections.
7. Once again, you will not be paid on any deal that does not have paperwork and keys. If you do not do it by the time the 20-day expires, your commission/collection fees are forfeit.
8. Effective immediately, on all deals, the person who brings in a trade is responsible for getting the title, or a dupl. request (only if you have registration or proof that the car is licensed to them) with a power of attorney for each person on the title. You will not be paid on these deals unless your paperwork is complete and trade titles are received. What takes you a minute while the customer is there saves a lot of time in the long run. Do it right the first time.

18. Mayer decided not to accept the new pay procedure and terminated his employment effective immediately on April 5, 2001.

19. At the time Mayer resigned, Berry's Auto had contracts for a total of \$24,589.00 time payments that had not yet been paid by customers for sales Mayer had made. Commissions from those sales at a rate of 30% would be \$7,596.00 ($\$24,589.00 \times 30\%$).

20. Berry's Auto has never collected a large percentage of the commissions Mayer claims because the cars have been repossessed or the customers have quit paying on their vehicles.

21. Berry's Auto did not pay Mayer for any commissions on amounts collected after his resignation became effective on April 5, 2001, because under the company policy, it considered

sales people to have earned commissions only when the monies from a sale have been collected. Mayer's commissions were paid based on amounts that had been collected from sales.

22. Under the terms and conditions of employment, all employees engaged in sales, including Mayer, received commissions only when Berry's Auto actually received payment on the vehicle.

23. Berry's Auto has never paid sales employees commissions for amounts collected from customers after they have left employment. The practice gives commission opportunity incentives to other sales staff who pursue customers and collect payments on the unpaid balance for car sales made by former employees who are unable to participate in collection activities after their employment relationship has been severed.

24. After Mayer's resignation, Berry's Auto did not pay him commissions (30% of gross profit) for car sales that had been collected because he failed to complete the paperwork or have an extra set of keys made. These sales included:

\$471.00 for sale of Lincoln to Perez
30.00 for sale of Hyundai to Ollefson
30.00 for sale of Lincoln to McIntosh
\$531.00 Total

25. Berry's Auto provided cellular phones to Mayer and his wife for personal use at their request because they were unable to establish an individual account with the phone company. Under the agreement, Berry's Auto paid the monthly phone bills for the account. Mayer agreed to reimburse Berry's Auto by having the phone charges taken out of his monthly pay.

26. The cellular phone company charged Berry's Auto a \$400.00 disconnection fee following Mayer's resignation in order to discontinue the service of the cellular phones.

27. Berry's Auto deducted \$400.00 from Mayer's final paycheck to offset the disconnection fee cost.

28. Berry's Auto deducted \$151.00 from Mayer's final paycheck following his resignation for record keeping or payroll errors that had occurred during his employment.

29. Berry's Auto deducted \$76.00 from Mayer's final pay for advanced time off he had received prior to his resignation which it categorized as unearned vacation time off.

30. Berry's Auto paid Mayer on a bi-weekly basis from November 1, 1998 through September 30, 1999. It paid him on a monthly basis from October 1, 1999 thereafter. Mayer requested and received pay advances prior to the end of the designated pay periods during the course of his employment.

31. Prior to the January 15, 2001 memo, Berry's Auto did not have a specified pay day. Following each pay period, Berry's Auto calculated Mayer's commissions based on the payments received from customers, then issued Mayer his commissions less advances. In the January 15,

2001 memo, Berry's Auto specified that the pay day for Mayer's commissions would be the 6th of the month.

32. On a few occasions, Berry's Auto paid Mayer more than 10 business days after the end of the pay period, as follows:

Pay Period End	Date Paid	Gross Amount	Advance	Total Paid Late
2/28/01	4/6/01	\$481.00	\$0.00	\$481.00
9/30/00	10/17/00	\$2,128.00	\$1,094.16	\$1,033.84
4/30/00	5/15/00	\$1,652.00	\$1,500.00	\$152.00
11/1/98	1/25/99	\$350.00	\$200.00	\$150.00

IV. DISCUSSION/RATIONALE

A. Identification of Respondent

Mayer filed his claim with the Department against Gale and Amy Berry and Berry's Auto/Berry's Cherries. In its investigation, the Department styled the claims as having been filed against Gale and/or Amy Berry, individually and/or as partners, d/b/a Berry's Auto, an assumed business name. The evidence presented at hearing established that Berry's Auto is the assumed business name of Berry's Cherries, Inc. Although some of Mayer's claims predate the incorporation of the business in August of 1999, the only compensation to which Mayer is entitled is for services performed after the incorporation. Thus, the caption of the case has been amended to reflect that the claim is also filed against Berry's Cherries, Inc. d/b/a Berry's Auto.

B. Applicable Law

Mayer claims he is entitled to unpaid wages for services performed while employed by Berry's Auto for monthly lot attendant fees, commissions, and improper withholding from his pay, and also for statutory penalties for late payment of wages. Therefore, this 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 any money due an employee by the employer including commissions. § 39-3-201(6), MCA; *Delaware v. K-Decorators, Inc.*, 1999 MT 13, 293 Mont. 97, 104-105, 973 P.2d 818.

Mayer claims he is entitled to the following amounts:

1. \$1,000.00 per month for lot attendant service performed from March 15, 2000 to April 5, 2001
2. \$950.00 in commissions for cash sales during February and March 2001

3. \$1,158.00 for wages improperly deducted from his final paycheck consisting of:

\$400.00 for phone disconnection fee
\$151.00 payroll errors
\$76.00 vacation pay
\$531.00 car sale commissions

4. \$7,596.00 in commissions on scheduled time payments he made that had not been collected at the time of his resignation on April 5, 2001

5. \$19,075.40 in penalties calculated at 110% for failure to pay wages pursuant to § 39-3-204, MCA, during the period from November 1998 through March 2001

1. Lot Attendant Fee from March 15, 2000 to April 5, 2001

Mayer contends that Berry's Auto owes him \$1,000.00 per month from March 15, 2000 to April 5, 2001 for performing lot attendant duties. The record shows that prior to March 15, 2000, Berry's Auto had entered into an agreement with Mayer under which he would be compensated at \$1,000.00 per month separate from his sales commissions for performing the lot attendant duties. However, effective March 15, 2000, Berry's Auto notified the sales staff, including Mayer, that all sales people would thereafter be responsible for performing the lot detail work without additional compensation over and above their commissions. Mayer maintains that he never agreed to the change Berry's Auto implemented related to the lot attendant work after March 15, 2000. However, an employee who continues to work after being notified that his compensation will be reduced has accepted the change in terms and conditions. § 28-2-503, MCA. Mayer continued his employment under the changed terms for more than a year after March 15, 2000, which supports a finding that he knew of and accepted the change in the terms of his employment. Mayer failed to establish that he is entitled to the lot fees during the period from March 15, 2000 until his resignation on April 5, 2001.

2. Commissions (\$950.00) for Car Sales Made in February and March 2001

Mayer seeks \$950.00 in commissions for cash sales he made in February 2001 (\$555.00) and March 2001 (\$395.00) over and above the \$1,000.00 guaranteed minimum salary based on the policy set forth in the January 15, 2001 memo he received from Berry's Auto. Berry's Auto contends that under the terms and conditions of employment, the \$1,000.00 minimum salary guarantee set forth in the August 1, 2000 and July 15, 2001 memos only applied when Mayer's commissions from cash and time pay sales did not exceed \$1,000.00.

The amount of commissions due from an employer to an employee is generally a matter of contract. *Keneally v. Orgain* (1980), 186 Mont. 1, 5, 606 P.2d 127. The August 1, 2000 memo is clear in addressing the guaranteed monthly salary for sales people. It indicates that sales people will receive commissions on cash and payment deals or \$1,000.00 for the month, whichever is more. Although the language of the January 15, 2001 memo is somewhat ambiguous, the evidence does not support a finding that there was a change implied or suggested in the January 15, 2001 memo that the claimant would receive commissions for cash sales over and above the guaranteed base salary. Therefore, Mayer was paid in accordance with the employment contract. Mayer is not entitled to the \$950.00 commissions for February and March 2001.

3. \$1158.00 Withheld from Final Paycheck

Section 39-3-204, MCA, requires employers to pay wages within 10 business days after they become due and payable. However, reasonable deductions may be made from an employee's wages for board, room and other incidentals supplied by the employer whenever such deductions are part of the conditions of employment, or other deductions provided by law. An employer cannot lawfully withhold wages for items such as shortages, mistakes, or other damages. 36 Op. Att'y Gen 17 (1975). An employer may make deductions voluntarily requested by an employee in his own behalf. *Christiansen v. Taylor Brothers, Inc.* (1987), 225 Mont. 318, 732 P.2d 841.

- a. \$400.00 cell phone disconnection fee: Mayer voluntarily entered into an arrangement with Berry's Auto where the costs incurred from the cell phones he and his wife used would be deducted from his pay. As a result of the agreement, costs incurred by Berry's Auto from those accounts was deducted from Mayer's wages while he was employed. The deductions from his wages for the costs of the cell phones were reasonable deductions in conformance with a voluntary arrangement requested by Mayer. *Christianson, supra*. Therefore, Mayer is not entitled to the cost of the disconnection fee.
- b. \$151.00 deducted for past payroll mistakes: Proper record keeping is always the responsibility of the employer. The amount withheld from Mayer's last paycheck for past payroll mistakes made by Berry's Auto is a deduction for a shortage or mistake. It was not a proper deduction and must be refunded to Mayer.
- c. \$76.00 deducted for vacation time: The evidence in the record does not support a finding that the deduction of vacation wages from Mayer's final paycheck was ever expressed or implied in the work agreement. Therefore, Mayer is entitled to recover this wage deduction.
- d. Commissions (\$531.00) for car payments which had been received at the time of Mayer's resignation: Berry's Auto deducted these commissions because he failed to assist with the required paperwork and to have an extra set of keys made. The commission sales people were expected to participate with those duties along with the business office staff. However, Berry's Auto had followed a practice of always paying commissions to Mayer when payments were collected even when he had not performed those duties. Therefore, paying commissions based on collection monies received was an established practice by Berry's Auto and Mayer was entitled to be paid for his services according to that practice under the work contract. Further, to the extent that Berry's Auto attempted to modify the work agreement retroactively on April 15, 2001 to support not paying commissions in these circumstances, that action was a forfeiture of wages already earned by Mayer. Forfeitures are prohibited by the wage statutes. *Langager v. Crazy Creek Products*, 1998 MT 44, 287 Mont. 445, 954 P.2d 1169. Mayer is entitled to \$531.00 in commissions.

4. Commissions for Uncollected Sales Following Mayer's Termination

Mayer alleges that he is entitled to \$7,596.00 in commissions on amounts from sales he transacted that had not been collected at the time he terminated his employment. Whether Mayer is entitled to these commissions depends on the employment contract. *Keneally, supra*. The employment contract in this case is based on Berry's Auto course of conduct with respect to commissions. There was a clear understanding under the terms and conditions of employment that no commissions were received by Mayer until after car sales payment amounts were collected. Mayer was always paid according to that practice. No salesperson employed by Berry's Auto has ever been paid commissions for amounts received after they left employment. The employment of all commission sales people required that the money from sales actually be collected before it was earned. Even if the contract allowed employees to receive commissions after separating from employment, Mayer provided no evidence to show the amount of collections after his resignation for which he would have been entitled to commissions. Mayer has not sustained his burden to prove that he is entitled to commissions from payments collected after his employment ended under the work contract. Based on the evidence, Mayer had no contractual right to claim commission for amounts which were not collected from sales at the time of his resignation.

5. Penalty for Late Payment of Wages

Mayer contends that many of his paychecks were not paid within 10 business days of becoming due and payable pursuant to § 39-3-204, MCA. He therefore contends that Berry's Auto owes him a penalty for late payment pursuant to § 39-3-206, MCA, which provides:

(1) An employer who fails to pay an employee as provided in this part or who violates any other provision of this part is guilty of a misdemeanor. A penalty must also be assessed against and paid by the employer to the employee in an amount not to exceed 110% of the wages due and unpaid

When the wages were due and payable is determined by reference to the employment agreement. In this case, the wages became due at the end of the pay period established by the employer. Prior to October 1999, this was at the end of each two week period. After October 1999, it was at the end of each month. Except for a portion of February 2001 commissions, and commissions earned in September 2000, April 2000, and November 1999, and except for the illegal withholdings at the conclusion of employment, Berry's Auto paid Mayer all commissions due within 10 business days of the day they became due.

Section 39-3-206, MCA, provides for the assessment of a penalty of up to 110%. The Department has adopted rules to implement § 39-3-206, MCA. Under these rules, no penalty is imposed prior to the issuance of a determination in the case, unless there were special circumstances. ARM 24.16.7551. All of the late wages for which Mayer is claiming the penalty were paid before the commencement of his claim. Thus, they were paid before any determination. The special circumstances referred to in the rule include failure by the employer to provide information to the Department, maintenance of false or misleading payroll information, prior violations of the wage and hour laws, and issuance of insufficient funds paychecks. None of these circumstances are implicated in this claim. Therefore, Mayer is not entitled to statutory penalty, except on the wages that were illegally withheld following his

separation from employment. Regarding the portion of his claim that relates to illegal withholding, Mayer is entitled to a 55% penalty. 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* (1978), 176 Mont. 31, 575 P.2d 925.

2. Berry's Cherries, Inc., was the employer of Benjamin J. Mayer in April 2001 when his employment terminated.

3. Berry's Cherries, Inc., violated § 39-3-204, MCA, by illegally withholding wages from Benjamin J. Mayer. Berry's Cherries, Inc., owes Benjamin J. Mayer \$758.00 in wages.

4. Berry's Cherries, Inc., is liable for a 55% penalty for failure to pay \$758.00 in wages when due. Berry's Cherries, Inc., owes Benjamin J. Mayer a penalty of \$416.90.

VI. ORDER

1. Berry's Cherries, Inc., is hereby ORDERED to tender a cashier's check or money order in the amount of \$1,174.90, representing \$758.00 in wages and \$416.90 in penalty, made payable to, 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.

2. The claims against Gale and Amy Berry as individuals or partners are dismissed.

DATED this 26th day of November, 2002.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ MICHAEL T. FURLONG

MICHAEL T. FURLONG
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.