

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

IN THE MATTER OF THE WAGE CLAIM) Case No. 649-2002
OF BRENDA D. OLSON,)

Claimant,)

vs.)

MTRIARCH CONSTRUCTION, INC.,)
a Montana corporation,)

Respondent.)

**FINDINGS OF FACT;
CONCLUSIONS OF LAW;
AND ORDER**

I. INTRODUCTION

On October 18, 2001, Claimant Brenda Olson filed a claim with the Montana Department of Labor and Industry, alleging she was owed \$300.00 in wages for services performed during the period of July 25 through August 29, 2001. The Wage and Hour Unit conducted an investigation and found that the Respondent, Matriarch Construction, Inc., owes the Claimant \$300.00 for work performed during the period of employment, pursuant to § 39-3-205, MCA. The determination also found the Claimant entitled to penalty pursuant to § 39-3-206, MCA. The Respondent denies owing any money to the Claimant on the basis that she was an independent contractor and that there was never an employee/employer relationship. The matter went to the Department's Independent Contractor Centralized Unit (ICCU) to make a determination whether or not an employee/employer relationship existed between the parties. On November 29, 2001, the ICCU issued a determination finding that the Claimant was an employee rather than an independent contractor while performing services for the Respondent during the period from July 25 through August 29, 2001.

Michael T. Furlong conducted a telephone hearing in this matter on July 2, 2002. The Claimant appeared and represented herself. Donna Peters and Steve Dozhier appeared as Claimant witnesses. The Respondent was represented by Craig Stevens, corporation president. Nancy Arkell appeared as a Respondent witness.

Claimant's Exhibits 1 through 7 and Respondent's Exhibit A were admitted into evidence. The Claimant and Respondent stipulated that file Exhibits 1 through 15 would be admitted into evidence.

II. ISSUES

1. Whether the Claimant performed services as an employee or an independent contractor pursuant to the law.
2. Whether the Respondent owes wages to the Claimant pursuant to §39-3-205, MCA.
3. Whether the Respondent owes penalty to the Claimant pursuant to §39-3-206, MCA.

III. FINDINGS OF FACT

1. Brenda Olson has been employed as a payroll clerk and bookkeeper by several employers for the last seven years. She currently works as a payroll technician for Tire-Rama where she has been employed for approximately 18 months. In addition to her experience in doing payroll, she has completed 12 months of formal education course work in bookkeeping.

2. Craig Stevens is owner and president of Matriarch Construction, Inc. The business is engaged in logging, lumber, and general timber business activities.

3. Steve Dozhier has been employed primarily in the construction industry for 25 years. In or about June 2001, he was hired by Stevens as a construction manager for the company.

4. Dozhier had been an acquaintance of Olson for some time and familiar with her bookkeeping skills and abilities.

5. Shortly after being appointed construction manager, Dozhier noticed problems arising because payroll checks were not being issued on time to employees causing some unrest between them. Stevens had been performing the weekly payroll tasks himself but was having problems getting the payroll done on time because of his other responsibilities. Dozhier approached Stevens about the matter and suggested hiring Olson to do the payroll to correct the problem.

6. Stevens concurred to have Dozhier contact Olson to see if she was interested in doing the company payroll. As a result, Dozhier met with Olson and discussed with her the possibility of her doing the company payroll.

7. Olson accepted Dozhier's offer following their meeting. She agreed to do the payroll on Wednesday evenings. She also made an agreement with Dozhier that she would receive \$50.00 per week.

8. After meeting with Dozhier, Olson went to the business office where she was introduced by Dozhier to Stevens. At that time, Stevens showed Olson the current company bookkeeping procedures for preparing payroll records and issuing checks.

9. Olson thereafter reported to the corporation office each Wednesday evening beginning July 25, 2001 through August 29, 2001. She completed the payroll each week following the instructions she received from Stevens. She also made out the workers' paychecks she was required to give to Stevens for his approval and signature before she mailed them out to the seven individual employees.

10. Olson used office space, equipment and supplies provided by Matriarch Construction to carry out the work which included the payroll check forms, envelopes, stamps, computer, printer, calculator, and copier.

11. During the first four weeks, she performed the payroll and bookkeeping by hand entries. However, on August 29, 2001, Stevens implemented a new business computer payroll system. He showed Olson the procedures to use in order to enter the payroll data on the computer. As a result, Olson completed the August 29, 2001 payroll using the new software package on the computer. She then had Stevens sign the checks before she issued them.

12. On August 29, 2001, Stevens indicated to Olson that her request for \$50.00 per week for doing the payroll was too high. He offered Olson a weekly amount of \$20.00 which she indicated was not enough.

13. When Olson finished with the payroll on August 29, 2001, she left Stevens a written notice that she would no longer perform the services because she believed that the wage he offered her of \$20.00 was not adequate and less than what they had previously agreed to.

14. Olson was never remunerated for any of the payroll services she performed for Matriarch Construction.

15. Olson does not perform payroll or bookkeeping tasks as an independent contractor for any other employers. She depends on the wages she receives from Tire-Rama for her source of income and livelihood.

IV. DISCUSSION/RATIONALE

Matriarch Construction alleges that there was never an employee/employer relationship between it and Olson. Stevens alleges he never in effect hired Olson and she was never on payroll as were other employees. Stevens further contends that he never authorized Dozhier to hire Olson in the capacity of an employee of Matriarch Construction. She was not paid by the hour as other employees under the arrangement for her to do the payroll and she never filled out the appropriate documents to show that she was an employee as other employees had to do. She was never issued a W-4 form and in the work agreement she set the cost she would charge for performing the company's payroll.

Olson asserts that at the time she was hired to do the company payroll on a weekly basis it was her understanding that she was engaged in an employee/employer relationship with Matriarch Construction for which it was agreed she would be paid \$50.00 per week. At no time did she offer her services in an independent contractor capacity.

The first issue to be decided in this case is whether Olson performed services as an independent contractor or an employee of Matriarch Construction. The Montana Supreme Court, in State ex rel. Ferguson v. District Court, 164 Mont. 84, 88, 519 P.2d 151, 153 (1974), determined that the primary test in determining whether or not an employer/employee

relationship exists is the control test. This test corresponds to §39-71-120(1)(a), MCA, and consists of four factors, which are: (1) direct evidence of right or exercise of control; (2) method of payment; (3) furnishing of equipment; and (4) right to fire. Sharp v. Hoerner Waldorf Corporation, 178 Mont. 419, 425, 584 P.2d 1298, 1301 (1978).

In Solheim v. Tom Davis Ranch and State Compensation Insurance Fund, 208 Mont. 265, 677 P.2d 1034 (1984), the Court noted at page 329 that:

The consideration to be given to the four factors is not a balancing process, rather *** independent contractorship *** is established usually and only by convincing accumulation of these and other tests, while employment, *** can, if necessary, often be solidly proven on the strength of only one of the four items "above".

The Court also indicated in Solheim, supra, that all four factors would have to be proved to establish an independent contractorship, but only one of the factors could be used to establish an employer/employee relationship, even though the evidence on the other three factors was inclusive or contradictory.

The question of control pursuant to the above law is to be approached from the standpoint of whether the person who does the service represents the will of the employer as to the result of the work done or the means in which it is accomplished. The former bespeaks the independent contractor relationship, and the latter bespeaks the employee relationship. Kirby Company of Bozeman vs. Employment Security Division, 614 P.2d 1040, 1044 (Mont. 1980).

The record shows that Brenda D. Olson was an employee of Matriarch Construction. It was her understanding from the time she was contacted and met with construction manager Dozier and corporate president Stevens in July 2001, that she was to perform the payroll services as an employee. Thereafter, the payroll tasks performed by Olson was not free of control from Matriarch Construction. This is clearly indicated by the fact that Matriarch Construction controlled the means whereby the projects were to be accomplished by furnishing Olson with the primary work place and all essential supplies and equipment in order to do her payroll tasks. Stevens instructed Olson as to the established procedures she was to apply when performing the payroll tasks. It was mandatory for Olson to give the employee paychecks to Stevens for him to examine and sign before they could be issued. Since there was a verbal contract, Stevens had the right to terminate Olson if he determined it appropriate. Either Stevens or Olson could sever the relationship without incurring liability due to the verbal nature of the contract. Such is sufficient to find control and direction.

The second or "b" prong of the statutory test found under § 39-71-120 (1), MCA, is whether Olson was customarily engaged in an independently established trade, occupation, profession or business. There is no evidence that Olson has held herself out to the public as an independent contractor. She is not registered with the State of Montana in the status of an independent contractor. She has no contracts to perform payroll and bookkeeping services with other business entities. She learned of the work at Matriarch only upon being contacted by the construction manager for the company who asked if she would be interested in the payroll job. Olson's primary source of income is from her employment with Tire-Rama which she depends on for her livelihood.

Olson accepted Matriarch Construction's offer to pay her \$50.00 per week to do the company payroll tasks. Olson's testimony that she was to be paid that amount under the terms of the work

agreement was corroborated by the construction manager, Dozier, who initially contacted Olson, with authorization from corporation president Stevens, to hire her to do the employee payroll duties. The record further supports a finding that Olson was suffered and permitted to perform the weekly payroll services from July 25 through August 29, 2001 (six weeks). She was never paid for providing those services. Under the circumstances, Matriarch Construction violated § 39-3-204, MCA, by failing to pay wages to Brenda D. Olson in the amount of \$300.00 (6 weeks x \$50.00).

Brenda D. Olson is also entitled to statutory penalty pursuant to § 39-3-206, MCA, and ARM 24.16.7561. Because Matriarch Construction failed to pay Olson any wage, in accordance with ARM 24.16.7561, a penalty of 110% of the wages determined is due and owing. Matriarch Construction owes Brenda D. Olson penalty in the amount of \$330.00 (\$300.00 x 110%).

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. Matriarch Construction, Inc., a Montana corporation, violated §§39-3-204 and 39-3-205, MCA, by failing to pay Brenda D. Olson wages when due. Matriarch Construction, Inc., owes Brenda D. Olson \$300.00 in wages.

3. Matriarch Construction, Inc., is liable for a penalty of 110% for failure to pay wages when due. Matriarch Construction owes Brenda D. Olson a penalty of \$330.00.

VI. RECOMMENDED ORDER

Matriarch Construction is hereby **ORDERED** to tender a cashier's check or money order in the amount of \$630.00, representing wages and penalty, made payable to Brenda D. 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.

DATED this 30th day of July, 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.