

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

IN THE MATTER OF THE WAGE CLAIM)	Case No. 1697-2003
OF CALE J. KELLEY,)	
)	
Claimant,)	
)	FINDINGS OF FACT;
vs.)	CONCLUSIONS OF LAW;
)	AND ORDER
M AND M DRYWALL,)	
a Montana corporation,)	
Respondent.)	

I. INTRODUCTION

In this matter, Petitioner Cale Kelley (Kelley) seeks payment for work he completed for Respondent M & M Drywall (M & M). The Wage and Hour Unit determined that M & M owed Kelley \$540.00 in unpaid wages. M & M has appealed from that determination.

Hearing Examiner Gregory L. Hanchett convened a contested case hearing in this matter on October 20, 2003. Kelley represented himself and testified under oath. Patty Plew represented M & M and also testified under oath. The parties stipulated to the admission of Exhibits 000001 through 000045. Based upon the evidence presented at the hearing, the hearing examiner finds that M & M owes Kelley unpaid wages. The reasoning that supports this determination follows.

II. ISSUE

Does M & M owe wages for work performed as alleged in Kelley's complaint and owe penalty as provided by law?

III. FACTS

1. M & M placed an advertisement at the Kalispell, Montana Job Service Office seeking dry wall installers and offering to pay the installers on an hourly basis. Kelley responded to the advertisement and M & M hired him as a drywall installer on February 10, 2003. M & M agreed to pay Kelley \$10.00 per hour for his work.

2. Kelley worked eight hours each day on Monday, February 10 through Friday, February 14, 2003 for a weekly total of 40 hours. He also worked eight hours on February 17 and six hours on

February 18, 2003 for a weekly total of 14 hours. All together, he worked 54 hours between February 10 and February 18, 2003.

3. Kelley reported to various job sites as directed by M & M. M & M set Kelley's work schedule. Kelley reported his work hours to M & M on a weekly basis by preparing a time sheet which reflected the number of hours Kelley worked each day. In addition, M & M directed Kelley in how he was to complete his work.

4. On February 18, 2003, M & M informed Kelley that his hourly wage would be reduced to \$6.00 per hour. This was not acceptable to Kelley, so he quit. M & M Drywall refused to pay Kelley any wages for the hours he worked.

IV. DISCUSSION

A. M & M Owes Kelley Unpaid Wages.

At the hearing, M & M did not dispute that it had not paid Kelley for any of the 54 hours of work that he completed. Despite the contrary finding of the Independent Contractor Central Unit, M & M clings to the notion that Kelley was an independent contractor. The facts of this case do not support that contention.

Montana law requires that employers pay employees wages when due, in accordance with the employment agreement, pursuant to Mont. Code Ann. § 39-3-204. For that law to apply, there must be an employer-employee relationship. An employee is defined as "any person who works for another for hire." Mont. Code Ann. § 39-3-201(4). The term "employ" means "to permit or suffer to work." Mont. Code Ann. § 39-3-201(3).

To be an independent contractor, the worker must be free from control over performance of services and the worker must be customarily engaged in an independent trade, occupation, profession and business. *Sharp v. Hoerner Waldorf Corp.*, (1978), 178 Mont. 419, 584 P.2d 1298. The control test is determined by considering four factors, (1) direct evidence of right or exercise of control; (2) method of payment; (3) furnishing of equipment; and (4) right to fire. *Sharp, supra*, 178 Mont. at 425, 584 P.2d at 1302. The *Sharp* Court specifically held "that the consideration to be given these factors is not a balancing process, rather . . . independent contractorship . . . is established usually only by a convincing accumulation of these and other tests, while employment . . . can if necessary often be solidly proved on the strength of one of the four items [above]." *Id.*

M & M controlled Kelley's work. It directed him in his day to day work (the jobs to be accomplished) and the manner in which the job was to be performed. M & M required Kelley to be at M & M's job site daily. He worked a schedule set by M & M: 8:00 a.m. to 4:30 p.m., Monday through Friday.

Moreover, M & M paid Kelley on a time basis (hourly) as opposed to a completed project basis. As the *Sharp* court recognized, payment on time basis is a strong indicator of employee status. These two factors alone-- control and method of payment-- demonstrate that Kelley was

an employee, not an independent contractor. Thus, M & M cannot rely on its independent contractor argument as a defense to this wage claim.

B. A Claim Of Poor Workmanship Does Not Offset Payment Of Wages.

M & M further argued that Kelley is not entitled to be compensated because some of his work was substandard. Kelley refutes this contention. Poor performance may provide a basis for disciplinary action or discharge, but employees are entitled to their pay for the hours they have already worked. Wages earned are due and payable. Mont. Code Ann. § 39-3-204. Therefore, even if M & M proved that Kelley completed substandard work, that would not relieve M & M of its statutory obligation to pay wages when they are due.

C. Penalty

Montana law assesses a penalty when an employer fails to pay wages when they are due. Mont. Code Ann. §39-3-206. For claims involving compensation other than minimum wage and overtime compensation, a penalty of 55% must be imposed in the absence of certain circumstances, none of which apply to this case. Admin. R. Mont. 24.16.7566. Applying this regulation, M & M owes penalty in the amount of \$297.00 (55% of \$540.00) for the unpaid regular wages due to Kelley.

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

2. M & M owes Kelley compensation for wages due and unpaid in the amount of \$540.00.

3. M & M is liable to Kelley for a statutory penalty in the amount of \$297.00 which represents 55% of the wages due and unpaid.

VI. ORDER

The respondent, M & M Drywall IS HEREBY ORDERED to tender a cashier's check or money order in the amount of \$837.00, representing \$540.00 in unpaid wages and \$297.00 in penalty, made payable to Cale M. Kelley and delivered to the Employment Relations Division, P.O. Box 6518, Helena, Montana 59604-6518 no later than 30 days after the date of this decision.

DATED this 25th day of November, 2003.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU
By: /s/ GREGORY L. HANCHETT

GREGORY L. HANCHETT
Hearing Officer

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

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 Mont. Code Ann. § 39-3-212. Such an application is not a review of the validity of this Order