STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM OF PATRICIA MASON,	)	**Case No. 33-1997**
Claimant,	)	
vs.	)	***FINAL AGENCY DECISION***
EVE ART,	)	
Respondent.	)	

*** * * * * * * * * * * ***

I. INTRODUCTION

The Hearing Officer convened a hearing on the claimant's wage claim on April 9, 2003. The claimant Patricia Mason attended on her own behalf and testified. Respondent Eve Art attended accompanied by her attorney, Michael J. San Souci, and testified. Counsel for the department's Wage and Hour Unit, Julia Swingley, attended the hearing by telephone. Cynde Swandal testified by telephone, by agreement of the parties. The hearing officer's exhibit table accompanies this decision. On May 19, 2003, the respondent filed the last post hearing brief and this matter was submitted for decision.

II. ISSUE

The issue in this case is whether Eve Art owes wages (based upon overtime rates) for work performed, as alleged by Patricia Mason's complaint.

III. FINDINGS OF FACT

1. In January 1996, Eve Art hired Patricia Mason as one of the persons providing home care to Art's elderly and infirm mother, Irene Schmolka, in the residence at Chico Hot Springs, Pray, Montana. Art and her husband have owned and operated the resort at Chico for many years. Art's arrangement with Mason was unrelated to the resort, except that the resort provided some meals without charge to Mason, as it did to resort employees. Mason and Art agreed that Art would pay Mason $8.00 per hour and that Mason would be responsible for Schmolka the entire time she was at the residence, where she would sleep and eat while providing the care. They also agreed that Mason would be responsible for her own taxes and that Art would pay the entire agreed amount to Mason without any kind of withholding. They did not discuss overtime.

2. Mason was on Social Security Disability benefits, and this was a "trial work period" for her. She understood that she would be responsible for her own taxes.

3. Art applied for government assistance in the home care of Schmolka. She and Mason reached an agreement with Bozeman Home Care Services, an entity approved for provision of such home care services as the government would assist in providing. Bozeman Home Care Services "hired" Mason in March 1996, agreeing to pay her $6.00 per hour for up to 8 hours a day to a maximum of 40 hours a week. For those hours, Art paid the balance of the $8.00 per hour that she and Mason had agreed upon, and the entire $8.00 per hour for all additional work hours.

4. Mason neither applied for nor obtained a State of Montana Independent Contractor Exemption from the Department of Labor and Industry. She and Art never discussed her status in terms of "independent contractor."

5. Art had the absolute right to control Mason's work. The nurses who cared for Schmolka provided training to Mason and the other women who provided lay care to Schmolka. Art decided how Mason would work, when Mason would work and what Mason would do.

6. Art paid Mason on an hourly basis, for each hour Mason was present and responsible for care of Schmolka.

7. To the extent that any equipment was necessary for Schmolka's care, such as medical accessories, Art arranged for the provision of the equipment.

8. The agreement between Art and Mason had no definite term. Either party was free to end the agreement at will.

9. Mason slept and ate at the residence while caring for Schmolka, usually in 24 hour shifts, often in consecutive 24 hour shifts. During the entire time Mason continued to maintain her own residence, within Montana, separate and apart from the home in which Schmolka resided. The arrangement between Mason and Art did not involve interstate commerce.

10. Schmolka worsened and eventually died. Mason last worked for Art as Schmolka's caretaker in November 1996.

11. From the beginning of January 1996 through November 1996, Mason worked 3,816 hours, including 2,043 hours of overtime (hours worked in excess of 40 during a week). Art and Bozeman Home Care Services paid Mason a total for $30,528.00 for the entirety of her work, which was exactly $8.00 per hour for all hours she worked. Art owes her an additional $8,172.00 in wages, $4.00 per hour for her 2,043 hours of overtime. 110% of the wages owed is $8,989.20.

12. On January 23, 1997, Mason filed a wage and hour claim with the Department of Labor and Industry, alleging that she was entitled to overtime wages for the hours in excess of 40 per week that she had worked for Art. The Department determined that Art owed Mason $8,172.00 in overtime premium pay. On redetermination, the Department gave notice that unless Art paid

the wages due and the 55% penalty assessed by November 27, 2000, the 110% statutory penalty would apply.

IV. Opinion

Employment Status

Montana law requires employers to pay employees 1.5 times their hourly rate for all hours worked more than 40 per week. Mont. Code Ann. § 39-3-405(1). For that law to apply, there must be an employer-employee relationship. The prior determination of the Workers' Compensation Court, as that Court specifically noted, did not reach whether Art employed Mason for purposes of wage and hour claims, that issue being beyond the jurisdiction of the Court.

The law applies a two-part test (control and independent trade), pursuant to Mont. Code Ann. § 39-51-201(15) and *Sharp v. Hoerner Waldorf Corp.* (1978), 178 Mont. 419, 584 P.2d 1298, to address independent contractor status for wage and hour purposes. To be an independent contractor Mason must render services in the course of an occupation, be free from control or direction over the performance of services and engage in an independently established trade, occupation, profession or business. Mont. Code Ann. § 39-51-201(15). *Sharp v. Hoerner Waldorf Corp*, ***supra***, recognizes four factors in determining if the right to control exists: (1) direct evidence of right or exercise of control; (2) method of payment; (3) furnishing of equipment; and (4) right to fire. All four factors indicate that Mason was an employee of Art.

The parties never considered or discussed overtime. They never considered or discussed whether Mason was an employee or an independent contractor. The testimony to the contrary was not credible. The parties did agree that Art would pay the gross wages due, without any withholding. The testimony of Art's former bookkeeper and Mason's friend, Swandal, confirmed the "gross wages, no deductions" testimony, but did not credibly confirm either the alleged insistence upon Social Security withholding or the alleged agreement upon independent contractor status. Mason's testimony that she adamantly insisted upon Social Security withholding was not particularly credible and even if accepted would not have made any great difference. Art's testimony that the two women agreed Mason would be an independent contractor was not at all credible. Apart from this business relationship with Mason, Art's long experience in the handling of employees and operation of a business makes it inherently incredible that she would fail to document such an agreement with a written contract.

The issues of overtime and independent contractor status never came up between Mason and Art until after they had completed the performance of their agreement. Only when Mason filed a claim for overtime did that issue arise. Only when Art interposed an independent contractor defense did that issue arise.

The parties never reached an enforceable agreement about Mason's status that could modify the applicable law. Pursuant to Mont. Code Ann. § 39-51-201(15) and *Sharp*, ***op. cit.***, the parties cannot simply agree that their relationship was one of independent contract and thereby defeat the meaning and intent of the law. To be an independent contractor, Mason had to engage in an

independently established trade, occupation, profession or business, as well as to be free from Art's control or direction over the performance of services. There was no evidence that Mason engaged in an independently established trade, profession or business. The parties never actually did agree that Mason was an independent contractor, but even if they had, saying it was so would not have made it so, since Mason could not waive her right, established as a matter of public policy, to higher wages for her overtime work. *In re Hoehne v. Sherrodd, Inc.* (1983), 205 Mont. 365, 668 P.2d 232, 234-35. Art employed Mason.

Applicable Law and Preemption Analysis

Art argued that the Fair Labor Standards Act exempted the employment relationship with Mason from any overtime requirements. In 1996, the FLSA excluded live-in companionship services for the aged or infirm from federal overtime laws. 29 U.S.C. § 213(a)(15); 29 C.F.R. 552.6. Montana later adopted essentially the same exclusion, Chap. 179, Laws 1999. Mont. Code Ann. § 37-3-406(1)(p).

A new enactment by the Montana Legislature is not retroactive unless expressly made so. Mont. Code Ann. § 1-2-109. An amendment is a new enactment as of the effective date of the amendment. Mont. Code Ann. § 1-2-203. A substantive enactment that would alter the rights and relations of the parties as applied to their interaction prior to that enactment is not given retroactive effect absent a clear legislative mandate. *Porter v. Galarneau* (1996), 275 Mont. 174, 911 P.2d 1143, 1148-49. Applying the 1999 amendment to the 1996 relationship between Mason and Art would radically alter their rights and there is no clear legislative mandate, so the amendment does not apply retroactively. Mason earned overtime.

The FLSA exemption did not itself preempt Mason's overtime entitlement. The FLSA expressly provides for the validity and enforcement of any other wage laws providing for higher or better wage requirements. *Berry v. KRTV Communications, Inc.* (1993), 262 Mont. 415, 865 P.2d 1104, 1111; *Plouffe v. Farm & Ranch Equip. Co.* (1977), 174 Mont. 313, 570 P.2d 1106, 1108-09. Montana law provides for the application of FLSA penalty provisions instead of Montana penalty provisions, but since the parties were not engaged in interstate commerce, the FLSA does not apply. Mont. Code Ann. § 39-3-408(1).

Remedies

Neither party knew anything about the applicable overtime laws. If they had, perhaps Art would have offered a lower base wage, with overtime, ***i.e.***, $6.00 per hour regular time for eight hours and $9.00 per hour overtime for sixteen hours, resulting in the same pay as they both thought Mason would receive under their $8.00 per hour agreement. Perhaps Mason would have accepted such an offer. That is not what transpired, and the impact of the mutual ignorance of the parties cannot now be ameliorated. They agreed upon $8.00 per hour. Since Mason was an employee, the result inevitably follows from application of the 1996 Montana laws that she is entitled to overtime pay of 1.5 times her normal hourly wage for all hours more than 40 she worked each week. Art's counsel has presented numerous ingenious arguments and interpretations of the law, but the applicable law is clear. Art may well have acted entirely in

good faith, but her liability arises despite that fact. Art's good faith is not a valid defense to the penalty. ***E.g.***, *Rosebud County v. Roan* (1981), 192 Mont. 252, 627 P.2d 1222, 1228.

The state overtime law incorporates the provisions of part 2, chapter 3, Title 39 of the Montana Code for enforcement of an overtime claim. Mont. Code Ann. § 39-3-407. The provisions of part 2, chapter 3, Title 39 provide for an employee to recover the wages due plus a penalty to be assessed against an employer and paid to the employee in an amount not to exceed 110% of the wages due and unpaid. Mont. Code Ann. §§ 39-3-206(1) and 39-3-207. The rules of the department provide that for overtime violations, the full 110% penalty should be imposed for any amounts not paid within the time specified in the department determination. ARM 24.16.7561. This case is an overtime case, timely payment was not made and the full 110% penalty is therefore applicable.

V. Conclusions of Law

1. The State and the Commissioner of the Montana Department of Labor and Industry have jurisdiction over this complaint. Mont. Code Ann. § 39-3-201 ***et seq.***; *State v. Holman Aviation* (1978), 176 Mont. 31, 575 P.2d 925.

2. Eve Art employed Patricia Mason in January through November 1996, and Mason was entitled under Montana law to overtime pay of 150% of her agreed hourly wage for hours in excess of 40 worked in a week, only receiving 100% of her hourly wage for her overtime hours. Eve Art owes Patricia Mason unpaid overtime wages in the amount of $8,172.00, representing the additional $4.00 per hour for Mason's overtime hours. Mont. Code Ann. § 39-51-201(15) and § 49-3-405(1).

3. Art owes Mason a statutory penalty of 110% of the unpaid overtime wages, in the amount of $8,989.20, pursuant to Mont. Code Ann. § 39-3-206(1) and Admin. R. Mont. 24.16.7561.

VI. Order

Eve Art is ORDERED to tender a cashier's check or money order for $17,161.20 ($8,172.00 in wages and $8,989.20 in penalty), payable to PATRICIA MASON, 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 23rd day of June, 2003.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU
By: /s/ TERRY SPEAR
Terry Spear
Hearing Officer

NOTICE OF REVIEW RIGHTS: You are entitled to obtain administrative review of this Order pursuant to Mont. Code Ann. §§ 39-3-216 and 39-3-217. You can obtain review by filing a written notice of appeal postmarked no later than July 11, 2003 . This appeal time includes the 15 days provided for in Mont. Code Ann. § 39-3-216(3), 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

ENFORCEMENT STATEMENT: If there is no appeal filed and no payment 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.