

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

IN THE MATTER OF THE WAGE CLAIM)	Case No. 836-2003
OF MICHAEL D. COLLETT,)	
)	
Claimant,)	
)	FINDINGS OF FACT;
vs.)	CONCLUSIONS OF LAW;
)	AND ORDER
ADVANTAGE ROOFING, INC.,)	
A MONTANA CORPORATION,)	
)	
Respondent.)	

I. INTRODUCTION

Michael Collett (Collett) filed a wage claim against Advantage Roofing, Inc. (Advantage) alleging that Advantage owed him wages in the amount of \$680.00. On December 10, 2002, a compliance specialist from the Wage and Hour Division issued a determination that Advantage owed Collett \$227.50 in unpaid wages and \$125.13 in penalty. Advantage timely appealed this determination.

Hearing Officer Gregory L. Hanchett convened a contested case hearing in this matter on July 15, 2003. Michael Collett appeared on his own behalf and testified under oath. Bill Manning, president of Advantage Roofing, appeared on behalf of Advantage and testified under oath. Travis Williams, a former employee of Advantage, also testified under oath. Documents 1 through 27 were admitted into evidence by stipulation of the parties. Based upon the evidence and arguments presented at the hearing, the hearing officer finds, for the reasons that follow, that Advantage owes Collett \$175.10 and that a 110% penalty in the amount of \$192.61 should be imposed.

II. ISSUE

Does Advantage owe Collett wages for work performed as alleged in the complaint?

III. FINDINGS OF FACT

1. Advantage Roofing completes roofing projects in Billings, Montana.

2. Advantage contracted to complete tear offs and re-roofing of two homes in Billings, one located at 35th Street and St. Johns (St. Johns project), and the other on 19th Street (19th Street Project).

3. Rick Elder contacted Collett and told him that Advantage was looking for people to complete the tear-off work. Elder himself was in the employ of Advantage as demonstrated by the Elder's pay stub (Document 20).

4. On September 4, 2002, Elder and Collett went to Manning's home to obtain a ladder and then go and begin the tear-off on the St. Johns project.

5. Collett worked at the St. Johns project for 7½ hours on September 4 and 7½ hours on September 5, 2002. On September 6, he worked 6 hours on the project and on September 11, 2002, he worked 6½.

6. Elder and Collett then worked on the 19th Street project for 7½ hours on September 12, 2002.

7. Collett kept a handwritten log of the hours he had worked at the two projects. He gave this to Elder to give to Manning in order to obtain payment for his work. Collett believed Manning was responsible for paying him.

8. Elder and Collett went to Manning's house to obtain payment. While Collett waited in the truck, Elder approached Manning. Some type of argument erupted between Elder and Manning. Manning gave Elder a check for \$680.00 and told both Elder and Collett to get off of Manning's property.

9. Elder kept this check for himself, apparently believing that his and Manning's deal called for far greater payment for Elder than the \$680.00 Elder had received.

10. Manning permitted Elder and Collett to do work for Manning even though Manning was aware that Elder had no separate business license and that he did not maintain any workers' compensation.

11. Collett received no payment from Manning.

12. Collett and Advantage had no agreement between them as to Collett's hourly wage for the work.

IV. DISCUSSION

A. Advantage Employed Collett

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).

Collett maintains that he was to be paid by Manning. Advantage maintains that Collett worked for Elder, not Advantage, and that Elder is responsible to pay Collett. The hearing officer resolves the conflict in testimony on this issue in favor of Collett. Elder told Collett that Advantage needed workers to tear off roofs. Collett and Elder went to Manning's home to obtain a ladder to begin work at the St. Johns project. Collett kept a record of hours worked that he gave to Elder to give to Manning for payment. And, while Advantage indicates that it did not hire Collett, it does not dispute that Collett completed work on both the St. Johns project and the 19th Street project. Collett was in the "employ" of Advantage in that Manning permitted Collett to work on both the St. Johns project and the 19th Avenue project. As the Montana Administrative Regulations provide, "it is the duty of management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them." Admin. R. Mont. 24.16.1005(3).

Advantage's efforts to show that Elder was an independent contractor, and thereby bolster its argument that Collett's contract for employment was with Elder, does not square with the facts of the case. First, Advantage made no effort at the hearing to explain Elder's pay stub (Document 20) and the inference regarding employment to be drawn from that document. That document shows that Advantage deducted for withholding, social security, and medicare employee taxes from the \$680.00 check provided to Elder. This evidence is alone sufficient to demonstrate that Advantage employed Elder and thus lend credibility to Collett's testimony that Elder recruited him to work for Advantage.

Second, neither Elder nor Collett can be deemed to be independent contractors on the face of the record before this hearing examiner. 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.*

Advantage controlled the work that Elder and Collett engaged in. Advantage directed them to the two jobs, provided a ladder to them to begin the work at the St. Johns project, and Manning told Elder and Collett to get off the jobs when he became dissatisfied with their work. Advantage thus controlled both Elder and Collett in the performance of tearing off the roofs.

Moreover, Elder and Collett were not customarily engaged in an independent trade, occupation, profession or business. Each of them tore off roofing material. Neither side presented any evidence to suggest that removal of roofing material is a recognized trade, profession or business. To the contrary, tearing off roofing material is simply one facet of the entire process of

roofing. The evidence in this matter establishes that Collett was in the employ of Advantage when he completed his work on the St. Johns and 19th Street projects.

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

Advantage further argues that Collett is not entitled to be compensated because Collett's work was substandard. 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 Advantage proved that Collett completed substandard work, that would not relieve Advantage of its statutory obligation to pay wages when they are due.

C. Collett Is Due \$175.10 in Unpaid Wages.

The compliance specialist for the Wage and Hour Division determined that Advantage owed Collett for 34 hours of work at \$6.50 per hour. It is clear from the testimony at the hearing, however, that there was no agreement between Collett and Advantage as to the amount of hourly wage to be paid to Collett. In the absence of such an agreement, Advantage is only required to pay the minimum wage prescribed by regulation. Mont. Code Ann. §§ 39-3-404 (1) and 39-3-408. The minimum wage presently prescribed by regulation is \$5.15 per hour. Admin. R. Mont. 24.16.1510(8). Multiplying the minimum wage by the number of hours Collett worked (34 x \$5.15) results in Collett being due \$175.10 in unpaid wages.

D. Imposition of 110% penalty is mandated.

The laws provide for wage claimants to recover their unpaid wages, plus a penalty of up to 110%. Mont. Code Ann. §§ 39-3-206 and 39-3-407. Because the compliance specialist did not perceive that this matter involved a claim for minimum wage, that examiner erroneously applied the 55% penalty provision of Admin. R. Mont. 24.16.7566. That penalty provision is not applicable to this case. Rather, the penalty provision set out in Admin. R. Mont. 24.16.7561 applies. That provision requires the imposition of a penalty equal to 110% of the wages due unless certain circumstances exist (none of which are applicable to this case). In this case, that penalty equates to \$192.61 (\$175.10 unpaid wages 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. Advantage owes Collett compensation for wages due and unpaid in the amount of \$175.10.

3. Advantage is liable to Collett for a statutory penalty of 110% of the wages due and unpaid, which is \$192.61.

VI. ORDER

The respondent, Advantage Roofing, Inc., IS HEREBY ORDERED to tender a cashier's check or money order in the amount of \$367. 71, representing \$175.10 in unpaid wages and \$192.61 in penalty, made payable to Michael D. Collett, 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 day of August, 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.