STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM OF NORMAN B. RHODES,	)	**Case No. 972-2002**
Claimant,	)	
vs.	)	**FINDINGS OF FACT; CONCLUSIONS OF LAW; AND ORDER**
JUSTIN INC., a Montana corporation d/b/a JUSTIN DODGE CHRYSLER DAEWOO JEEP,	)	
Respondent.	)	

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I. INTRODUCTION

This matter arises from a claim by Norman Rhodes (claimant) that he is due several thousand dollars in unpaid wages from Justin Dodge, Inc., (respondent). When the respondent did not respond to a request for information, the Wage and Hour Division of the Department of Labor and Industry rendered a default determination that the respondent owed the claimant $13,300.00 in unpaid wages and a 110% penalty in the amount of $14,630.00, for a total award of $27,930.00. The Wage and Hour Division subsequently issued a redetermination which reduced the amount due to the claimant to $7,900.00 and reduced the amount of the penalty to $8,690.00, for a total award of $16,590.00.

The respondent thereafter requested a contested case hearing to challenge the determination of the Wage and Hour Division. Hearing Officer Gregory L. Hanchett held a contested case hearing in this matter on March 11, 2003 and June 12, 2003. Brian T. Atcheson, Attorney at Law, represented the claimant. J. Richard Orizotti, Attorney at Law, represented the respondent.

The parties stipulated to admission of Exhibits 100 through 121. The parties further stipulated to the admission of Exhibits 122 (report of Linda Young), 123 (report of James Green), and 124 (a simulated signature which reads "Dusty Rhodes," prepared by James Green). Norman Rhodes, Brion Bethel, Craig Peterson, Jerry Joseph, Justin Todd, and Bob Anderson testified under oath as fact witnesses. Lynda Young and James Green, hand writing analysts, testified under oath as expert witnesses. Based on the evidence adduced at the hearing, the following findings of fact, conclusions of law, and final order are made.

II. STATEMENT OF ISSUE

Does the respondent owe wages for work performed as alleged in the claimant's complaint?

III. FINDINGS OF FACT

1. At all times material to this case, the respondent was duly incorporated in the State of Montana engaged in the business of selling cars.

2. During 2000, the respondent's sales were lagging. To increase sales, the respondent hired Craig Peterson to act as a consultant to the dealership. Peterson had previously run a successful automobile dealership in Idaho which had consistently maintained a high volume of sales. The claimant worked for Petersen at his Idaho dealership.

3. After Peterson took on his new responsibilities for the respondent, he suggested to respondent co-owners Justin Todd and Bob Anderson that a new sales crew, which included the claimant , be brought on board to reverse the trend of the sagging car sales. Todd and Anderson agreed to Peterson's suggestion. Anderson hired the claimant.

4. Peterson contacted the claimant to recruit the claimant for work at the respondent dealership. Peterson did not discuss with the claimant what the claimant would be paid in the way of compensation.

5. Peterson also developed the pay system that the respondent dealership implemented to compensate the and other sales managers. Under the plan, a sales manager received $35.00 for each car sold by the dealership in a month. In addition, volume bonuses were available when the dealership exceeded a certain volume of cars sold. Under this plan, if the dealership sold 100 cars, then each sales manager would receive $500.00 in addition to $35.00 for each car sold. If the dealership sold 125 cars, then each sales manager would receive $1,000.00 in addition to $35.00 for each car sold. If the dealership sold 150 cars, then each sales manager would receive $1,300.00 in addition to $35.00 for each car sold. If the dealership sold 200 cars, then each sales manager would receive $2,000.00 in addition to $35.00 for each car sold.

6. The employer's pay policy provided that sales managers would receive their paychecks on the 5th and 20th of each month (Exhibit 121). The payment on the 5th of the month represented compensation for sales commissions earned during the preceding month. The payment on the 20th of the month represented a draw for 75% of the commissions earned through the 15th of the current month.

7. The claimant began working for the respondent on July 5, 2001. On July 23, 2002, the claimant signed a copy of the pay plan which outlined the details of compensation as described in Paragraph 5, above.

8. During one day in July, 2001, the claimant and one other sales manager, Tina Venable, began openly complaining about the pay plan. To diffuse the situation, Anderson held a meeting in his office with the claimant, Venable, Todd, Anderson, Peterson, and Brion Bethal, another

sales manager, present. At this meeting, the claimant was specifically reminded about the pay plan outlined in Paragraph 4, above, and asked if he had any problem with the plan. The claimant indicated that he had no problem with the plan.

9. On July 10, 2001, the claimant took a draw against his July commissions in the amount of $1,800.00. Exhibit 102. During the month of July, 2001, the dealership sold 83 vehicles. Under the pay plan, the claimant was due gross compensation of $2,905.00 for the sale of these cars ($35.00 x 83 vehicles sold = $2,905.00). The claimant had federal and state withholdings in the amount of $716.50. Deducting this amount and the $1,800.00 draw already paid to the claimant yielded a net amount due to claimant for July of $388.63. The Respondent paid this amount to the claimant by check on August 8, 2001(Exhibit 108).

10. During the month of August, 2001, the dealership sold 98 vehicles. The claimant 's gross compensation under the pay plan for those vehicles sold was $3,430.00. In addition, the claimant received a "spiff" (special compensation for selling a specific vehicle) in the amount of $250.00. Thus, the total compensation due to the claimant for the month of August was $3,680.00.

11. The claimant received a draw against his August commissions of $1,000.00 (Exhibit 109) on August 9, 2001. He received an additional draw against his August commissions of $1,372.00 (Exhibit 111) on August 17, 2001. He received a check for the spiff on August 8, 2001 in the amount of $250.00 (Exhibit 107). The claimant requested that instead of taking the entire amount of his $1,000.00 draw out of his August paycheck, that the pay back to the dealership be taken over a period of four months beginning in September, 2001 in the amount of $250.00 for each month (Exhibit 110). The dealership agreed to this.

12. The claimant's employment with the dealership terminated on September 5, 2001. Subtracting the two draws that had already been paid to the claimant against his August commissions, as well as his state and federal withholdings for the month, the dealership owed the claimant $117. 43. The dealership initially prepared a final check in the amount of $1,117.43 (Exhibit 115). In doing so, however, the office manager, Lacey Forsman, neglected to deduct the $1,000.00 draw amount paid to the claimant on August 9, 2001. Upon realizing the error, Forsman voided the check for $1,117.43 and reissued a check in the amount actually due to the claimant , $117. 43 (Exhibit 116).

IV. DISCUSSION

The claimant contends that he is entitled to unpaid wages for services performed while employed by the Respondent auto dealership. 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 Mont. Code Ann. § 39-3-204. 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. Mont. Code Ann. § 39-3-201(6); *Delaware v. K-Decorators, Inc.*, 1999 MT 13, 293 Mont. 97, 104-105, 973 P.2d 818. 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.

An employee who brings suit for unpaid wages has the initial burden of proving that he performed work for which he was not properly compensated. *Anderson v. Mt. Clemens Pottery Co.* (1946), 328 U.S. 680, *Garsjo v. Department of Labor and Industry* (1977), 172 Mont. 182, 562 P.2d 473.

The parties do not dispute the applicable law. The controversy in this matter centers on the parties' dispute of the facts. The claimant contends that he was to be paid at least $300.00 to $500.00 per day while employed by the respondent car dealership without regard to the number of cars sold by the dealership. The respondent contends that the claimant was to be paid in accord with the volume sales pay plan at $35.00 for each car sold by the dealership. The credible evidence shows that the employment agreement between the parties contemplated that the claimant would receive $35.00 for each car sold by the dealership.

In making this determination, the testimony of Brion Bethel is highly persuasive. Bethel had nothing to gain or lose as a result of this litigation. Bethel left the respondent dealership in November, 2001, before the claimant filed this claim. Bethel, along with Craig Peterson, helped to institute the volume based compensation program at the dealership. Bethel testified unequivocally that all sales managers, including the were compensated under the pay plan of $35.00 per car sold by the dealership. In addition, Bethel testified that he was present during the July discussion where the pay plan was discussed and the claimant indicated that he had no problem with the pay plan.

In addition, the testimony of Craig Peterson was very telling on this issue. Peterson testified credibly that he made no representations to the claimant about compensation. Peterson had no incentive to fabricate in this matter. Indeed, Peterson has himself maintained a wage claim action against the respondent.

The claimant 's testimony regarding his compensation agreement was not credible. The claimant first contended in his complaint to the Wage and Hour Division that he would be paid $300.00 to $500.00 each day without regard to the volume of car sales. During direct examination at the hearing, the claimant initially contended that he was to be paid "a minimum of $300.00" per day without regard to the volume of car sales. He later changed that contention during his testimony to indicate that he was to be paid between $200.00 and $300.00 each day. This is a serious inconsistency, one that clearly impugns the claimant 's credibility.

In addition, the claimant's contention that he was brought on board as a trouble shooter is not credible in light of the overwhelming evidence to the contrary. The claimant was a sales manager and his compensation was to be in accord with the volume sales compensation plan described in the findings of fact.

The testimony of the expert witnesses was not of particular assistance in this case. At most, the combined effect of the expert testimony is a suggestion that the claimant 's signature on the pay plan could have been forged or it could have been authentic. A trier of fact is free to disregard an expert's testimony and adopt lay testimony that is substantial and more credible. *Rose v. Rose* (1982), 201 Mont. 86, 651 P.2d 1018. Brion Bethel's testimony recounting the July, 2001 discussion of the pay plan in Anderson's office is far more substantial and credible than the

experts' hypothecations. Bethel's testimony that: (1) the claimant was asked at the time of the meeting if he agreed with the plan, and (2) the claimant responded that he was in agreement convinces the hearing officer that the claimant must have signed the pay plan at some point.

Having resolved the issue of the compensation agreement in favor of the respondent, all that remains to determine is whether the claimant was properly compensated under that agreement. As demonstrated by the findings of fact, the respondent fully compensated the claimant for commissions earned during the time of the claimant's employment.

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. The claimant has failed to demonstrate by a preponderance of the evidence that he is due additional wages.

VI. ORDER

The claim of Norman Rhodes is hereby dismissed.

DATED this __ day of June, 2003.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: 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