STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM OF JENNIFER D. KOCH,	)	**Case No. 1447-2003**
Claimant,	)	
	)	
vs.	)	**FINAL AGENCY DECISION**
	)	
W M SCOBIE INC., d/b/a MONTANA DESIGNS, a Montana Corporation,	)	
Respondent.	)	

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

I. INTRODUCTION

On February 14, 2003, Koch filed a claim with the Department of Labor and Industry contending that W. M. Scobie, Inc., d/b/a Montana Designs owed her $1,223.14 in commissions she had earned but was not paid, and owed her $600.00 in medical expense reimbursement. On March 4, 2003, Montana Designs filed a response to the claim, denying that it owed Koch any additional compensation. On March 12, 2003, Koch amended her claim to allege that Montana Designs owed her $3,452.82, comprised of $306.19 in overtime premium pay, $2,546.63 in earned but unpaid commissions, and $600.00 in medical expense reimbursement. On March 31, 2003, Montana Designs filed a response to the amended claim, denying that it owed Koch any additional compensation. On May 6, 2003, Montana Designs submitted payment to the Department of $512.50, less applicable withholding, which it determined to be due to Koch during the first quarter of 2003. The Department retains those funds pending final resolution of the claim.

On June 26, 2003, the Department's Wage and Hour Unit issued a determination finding that Montana Designs owed Koch $512.50 and dismissed the claim due to the payment submitted by Montana Designs. On July 11, 2003, Koch requested a redetermination in the case. The Wage and Hour Unit elected to treat the request as an appeal to hearing rather than a request for redetermination and, following mediation efforts, transferred the case to the Department's Hearings Bureau on December 12, 2003.

Hearing Officer Anne L. MacIntyre held a scheduling conference in this matter on January 5, 2004. During the conference, the parties agreed to a schedule of proceedings including close of discovery on March 5, 2004, final prehearing exchange on April 16, 2004, final prehearing conference on April 23, 2004, and hearing on April 30, 2004. The parties also agreed to respond to discovery requests within 20 days.

Upon reviewing the prehearing exchange documents submitted by the parties, the hearing officer determined that the parties were not adequately prepared for a hearing to commence on April 30, 2004, and convened a prehearing conference on April 21, 2004 to discuss the status of prehearing preparation. Based on that conference, the hearing officer vacated the scheduled final prehearing conference and hearing date, and ordered the parties to provide copies of all discovery materials exchanged in the case. Following hearing on an order to show cause why the hearing officer should not issue an order compelling discovery, the parties agreed to resolve the discovery dispute by allowing Koch to inspect and copy the books and records of Montana Designs that related to Koch's claim. The hearing officer then reset the hearing for July 9, 2004.

Following the completion of discovery, the hearing officer issued a draft prehearing order which the parties reviewed and to which they proposed revisions at a final prehearing conference on June 29, 2004. Following the conference, and before the commencement of hearing, the hearing officer provided copies containing the revisions agreed on to the parties, and gave them a second opportunity to review the order and propose changes.

At the commencement of hearing, upon being asked to sign the final prehearing order, counsel for Montana Designs raised two exceptions to the prehearing order. First, he took exception to the date of issuance of the Wage and Hour Unit determination stated on page 2 of the prehearing order. The prehearing order stated that the determination was issued on June 23, 2003, and the record showed that the determination was issued and mailed on June 26, 2003. Second, counsel took exception to the prehearing order on the grounds that the Hearings Bureau lacked jurisdiction of the claim. This was apparently based on a contention that the claimant's appeal of the determination was not timely filed. Even though respondent's counsel stated he did not seek a ruling on this exception, the issue of jurisdiction will be addressed in the rulings section of this decision, below.

The hearing commenced at 9:00 a.m. on July 9, 2004, in the Bozeman City Hall, Finance Department Conference Room, Bozeman, Montana. Koch was present and represented herself. Geoffrey C. Angel, Attorney at Law, represented the respondent, W. M. Scobie, Inc. Margaret (Peggy) Scobie was respondent's designated representative. Koch, Scobie, Mary Jo Penkal, Brenda Griggs, and Renee Crawford testified.

Documents from the investigative file of the Wage and Hour Unit numbered 1, 16, 17 - 20, 22 - 24, 44, 45, 46, 52, 54, 58, 63, 91, 92, 98 - 101, 111 - 116, 117, 137 - 141, 143 - 146, 168 - 169, 171, and 172 were admitted into evidence without objection. Document 53 was admitted into evidence without objection, but the parties provided a more legible copy of the document at hearing. Documents 30 to 43 were admitted into evidence without objection, but the parties provided the original calendars which were photocopied to obtain Documents 30 to 43, and included a calendar for November 2002 which was not included in the Wage and Hour file. Those original calendars, for the months September, October, November, and December 2002, and January 2003, were admitted as exhibits 308 - 312.

Documents 177 to 307, obtained by Koch when she inspected and copied the records of Montana Designs related to her claim, were admitted into evidence over respondent's objection that they contained confidential information which related to third parties, respondent's clients.

This issue is further addressed in the rulings section of the decision, below. Documents 174 to 176, Koch's summary of her claimed commissions, was admitted into evidence without objection. However, in reviewing the exhibits following the hearing, the hearing officer found that the record did not include documents numbered 204, 258, 259, or 272. These were apparently omitted from the packet when Koch prepared it.

Documents 64 to 81, offered by the respondent and objected to by the claimant, were excluded from evidence on the grounds that they were not the best evidence of the elements of commission owed to Koch. This issue is further addressed in the rulings section of the decision, below. The hearing officer later agreed to allow these documents for the purpose of matching project numbers and clients with particular contracts.

Documents 314 - 315, a copy of the Dowling contract provided to the claimant during discovery, were admitted into evidence over respondent's objection that they had not been provided to respondent in the prehearing exchange. Documents 316 to 319, invoices associated with the Dowling project, were admitted into evidence without objection. Documents 320, 321, and 323, Koch's paycheck detail statements, and one uncashed paycheck, were admitted into evidence without objection.

Following the hearing, the parties agreed to waive posthearing argument. The matter was deemed submitted for decision on July 16, 2004, when no brief was received from Montana Designs concerning the confidentiality of the client contracts and costs admitted into evidence in the case.

II. RULINGS ON EXCEPTIONS AND EVIDENTIARY OBJECTIONS

A. Request to Seal Exhibits

The hearing officer ruled that she would consider a request to seal the exhibits which were copies of contracts of the respondent's clients and other information which related to the costs of the sales to them, if Montana Designs submitted legal authority for this request by July 16, 2004. Montana Designs submitted no legal authority on the question.

> In general, pursuant to Article II, section 9, of the Montana Constitution, the proceedings of agencies of state government are public proceedings. This provision of the Constitution provides:

No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

Thus, administrative hearings conducted by the Department are public, and the documents which are part of the hearing process are open to the public, except when the demand of individual privacy clearly exceeds the merits of public disclosure. The question in this case is whether any demand of individual privacy related to the documents in question would justify

sealing the documents so that, although part of the record of the case, they are not available to the public.

Under Montana law, a two-part test applies in determining whether a person has a constitutionally protected privacy interest. First, does the person have a subjective or actual expectation of privacy? Second, is society willing to recognize that expectation as reasonable? If a privacy interest exists, the tribunal must then decide whether that interest outweighs the public's right to know. *Great Falls Tribune Co. v. Cascade County Sheriff* (1989), 238 Mont. 103, 775 P.2d 1267.

Here, the interest asserted by the respondent is that of its clients in what they paid for their cabinets, and what the costs of the cabinets were to the respondent. There has been no evidentiary showing that respondent's clients had any subjective or actual expectation of privacy in this information. Even if they did, society is not willing to recognize such an expectation as reasonable. What these individuals spent in a commercial transaction is simply not the kind of personally private information that gives rise to a constitutionally protected privacy interest. These are not matters such as medical information or performance appraisals from a personnel file. Because there is not a constitutionally protected privacy interest, it is not necessary to determine whether the public's right to know outweighs the interest. The exhibits will remain in the record, unsealed.

B. Exceptions to Prehearing Order

The respondent correctly excepted to the error in the date of the Wage and Hour determination in the prehearing order. This date contained a typographical error. The correct date of the determination, June 26, 2003, is reflected in this decision.

Although counsel for the respondent stated at the hearing that he did not seek a ruling on his exception concerning jurisdiction of the Hearings Bureau, this issue must be addressed so that an appropriate record is established for purposes of judicial review. The basis of respondent's exception was that Koch did not timely appeal the determination issued by the Wage and Hour Unit regarding her claim. Mont. Code Ann. § 39-3-216(3) provides that following a determination that a wage claim is valid:

> If a party appeals the department's determination within 15 days after the determination is mailed by the department, a hearing must be conducted according to contested case procedures under Title 2, chapter 4, part 6. . . .

The rules of the department provide that a party who receives an adverse decision on a wage claim may request a redetermination or a hearing within 15 days of the date the determination is mailed. Admin. R. Mont. 24.16.7534 and 24.16.7537.

In issuing its determination on June 26, 2004, the Wage and Hour Unit advised the parties of their appeal rights as follows:

> The employer or employee may either appeal this Determination or request a Redetermination. Either request must be in writing to the attention of John Andrew, Bureau Chief, Labor Standards Bureau, Employment Relations Division, PO Box 6518, Helena, MT 59604-6518. The Appeal (Hearing), or request for Redetermination must be postmarked by *7-14-03 .* You must set out the reason for the request including any new or additional information that would alter or affect this original Determination.

Document 19 (appeal date inserted on blank line in handwriting, apparently by the compliance specialist).

Under the statute, Koch's appeal was due on July 11, 2003.[(1)] The Labor Standards Bureau stamped Koch's appeal of the determination as received on July 15, 2003, a Tuesday. Document 16. It was dated July 11, 2003, a Friday. There is no evidence in the record to establish that it was postmarked after July 11, 2003. The compliance specialist, Renee Crawford, testified that although the envelope was in the Wage and Hour unit's investigative file, the postmark was not legible. Because Montana Designs did not raise this issue before the hearing, the envelope was not produced as a possible exhibit. Crawford testified telephonically from Helena and the investigative file was in her possession. Although respondent's counsel moved for the admission of the envelope into evidence, the hearing officer denied his request because the envelope was not present at the hearing and neither party had seen it.

In the final prehearing order, Montana Designs stipulated to all of the facts set forth in the procedural history portion of the order. One of those facts stated: "On July 11, 2003, Koch requested a redetermination in the case. The Wage and Hour Unit elected to treat the request as an appeal to hearing rather than a request for redetermination and, following mediation efforts, transferred the case to the Department's Hearings Bureau on December 12, 2003." Thus, Montana Designs stipulated that Koch appealed on July 11, 2003.

Accepting Montana Designs' stipulation at face value, Koch filed a timely appeal. However, there are additional reasons the assertion that the Hearings Bureau lacks jurisdiction is incorrect. The Hearings Bureau is not a separate entity, like a court. It is an administrative subdivision of the Department of Labor and Industry. Its jurisdiction is derived from the jurisdiction of the Department. The administrative hearing in the Hearings Bureau is the first opportunity for a due process hearing on the claim. Thus, its jurisdiction is not the equivalent of appellate jurisdiction.

The time limits for filing wage claims with the Department are statutes of limitation, not jurisdictional prerequisites. *Marias Healthcare Services, Inc. v. Turenne*, 2001 MT 127, 305 Mont. 419, 28 P.3d 491. The time limit to appeal an investigative determination to a department contested case hearing is more akin to a time limit for the initial claim than to the time limit for appealing from a decision after hearing or from a district court judgment. Statutes of limitation are affirmative defenses, subject to waiver if not raised by answer. *Id.* This is true sometimes even when the context is appeal of an administrative decision to a judicial body. *Montana Wildlife Federation v. Sager* (1980), 190 Mont. 247, 620 P.2d 1189.

Montana Designs waived any defense to Koch's claim based on failure to timely appeal by failing to raise it earlier in the proceeding. Koch appealed the determination in July 2003. Montana Designs did not raise the issue until the commencement of the hearing, on July 9, 2004. Although neither the statute or rules require a responsive pleading to be filed following an appeal, the scheduling order issued by the hearing officer required the parties to submit final contentions and issues of law by April 16, 2004; Montana Designs filed its final contentions on April 20, 2004. It did not raise the timeliness of the appeal as an issue. The failure of Montana Designs to raise the timeliness of the appeal in its final contentions and issues of law constituted a waiver.

Further, even if Koch's appeal was untimely, she filed it within the time frame set forth in the notice of appeal rights given to her by the department. For it to have been received by the Labor Standards Bureau by mail on July 15, 2003, it would necessarily have been mailed on or before July 14, 2003, which was the deadline given Koch by the department. She was and is proceeding *pro se* in this matter. To deny her an opportunity for hearing on the basis of inaccurate or misleading information given to her by the department concerning the time to appeal the department determination would deny her due process. *Pickens v. Shelton-Thompson*, 2000 MT 131, 300 Mont. 16, 3 P.3d 603.

For all of these reasons, respondent's exception concerning the jurisdiction of the Hearings Bureau based on the timeliness of Koch's appeal is without merit.

C. Rulings on Documents 63 to 81

In the order to show cause issued May 14, 2004, addressing the need for additional discovery in the case, the hearing officer put the parties on notice that source documents regarding the amount of each of Koch's sales, the costs of those sales, and employer pay records showing what Montana Designs paid Koch and when would be essential to a decision in this case. These records were in the possession of the respondent. In resolution of the order to show cause, Montana Designs allowed Koch to inspect and copy its files of her sales. The documents Koch obtained, documents 177 to 307, were admitted into evidence over the objection that they contained confidential information concerning respondent's clients. Montana Designs did not object to the substance of the documents. Koch also prepared a summary of documents 177 to 307, documents 174 to 176, which was admitted into evidence without objection.

During the final prehearing conference, counsel for Montana Designs stated that he would prepare and propose for admission a demonstrative exhibit summarizing Koch's sales and the costs of the goods and services related to those sales. Respondent did not prepare or propose such an exhibit. Respondent also failed to present any source documents concerning sales, costs or pay records.

At hearing, during the direct examination of Peggy Scobie, respondent proposed the admission of documents 63 to 81, a spreadsheet submitted to the Wage and Hour unit by Montana Designs during the investigation of the claim in which the respondent attempted to calculate the commissions earned by Koch. It did not include any source documents concerning these sales or their associated costs. Koch did not object to the admission of document 63, and it

was admitted into evidence. However, Koch did object to the admission of the remainder of these documents on the ground that they contained amounts that were not consistent with the source documents, and contained elements of cost which were not a part of the employment agreement. The hearing officer sustained the objection on the grounds that the summary was not the best evidence and that the source documents should have been produced.[(2)] Later in the hearing, however, the hearing officer admitted the documents for the limited purpose of associating certain project numbers with their costs.

The best evidence rule, reflected in Rule 1002 of the Montana Rules of Evidence, requires that to prove the content of a writing, the original writing is required. However, photocopies are allowed as long as no question exists as to the authenticity of the original. Montana Designs proposed documents 63 to 81 to prove the contents of its sales contracts and invoices, documents in its possession. Koch's objection was well taken because the summary was not the best evidence of those writings.

Rule 1006 of the Rules of Evidence also allows the admission of a chart, summary, or calculation in the place of "voluminous writings . . . which cannot conveniently be examined in court." The documents in this case were not so voluminous as to prevent them from being examined in this non-jury proceeding, and the hearing officer had notified the respondent of the need for source documents in her order to show cause dated May 14, 2004.

Thus, under the principles of the Rules of Evidence, the summary prepared by Montana Designs for the investigation was properly excluded.

III. ISSUES

The issue in this case is whether W. M. Scobie, Inc. d/b/a Montana Designs, owes wages for work performed, as alleged in the complaint filed by Jennifer D. Koch, and owes penalties or liquidated damages, as provided by law.

IV. FINDINGS OF FACT

1. W. M. Scobie, Inc. d/b/a Montana Designs is an enterprise engaged in commerce, as that term is used in federal Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 *et seq.*

2. Montana Designs employed Jennifer Koch as a cabinetry designer and sales person from July 10, 2001 to January 24, 2003. Margaret Scobie supervised Koch.

3. Koch's claim is for the period July 1, 2002 through the end of her employment on January 24, 2003.

4. At the beginning of Koch's employment, Montana Designs agreed to pay her an hourly wage of $8.00 per hour plus a 5% commission on the net of paid invoices for Koch's sales. The commissions were to be paid quarterly. Montana Designs also agreed to pay Koch $200.00 per month as a reimbursement for medical expenses, to begin after 90 days of employment.

5. Montana Designs increased Koch's hourly wage to $9.00 per hour on August 1, 2001, $10.00 per hour on January 19, 2002, and $11.50 per hour on July 29, 2002.

6. In addition to the 5% sales commissions, Montana Designs paid Koch a flat commission on contractor orders of $150.00 for a first order from a new contractor, $250.00 for a third order, and $500.00 for a fifth order.

7. The net profit on a sale is the amount paid by the customer less the cost of goods and services for the sale.

8. The costs of goods and services for a sale consist of the invoices from cabinet manufacturers and other miscellaneous vendors involved in completing the project.

9. Another employee, Brenda Griggs, received $200.00 per month medical reimbursement from the beginning of employment. Koch received the reimbursement only after 90 days of employment.

10. Between July 1, 2002 and the end of her employment, Koch earned the following commissions:[(3)]

Catteneo	$ 131.66
Bearrow/Flowers291	43.46
Bearrow 297	64.61
vanderWende	363.61
Cafritz	62.14
Graves	117.81
Crawford	92.24
McLain	178.28
Springer	253.88
Lien	143.24
Carvalho	65.76
Jesse	65.21
Bearrow 353	41.65
Holland	5.02
Johnson	182.88
McLendon	139.29
Dowling	11.92
Total	$1,962.64

11. In addition to the sales commissions, Koch earned $950.00 in contractor commissions from July 1, 2002 through the end of her employment.

12. At the end of Koch's employment, Montana Designs owed her $2,912.64 in commissions.

13. Montana Designs did not pay Koch for her commissions following the third quarter of 2002. Following the fourth quarter, in a paycheck dated January 20, 2003, it paid her commission of $487.85. On May 6, 2003, it submitted a check dated April 30, 2003, in the amount of $512.50 for commissions due to Koch to the department after Koch filed her claim. On July 15, 2003, it issued a check to Koch for commissions in the amount of $437.29. On October 15, 2003, it issued a check to Koch for commissions in the amount of $18.64. This check was not signed, however, and Koch did not negotiate it. The total paid to Koch for her commissions after July 1, 2002, was $1,437.64, including the amount paid to the department, but not including the unsigned check.

14. Koch worked a four-week rotating schedule in which she worked 5 days the first week, 6 days the second week, 4 days the third week, and 5 days the fourth week. She usually arrived at work at about 8:30 a.m., left at 5:00 p.m. or later, and did not have a lunch break. She often worked more than 8 hours per day, and sometimes worked extra days in the weeks that she was scheduled to work 4 or 5 days.

15. Montana Designs gave employees paid holidays on Memorial Day, Fourth of July, Labor Day, Thanksgiving, Christmas Day, New Year's Eve, and New Year's Day.

16. Montana Designs did not pay Koch overtime premium in the weeks she worked more than 40 hours. Instead, it had an informal compensatory time system in which it allowed employees time off with pay when they had worked over 40 hours per week. In Koch's claim, she contended that, when she terminated her employment, Montana Designs still owed her for 17.75 hours of overtime.

17. Based on the time records kept by Koch and admitted into evidence, from September 1, 2002 through the end of her employment, Koch worked 48 hours of overtime. She also took off 25 hours with pay, which was not attributable to holiday pay or earned vacation. She received paid holidays on Labor Day, Thanksgiving, Christmas, New Year's Eve, and New Year's Day during the period. She received paid vacation days off on December 19, 26, and 27, 2002.

18. The failure of Montana Designs to pay overtime premium was not done in good faith or with reasonable grounds to believe the failure was not a violation of the Fair Labor Standards Act.

19. On February 14, 2003, Koch filed a claim with the Department of Labor and Industry contending that Montana Designs owed her $1,223.14 in commissions she had earned on various sales but had not been paid, and owed her $600.00 in medical expense reimbursement. On March 4, 2003, through counsel, Montana Designs filed a response to the claim, denying that it owed Koch any additional compensation. It erroneously characterized Koch's claimed commission as relating only to the Dowling project, and stated that because the Dowling project was a loss to Montana Designs, it did not owe Koch a commission for this project.

20. On March 12, 2003, Koch amended her claim to allege that Montana Designs owed her $3,452.82, comprised of $306.19 in overtime premium pay, $2,546.63 in earned but unpaid commissions, and $600.00 in medical expense reimbursement. On March 31, 2003, through

counsel, Montana Designs filed a response to the amended claim, denying that it owed Koch any additional compensation, and contending that all of the projects on which Koch worked resulted in losses because of costly errors committed by Koch.

21. On May 6, 2003, Montana Designs submitted payment to the Department of $512.50, less applicable withholding, which it determined to be due to Koch during the first quarter of 2003. It also submitted the spreadsheet it created (documents 63 to 81) in which it calculated the commissions.

22. On May 22, 2003, Koch discussed her claim with Renee Crawford, compliance specialist in the Department's Wage and Hour unit who investigated Koch's claim. Following their conversation, on May 27, 2003, Crawford wrote to counsel for Montana Designs requesting additional information:

> There is apparently a dispute regarding the spreadsheets provided by both parties. Therefore, please provide this office with copies of the Original Contracts, Amended Contracts and Invoices for the time period in question (July 2002 to January 24, 2003). I am sure with these documents our office will then be able to thoroughly investigate the purchases, changes, and what was in fact owed and paid. With the above documentation, please include a copy of pay stubs showing payment of wages.

22. On June 2, 2003, through counsel, Montana Designs responded to the letter from Crawford by reiterating the arguments previously made. It provided none of the documentation requested by Crawford.

23. On June 26, 2003, the Wage and Hour unit issued its determination finding that Koch was entitled only to the $512.50 previously tendered by Montana Designs, and dismissing the balance of her claim. With respect to the claim for commissions, the determination accepted the argument of Montana Designs that because it had experienced a loss on the Dowling project, Koch was not entitled to additional commissions.

V. DISCUSSION AND ANALYSIS[(4)]

A. Koch's Claim for Unpaid Commissions

The commission component of Koch's claim is governed by Montana law, which requires that employers pay employees wages when due in accordance with the employment agreement, and in any event not more than 15 days following the separation from employment. Mont. Code Ann. §§ 39-3-204 and 39-3-205. 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" include any money due from an employer to an employee, including bonuses and 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.

1. Determination whether sales commissions are due and in what amount

The employment agreement between Koch and Montana Designs provided that Koch would earn a commission for her sales of 5% of net paid invoices, plus certain flat contractor commissions. The dispute between the parties is whether Koch was entitled to commission payments after July 1, 2002.

At hearing, Koch claimed that at the conclusion of her employment, Montana Designs still owed her commissions for the sales listed on documents 174 to 176. Koch had the burden of proof in this case of whether Montana Designs owed her additional commission payments. The proof required consisted of her testimony and business records maintained by Montana Designs.

Montana Designs' position was that Koch inaccurately calculated the commissions due her, and that it had paid her all commissions due. It contended that the contract amounts and costs presented by Koch were incomplete and inaccurate, essentially arguing that on that basis that she had failed to carry her burden of proof. However, if Koch's evidence was inaccurate or incomplete, Montana Designs had the burden to rebut it by substantial evidence. Even though the documents which might have supported its position were in its possession, it did not present the documents as evidence.

In wage claim cases in which the employer has failed to maintain appropriate records, Montana courts have declined to penalize the employee by denying recovery on the ground that the employee is unable to prove the precise extent of uncompensated work. ***See, e.g.,*** *Garsjo v. Department of Labor and Industry* (1977), 172 Mont. 182, 562 P.2d 473.

> In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.

Id. at 188-89, citing *Anderson v. Mt. Clemens Pottery Co.* (1946), 328 U.S. 680, 687. This standard is equally applicable in a commission case when the records necessary to prove the amount of compensation due the claimant are in the possession and control of the former employer. The evidence presented by Koch was adequate to prove most of the elements of her commission claim.

After carefully analyzing the evidence, even though some gaps exist, it is clear that Montana Designs owed Koch $1,962.64 in commissions for sales that she completed after July 1, 2002 through the end of her employment. Attachment A lists each of the sales claimed, and the amount of commission due. The hearing officer has resolved the gaps and conflicts in the evidence as follows:

a. In some instances, no evidence of the amount of the contract or sale price was admitted into evidence. These included three small sales (Baker, Bakosh, and the Helvey countertop), Bearrow 297, and a second sale amount of $3,806.49 on the Lien project.[(5)] Koch had the burden to show that she made sales which entitled her to a commission, and absent some document showing the sale, she did not carry this burden. When there was no evidence to support a sale or contract price, the sale has been excluded in arriving at the commissions due. In the case of Bearrow 297,

the evidence included a lien waiver document. Because the evidence establishes that the practice of Montana Designs was to obtain a 50% advance payment on all sales, the hearing officer has concluded that the sale amount in Bearrow 297 was two times the lien amount.[(6)] With respect to the second Lien contract, the sale has been excluded in its entirety, including the costs of goods associated with the second sale.

b. There are a number of problems and issues with the invoices and costs of goods for the various sales. Some or all of the invoices showing the costs of goods are missing from several projects, including Springer, Carvalho, Johnson, and McLendon. In these cases, the hearing officer has deducted the cost of goods amount shown by Koch on her summary (documents 174 - 176). Clearly, the projects all had costs, and as a matter of just and reasonable inference, it is appropriate to accept the amounts from the summary to determine the net profit. The other alternative is to infer from the failure of Montana Designs to rebut Koch's evidence that no costs were attributable to the project, and calculate the commission on the contract price alone, but such an approach would be unreasonable.

The total invoice price on each invoice exceeds the actual invoice price in all cases by a substantial amount. The evidence at hearing established that this was because Montana Designs' dealer price was 23.2% of the invoice price. Thus, the actual invoice price, rather than the total invoice price, represents the cost of the goods. In addition, many of the invoices contain notations that the amount paid was in fact less than the actual invoice price. This is due to the fact that the supplier gave a 2% discount for invoices paid within 10 days. In cases that the invoices show Montana Designs received the discount, the hearing officer has calculated the cost of goods as the amount paid on the invoice.

Scobie testified that, as to the contracts with R.S. Bearrow Construction, the invoices submitted by Koch did not match the job numbers for those projects, and were therefore not the correct costs of goods. The hearing officer admitted documents 63 to 81 for the purpose of being able to match the project numbers with the costs. Koch claimed only one sale which seems not to match with the invoices, the Bearrow contract dated December 13, 2002 (document 298). The invoices Koch included for this project (documents 291 to 293) were dated in February and March, 2002, and contained customer number 238. These invoices could not have related to the contract in question. Therefore, the hearing officer has used the costs of goods from Kraftmaid invoices relating to Bearrow 353 on respondent's spreadsheet (document 79) to arrive at the net profit for this project.

c. Scobie testified that several of the projects completed after Koch left employment had additional costs which made them unprofitable, and that the cost of goods sold should have included delivery charges for all projects. Montana Designs provided no substantial evidence on the costs of the projects after Koch left employment; they are not even listed on respondent's spreadsheet. Koch credibly testified her understanding of the employment agreement to be that delivery charges were not to be deducted in calculating net profit. Regardless of whether they should have been deducted, Montana Designs presented no substantial evidence to prove the amount of the delivery charges. Again, the records on these issues were the business records of Montana Designs, and it had the burden to provide substantial evidence to rebut Koch's evidence

it maintained to be inaccurate or incomplete. Therefore, the hearing officer has not included the alleged additional costs or included delivery charges as part of the costs of goods sold.

2. Determination whether contractor commissions are due and in what amount

The parties stipulated that Koch was entitled to a flat commission on contractor orders of $150.00 for a first order from a new contractor, $250.00 for a third order, and $500.00 for a fifth order. At hearing, Koch credibly testified that between July 1, 2002, and the end of her employment, she sold three first orders to new contractors and a fifth order to R.S. Bearrow Construction. She was therefore entitled to a commission of $950.00 for these orders.

3. Amounts paid to Koch

Montana Designs contended that it had paid Koch all of the commissions due her. However, the only evidence admitted at hearing to establish what was paid to Koch was Koch's check stubs, and these were provided by Koch. If there were additional records to support the employer's contention that Koch was paid her commissions, Montana Designs should have put them into evidence. Hence, the only payments for which substantial evidence exists in this case are those addressed in paragraph 13 of the Findings of Fact.

In particular, Montana Designs contended that it paid Koch the contractor commission for her fifth sale to Bearrow Construction sometime before the beginning of the third quarter of 2002. It pointed to documents 171 and 172 to support this contention. Although document 171 suggests that a fifth contractor commission was paid to Koch after the second quarter of 2002, document 54, another document prepared by Montana Designs and submitted during the investigation, shows that the commission was still due when Koch left employment. The source of document 171 is not clear. Koch credibly testified that the contractor commission for her fifth sale to Bearrow was never paid to her. Again, the records of payments to employees are records which would reasonably be expected to be maintained by the employer. The records in evidence are ambiguous on the question of whether Koch was paid her contractor commission for the fifth sale to Bearrow Construction. After weighing Koch's testimony against the ambiguous records, the hearing officer has concluded that the commission was not paid before Koch left employment.

4. Calculation of commissions due and penalty

For sales through the end of her employment, Montana Designs owed Koch $1,962.64 in sales commissions plus $950.00 in contractor commissions for a total of $2,912.64. As of the date of hearing, Montana Designs had paid Koch $1,437.64, leaving a balance due to Koch of $1,475.00. This balance includes the $18.64 which was sent to Koch in an unsigned check. Koch must return the unsigned check to the Wage and Hour Unit, which will hold it for delivery to Montana Designs when Montana Designs complies with its obligations under this order. If Koch, for any reason, is unable to send the check to the Wage and Hour Unit, she can comply with this requirement by providing the Wage and Hour Unit with an agreement, in writing, to indemnify Montana Designs for the amount of the check, should it be cashed.

Montana law provides for a penalty to be assessed against an employer that fails to pay wages when due. The penalty is to be paid to the employee in an amount not to exceed 110% of the wages due and unpaid. Mont. Code Ann. § 39-3-206(1). The rules of the department provide that for cases involving special circumstances, including the failure to provide information requested by the department, the full 110% penalty is to be imposed. Admin. R. Mont. 24.16.7566(2). One of the special circumstances is the failure to provide information requested by the department in the department's investigation of the wage claim. Admin. R. Mont. 24.16.7556(1)(a). The rules also provide that if the wages claimed are paid by the employer before the claim is filed or prior to the issuance of a determination, no penalty will be imposed unless the special circumstances described in Admin. R. Mont. 24.16.7556 apply. Admin. R. Mont. 24.16.7551.

Montana Designs paid Koch $487.85 of the commissions due to her prior to the filing of her claim, so no penalty is due on that amount. However, Montana Designs then failed to provide information requested by the department in its investigation of Koch's claim. This information was key to a determination of whether Montana Designs still owed commissions to Koch and in what amount. Montana Designs persisted in its failure to provide information until the hearing officer issued an order to show cause contemplating discovery sanctions on May 14, 2004. Providing this information at an earlier time in the process might have resulted in a more timely, less costly, and more appropriate resolution of the issues in the case.[(7)] Therefore, a penalty of 110% on the commissions due to Koch, except the $487.85, is appropriate and in fact required under the department's rules. Montana Designs therefore owes Koch a penalty of $2,667.27 ($2,912.64 - 487.85 = $2,424.79 x 110%).

B. Koch's Claim for Overtime Compensation

The Fair Labor Standards Act (FLSA) prohibits employers to whom the act applies from employing their employees in excess of 40 hours in a single work week unless the employee is compensated at a rate not less than one and one-half times the regular rate at which the employee is employed. 29 U.S.C. § 207(a)(1). Montana law allows employees due wages, including wages due under the FLSA, to file a claim with the Department of Labor and Industry to recover wages due. Mont. Code Ann. § 39-3-207; *Hoehne v. Sherrodd, Inc.* (1983), 205 Mont. 365, 668 P.2d 232.

Montana Designs attempted to establish at hearing that Koch received other time off without pay during her employment, and that she was therefore not entitled to any overtime pay. There are several flaws in this argument. First, whether or not Koch received time off with pay in some weeks, she remains entitled to the overtime premium for hours worked over 40 in a work week. Second, many of the hours Montana Designs is referring to were in the period prior to September 1, 2002. Because the record does not include time records for Koch's work prior to September 1, 2002, there is no means of comparing the hours claimed by Montana Designs to other work performed in the same time period. In view of Montana Designs' fluctuating schedule in which Koch always worked more than 40 hours per week at least one week per month, it is likely that an analysis of Koch's complete period of employment would result in a greater overtime liability to Montana Designs. Therefore, in the absence of complete time records, the only appropriate period to consider is the period September 1, 2002 through the end of Koch's employment.

Of the 48 hours of overtime that Koch worked from September 1, 2002 through the end of her employment, she received straight time compensation for 25 hours for which she took paid time off. Therefore, Montana Designs owes Koch for 23 hours at 1½ times her hourly rate. For the remaining 25 hours, Montana Designs owes Koch only the overtime premium, or half her hourly rate. Therefore, Montana Designs owes $540.50 in overtime compensation (23 hours x $11.50 x 1.5 = $396.75; 25 hours x $11.50 x .5 = $143.75; $396.75 + $143.75 = $540.50).[(8)]

Under Montana law, the liquidated damages provision of the FLSA, not the statutory penalty provisions of the state Minimum Wage and Overtime Act, apply to cases subject to FLSA. Mont. Code Ann. § 39-3-408. The FLSA has a liquidated damages provision which states:

> Any employer who violates the provisions of Section 206 or Section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid . . . wages . . . and in an additional equal amount as liquidated damages.

29 U.S.C. § 216.

However, the Portal to Portal Act alters the liquidated damages provision of the FLSA.

> In any action commenced prior to or on or after the date of the enactment of this Act to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 16 of such Act.

29 U.S.C. § 260. The court may refuse to award liquidated damages if the employer demonstrates it acted reasonably and in good faith.

To demonstrate "good faith" under this exception, an employer must show "the act or omission giving rise to [the violation] was in good faith and that [it] had reasonable ground for believing that [its] act or omission was not a violation of the [FLSA]." *Brock v. Shirk* (9th Cir. 1987), 833 F.2d 1326, 1330. This test has both subjective and objective components. *Id.* Good faith requires an honest intention and no knowledge of circumstances which might have put the employer on notice of FLSA problems. *Id.* ***See also*** *Key West, Inc. v. Winkler*, 2004 MT 186, ¶¶ 29-32, 322 Mont. 184, 191, 95 P.3d 666, 671.

The record in this case contains no evidence whatever about Montana Designs' motivation or beliefs concerning the application of the overtime laws to its business. Further, Koch testified that at the beginning of her employment, Montana Designs paid her overtime premium when she worked over 40 hours per week. This shows the management of Montana Designs was aware that the law required overtime premium in these circumstances. Montana Designs has failed to

establish that it should be relieved of the requirement to pay liquidated damages. It therefore owes Koch liquidated damages of $540.50.

C. Koch's Claim for Medical Expense Reimbursement

Koch's employment agreement with Montana Designs provided for her to receive $200.00 per month as a reimbursement for medical expenses, following a probationary period of 90 days. Montana Designs paid this amount to Koch in accordance with the employment agreement. Montana Designs paid Brenda Griggs $200.00 per month for medical expense reimbursement during her probationary period. Koch contends that Montana Designs' differential treatment of the two employees violates the Equal Pay Act, and that Koch should be paid $600.00 for the three months of her probationary period that she was not paid the medical expense reimbursement.

In her prehearing submissions, Koch included a quote for the proposition that an employer must pay the same fringe benefits for each employee. The source of this quote is unclear. She attributed it to the "Equal Pay Act and Title IV of EEOC Sec. 1620.11 Fringe Benefits."

The Equal Pay Act provides:

> No employer [subject to the Fair Labor Standards Act] shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex. . . .

29 U.S.C. § 206(d).

It is unclear what Koch is referring to by "Title IV of EEOC Sec. 1620.11 Fringe Benefits." EEOC most likely means the Equal Employment Opportunity Commission, which is responsible for enforcement of the Equal Pay Act at the federal level. However, EEOC is not responsible for the enforcement of Title IV of any law. EEOC is responsible for enforcement of Title VII of the Civil Rights Act of 1964, as amended. That law prohibits discrimination in employment on the basis of sex, race, color, national origin and religion. Also, EEOC has adopted regulations to implement the Equal Pay Act including one found at 29 CFR § 1620.11 entitled "Fringe Benefits." It states:

> (a) "Fringe benefits" includes, e.g., such terms as medical, hospital, accident, life insurance and retirement benefits; profit sharing and bonus plans; leave; and other such concepts.
> (b) It is unlawful for an employer to discriminate between men and women performing equal work with regard to fringe benefits. Differences in the

> application of fringe benefit plans which are based upon sex-based actuarial studies cannot be justified as based on "any other factor other than sex."
> (c) Where an employer conditions benefits available to employees and their spouses and families on whether the employee is the "head of the household" or "principal wage earner" in the family unit, the overall implementation of the plan will be closely scrutinized.
> (d) It is unlawful for an employer to make available benefits for the spouses or families of employees of one gender where the same benefits are not made available for the spouses or families of opposite gender employees.
> (e) It shall not be a defense under the [Equal Pay Act] to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other.
> (f) It is unlawful for an employer to have a pension or retirement plan which, with respect to benefits, establishes different optional or compulsory retirement ages based on sex or which otherwise differentiates in benefits on the basis of sex.

Clearly, the Equal Pay Act addresses only differences in employee compensation based on sex. Both Koch and Griggs are female. Koch has failed to show that she was paid less than an employee of the opposite sex. She therefore is not able to prevail on her claim under the Equal Pay Act. The hearing officer knows of no other statute or legal theory which would require Montana Designs to pay Koch the same amount as Griggs for medical expense reimbursement, and she is not entitled to the $600.00 she claims for it.

D. Montana Designs' Claim for Attorney Fees and Costs

Montana Designs also seeks attorney's fees and costs of defending this claim. However, it is not entitled to fees and costs because it did not prevail in the case.
Even if Montana Designs had prevailed, attorney's fees and costs are not available in this administrative proceeding. Mont. Code Ann. § 39-3-214; *Chagnon v. Hardy Construction Co.* (1984), 208 Mont. 420, 680 P.2d 932 ***and*** *Thornton v. Commissioner* (1980), 190 Mont. 442, 621 P.2d 1062 (attorney's fees are not recoverable at the administrative stage of a wage and hour claim but are available once the case is appealed to the district court).

VI. 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. W. M. Scobie, Inc. d/b/a Montana Designs violated Mont. Code Ann. §§ 39-3-204 and 39-3-205, when it failed to pay Jennifer D. Koch commissions when due and within 15 days following her separation from employment. It owes her $1,475.00 in wages. Mont. Code Ann. § 39-3-206.

3. W. M. Scobie, Inc. d/b/a Montana Designs failed to provide information requested by the Department in the investigation of Jennifer D. Koch's wage claim. Therefore, it owes Koch a

statutory penalty of 110% of the commissions it failed to pay within 15 days of her separation from employment. Mont. Code Ann. § 39-3-206 and Admin. R. Mont. 24.16.7556. W. M. Scobie, Inc. d/b/a Montana Designs owed Koch $2,912.64 in commissions at the conclusion of her employment, and paid her $487.85 prior to the filing of her claim. It therefore owes her a penalty in the amount of $2,667.27 ($2,912.64 - 487.85 = $2,424.79 x 110%).

4. W. M. Scobie, Inc. d/b/a Montana Designs owes Jennifer D. Koch $540.50 in overtime premium compensation for the period September 1, 2002 through the end of Koch's employment under 29 U.S.C. § 207(a)(1).

5. W. M. Scobie, Inc. d/b/a Montana Designs did not show that it acted reasonably and in good faith when it failed to pay Jennifer D. Koch overtime premium compensation as required by law. Koch is therefore entitled to liquidated damages in the amount of $540.50. 29 U.S.C. §§ 216 and 260.

6. Jennifer D. Koch is not entitled to $600.00 for medical expense reimbursement.

7. W. M. Scobie, Inc. d/b/a Montana Designs is not entitled to attorney's fees or costs.

VII. ORDER

1. W. M. Scobie, Inc. d/b/a Montana Designs IS HEREBY ORDERED to tender a cashier's check or money order in the amount of $5,223.27, representing $1,475.00 in unpaid commissions, $540.50 in overtime premium pay, $540.50 in liquidated damages, and $2,667.27 in statutory penalty, payable to the claimant, Jennifer D. Koch, and delivered to the Wage and Hour Unit, Employment Relations Division, P.O. Box 6518, Helena, Montana 59604-6518 no later than November 29, 2004. W. M. Scobie, Inc. d/b/a Montana Designs may deduct applicable withholding from the wage portion but not the liquidated damages or penalty portions.

2. Jennifer D. Koch IS HEREBY ORDERED to tender check no. 4449, drawn on the account of W. M. Scobie, Inc. at First Security Bank in Bozeman, Montana, dated October 15, 2003 and payable to Koch, to the Wage and Hour Unit, Employment Relations Division, P.O. Box 6518, Helena, Montana 59604-6518 no later than November 29, 2004. If Koch is unable to tender the check to the agency for any reason, she may, in the alternative, tender a written agreement to indemnify W. M. Scobie for the amount of the check if it is cashed.

3. Upon receipt of the cashier's check or money order from W. M. Scobie, Inc. d/b/a Montana Designs and check no. 4449 or indemnity agreement from Koch, the Wage and Hour Unit shall promptly disburse all sums tendered to the department by W. M. Scobie, Inc. d/b/a Montana Designs to Koch, including the funds which W. M. Scobie, Inc. tendered to the department during the investigation of the claim. The Wage and Hour Unit shall also promptly forward check no. 4449 or the indemnity agreement to W. M. Scobie, Inc.

DATED this 29th day of October, 2004.

DEPARTMENT OF LABOR AND INDUSTRY

By: /s/ ANNE L. MACINTYRE
Anne L. MacIntyre, Chief
Hearings Bureau

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.

1. It is unclear why the notice advises Koch that she has until July 14, 2003, to have the appeal postmarked. Rule 6(e) of the Montana Rules of Civil Procedure does not apply to appeals under Mont. Code Ann. § 39-3-216. Rule 6(e) requires the addition of 3 days when a party is required to take an action following service, and service occurs by mail. Mont. Code Ann. § 39-3-216 does not use the term "service;" it requires the appeal to be made within 15 days of mailing. However, treating the date of mailing (postmark) as the date of appeal is proper. *Johansen v. State*, 1999 MT 187, 295 Mont. 339, 983 P.2d 962.

2. Respondent maintained the exclusion of respondent's spreadsheet to be an unfair application of the rules, since the hearing officer admitted claimant's summary, documents 174 to 176. However, respondent did not object to the admission of documents 174 to 176. Further, claimant's summary was for the most part a compilation of other documents in evidence.

3. The spreadsheet included as attachment A analyzes the commissions claimed by Koch and shows how these amounts were calculated.

4. Statements of fact in this discussion and analysis are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

5. Document 272, which was missing from claimant's packet that was admitted into evidence, was probably this contract document. The Lien contract was not included in respondent's spreadsheet.

6. This sale is also reflected on respondent's spreadsheet (document 79) in the same amount used in the hearing officer's calculations.

7. The department did not exercise its authority under Mont. Code Ann. § 39-3-210(2) to subpoena the documentary evidence necessary to a determination in the case. Renee Crawford testified that the reason for this was that, because the department is not an advocate for either party, it requires the parties to produce the evidence necessary for a determination. In a case such as this, in which employer business records are key, the claimant will only rarely have the necessary records to support the claim. It is difficult to understand how exercising its subpoena power to obtain employment records needed to thoroughly investigate a claim casts the

department as an advocate for the claimant. Mont. Code Ann. § 39-3-209 requires the agency "to inquire diligently for any violations of [the Wage Payment Act] and to institute actions for the collection of unpaid wages and for the penalties provided for. . . ." In completing a diligent inquiry, the department's role is that of an advocate for the enforcement of the law, not for either party. However, despite the department's apparent stance on subpoenaing employer business records, the employer is required to provide information sought in the investigation, and its failure to do so mandates imposition of the full 110% penalty.

8. Koch's overtime claim was for $306.19, based on her understanding of the employer's compensatory time policy which would have allowed her to take off for hours worked in excess of 40 per week. However, the employer's policy did not comply with the law, and an award of overtime pay actually due is appropriate under the circumstances.