

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

IN THE MATTER OF THE WAGE CLAIM)	Case No. 413-2004
OF JUANITA M. LINDENBERG,)	
Claimant,)	
)	
vs.)	FINDINGS OF FACT;
)	CONCLUSIONS OF LAW;
)	AND ORDER
SEW AND GO,)	
)	
Respondent.)	

I. INTRODUCTION

Sew & Go appeals from a Wage and Hour Unit determination that found Sew & Go owed additional wages to Juanita Lindenberg. Hearing Examiner Gregory L. Hanchett convened a contested case hearing in this matter on January 20, 2004. Lindenberg appeared on her own behalf and testified under oath. Ellen Schmidt appeared on behalf of Sew & Go. Lindenberg, Schmidt, Bill McCrea, Pat McMillan Christy Stoll, and Marie Van Whye testified under oath. Claimant's Exhibits 1 through 11 and Respondent's Exhibits A through R were admitted into the record. Based on the evidence and adduced at the hearing and the oral and written arguments of the parties, the hearing examiner makes the following findings of fact, conclusions of law, and final order.

II. ISSUE

Does Sew & Go owe Lindenberg additional commissions and penalty as provided by law?

III. FINDINGS OF FACT:

1. Schmidt and McCrea are the proprietors of Sew & Go located in Billings, Montana.

2. Schmidt hired Lindenberg to work at the Sew & Go store in April 2003. At that time, Schmidt and Lindenberg agreed that

Lindenberg would work for \$240.00 per week salary plus a commission on sales of goods in the store.

3. In July, 2003, Sew & Go began selling air conditioning units. At that time, Lindenberg and Bill McCrea entered into a verbal agreement that modified Lindenberg's compensation. The two agreed that Lindenberg would work for the higher of \$240.00 per week salary or commissions on the sale of heaters and air conditioning units. Lindenberg would earn \$100.00 for each air conditioning unit she sold and \$33.00 for each heater she sold.

4. During the week of July 20, 2003 through July 24, 2003, Lindenberg sold five air conditioning units and eight heaters. For these sales, she earned a total commission of \$764.00 (\$500.00 on air conditioning units and \$264.00 commission on heaters).

5. On July 23, 2003, Sew & Go paid Lindenberg \$243.00.

6. During the week of July 27, 2003 through July 31, 2003, Lindenberg sold two heaters and two air conditioning units. She earned a total commission of \$266.00 (\$66.00 for heaters and \$200.00 for air conditioning units).

7. On August 2, 2003, Sew & Go paid Lindenberg \$200.00.

8. During the week of August 4, 2003 through August 8, 2003, Lindenberg sold three heaters and one air conditioning unit. She earned a total commission of \$199.00 (\$100.00 for the air conditioning unit and \$99.00 for the heaters).

9. On August 8, 2003, Sew & Go paid Lindenberg \$200.86.

10. During the week of August 4 through August 8, 2003, Lindenberg's commissions did not exceed the amount of her weekly salary.

IV. DISCUSSION⁽¹⁾

A. Sew & Go owes Lindenberg for Unpaid Commissions.

Lindenberg's 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 § 39-3-204, MCA. 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 to an employee from the employer, including commissions. § 39-3-201(6), MCA; *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. The preponderance of the evidence here shows that Lindenberg's initial agreement with Schmidt was reformed in July 2003, to provide that Lindenberg would be paid the higher of \$240.00 per week salary or the commission due from the sale of heaters and air conditioning units. Lindenberg would receive \$100.00 per air conditioning unit and \$33.00 per heater as a commission on the sale of each air conditioning unit and each heater.

Between July 21, 2003, and July 31, 2003, Lindenberg earned commission in the amount of \$1,030.00 with the sale of seven air conditioning units and ten heaters. During the week of August 4 through August 8, 2003, she sold one air conditioning unit and three heaters for a total commission of \$199.00. During this last week, under the parties' agreement, Lindenberg should have received her \$240.00 salary. Totaling all three weeks, Lindenberg was entitled to total compensation of \$1,270.00. For these three weeks, however, Sew & Go paid Lindenberg only \$643.86. Sew & Go failed to pay Lindenberg \$626.14 (\$1,270.00 owed less \$643.86 paid), which she is due.

Sew & Go contends that it paid Lindenberg an additional \$256.00 by a money order sent to a nearby business which Lindenberg picked up. The testimony of Pat McMillen, however, demonstrates the contrary. McMillen picked up this money, not Lindenberg. The credible evidence shows that Sew & Go paid Lindenberg only \$643.86 during the time period between July 21, 2003, and August 8, 2003.

B. Sew & Go Owes Penalty.

For valid wage claims other than minimum wage and overtime compensation, a penalty of 55% of unpaid wages must be imposed. Mont. Code Ann. § 39-3-206, Admin. R. Mont. 24.16.7566. In this case, that penalty is \$344.38 (\$626.14 x .55).

V. CONCLUSIONS OF LAW

1. The State of Montana and the Commissioner of the 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. Sew & Go owes Lindenberg additional wages in the amount of \$626.14.

3. Sew & Go owes Lindenberg a 55% penalty in the amount of \$344.38.

VI. ORDER

Sew & Go is hereby ORDERED to tender a cashier's check or money order in the amount of \$970.52, representing \$626.14 in unpaid commissions and \$344.38 in penalty, payable to Juanita Lindenberg, and 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 10th day of March, 2004.

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.

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