

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM) Case No. 102-2006
OF KEVIN ALLEN,)

Claimant,)

vs.)

TONY ARMOUR'S HOME CENTER,)

Respondent.)

**FINDINGS OF FACT;
CONCLUSIONS OF LAW;
AND ORDER**

* * * * *

I. INTRODUCTION

On July 18, 2005, Kevin Allen (Allen) filed a claim with the Wage and Hour Unit of the Department of Labor and Industry maintaining that Tony Armour's Home Center (Armour) owed him \$9,000.00 in unpaid commissions.

On August 15, 2005, the Wage and Hour Unit dismissed Allen's claim. On August 30, 2005, Allen appealed the determination. The Wage and Hour Unit referred the matter to a mediator who contacted the parties and attempted to mediate the dispute. On September 14, 2005, the mediator dismissed the matter indicating that all efforts to resolve the dispute were unsuccessful. He referred the matter to the Hearings Bureau.

On October 4, 2005, the Hearing Officer held a pre-hearing conference by telephone in this matter. Both parties were present. Both parties stipulated to the admission of Exhibits 1 through 58 into the record. Allen requested an in-person hearing and both parties stipulated to one.

On Friday, October 21, 2005, the Hearing Officer held an in-person hearing in this matter at the Missoula Workforce Center. Both parties were present. Allen indicated that he intended to call approximately 12 witnesses but none of them showed up.

Exhibits C-2 through C-19, offered by the claimant during the hearing, were admitted into the record without objection. Exhibits C-1 and C-20 through C-30, offered by the claimant, were excluded from the record on the basis that they are not

relevant. Exhibits marked 1 through 11, offered by the respondent, were admitted into the record over the claimant's objection that they were not offered prior to the hearing, on the basis that the respondent showed good cause for not providing them prior to the hearing.

II. ISSUE

The issue in this matter is whether Armour owes Allen commissions for sales, wages for overtime work, reimbursement for expenses and penalties or liquidated damages as provided by law.

III. FINDINGS OF FACT

A. COMMISSIONS FOR SALES.

1. Armour employed Allen as a salesman during the period beginning March 6, 2005, through July 9, 2005.

2. On March 15, 2005, Allen signed a payment agreement and an addendum with Armour indicating that he would be paid a 20% commission for the sale of new, used and consigned homes which he completed. The commissions were to be paid on the net amount of the sale, or the difference between the cost of the unit and the actual cash value, including extras sold by Allen. The commissions were to be paid on the new and used homes only after the home was delivered to the residential site and set up.

3. As a salesman, Allen was paid on a commission basis only. Armour required that Allen use the time clock only to verify his presence at the lot.

4. On or about May 1, 2005, Brad O'Dell, salesman, resigned. He gave files on customers Kautz, Terrell, Olson and Shoji to Allen. Armour took them away from Allen and pursued the sales himself, because he wanted Allen to follow up on the leads he already had but was not working on. The action by Armour did not affect the payment agreement they had signed on March 15, because Allen would still be paid for the sales he closed according to the agreement. Allen considered Armour's action a breach of that agreement. There is no provision in that agreement which prohibits Armour from deciding which files were to be referred to Allen. As employer, Armour maintained the right to determine which files were available for Allen to work on.

5. On May 1, 2005, Armour closed the sale on the unit to Kautz. Allen asked for the commission on it and Armour refused to pay it. Kautz had problems getting

water and power to the site for several months, which delayed delivery and set up until the end of July, 2005, after Allen had quit.

6. Allen now claims commissions on the Kautz, Terrell, Olson and Shoji sales which Armour made. He estimates the commissions total \$13,000.00. He also requests reimbursements totaling \$600.00 for expenses which the business paid on those sales.

B. OVERTIME WAGES.

1. Based upon the time clock records, Allen calculates that he worked 17 hours and 9 minutes of overtime during the month of March, 2005; 28 hours and 51 minutes of overtime during the month of April, 2005; 48 hours and 32 minutes of overtime during the month of May, 2005; 38 hours and 13 minutes of overtime during the month of June, 2005; and no overtime in July of 2005.

C. REIMBURSEMENT FOR EXPENSES.

1. On May 16 and 17, 2005, Allen went to Millersburg, Oregon, for training. Armour authorized the trip. Allen drove to Spokane, Washington, and took a flight to Portland, Oregon, where he rented a vehicle and drove to Millersburg. He put the expenses, including gasoline, the airline ticket, the rental car, meals and motel on his own credit cards. While he was there, he called Armour several times, using his own cell phone.

2. On July 15, 2005, Armour reimbursed Allen \$2,330.71 for expenses, based upon receipts Allen presented to him.

IV. DISCUSSION AND ANALYSIS

A. COMMISSIONS FOR SALES.

Allen signed the agreement with Armour which indicates that he is to be paid a 20% commission on the net¹ value of the unit sold. The addendum he signed indicates that the commission is paid to the salesman who acquires the purchase agreement with a deposit and factory order form, after the unit is delivered, fully funded, all expenses paid and the file closed. There is no evidence that Allen was involved in any aspect of the sales of the units to Kautz, Terrell, Olson and Shoji. He

¹ The agreement states that the commission is to be paid on the "gross" which the employer defines as the difference between the selling price and the cost of the unit, or, in effect, the net value.

did not get the purchase agreements, the deposits, or the factory order forms on any of those units. He had possession of the files for a short time but did no work on them. By the definitions within the agreements which he signed, Allen is not entitled to commissions on the units which Armour sold.

Further, there is no evidence that Armour violated the agreements or the spirit of the agreements by taking the files on Kautz, Terrell, Olson and Shoji from him. The agreements define the payment of commissions and the conditions under which the commissions are paid. As employer, Armour had the right to determine how many and which files Allen would work on.

B. OVERTIME WAGES.

Mont. Code Ann. § 39-3-405(1) indicates that an employer may not employ an employee for a workweek longer than 40 hours unless the employee receives compensation for employment longer than 40 hours at a rate of not less than 1½ times the hourly wage rate at which they are employed.

Mont. Code Ann. § 39-3-406(2)(d) indicates that Mont. Code Ann. § 39-3-405(1) does not apply to a salesperson paid on a commission basis and primarily engaged in selling or servicing of automobiles, trucks, mobile homes, recreational vehicles, or farm implements, if employed by a nonmanufacturing establishment primarily involved in the business of selling the vehicles or implements to ultimate purchasers.

Allen was employed as a salesman of mobile homes and was paid on a commission basis. He was not an hourly employee of a manufacturer. He maintains he sold manufactured homes, not mobile homes. However, a manufactured home is a mobile home until it is put on a concrete foundation. Therefore, Allen is not entitled to overtime wages for work in excess of 40 hours per week.

C. REIMBURSEMENT FOR EXPENSES.

Allen's claim includes a request for reimbursement for expenses not paid by Armour related to his trip to Millersburg, Oregon, on May 16 and 17, 2005. Armour has reimbursed Allen \$2,330.71 for expenses, based upon receipts Allen presented to him. Allen maintains that he has presented Armour with copies of bills for use of his cell phone in the amount of \$44.59, car rental in the amount of \$49.60, fuel for the rental car in the amount of \$21.00, a dinner in the amount of \$12.50, an additional flight fee for an earlier flight requested by Armour in the amount of \$17.00, mileage and fuel costs for use of his personal vehicle in the amount of \$35.00, and an airport parking fee in the amount of \$6.00.

This reimbursement request, totaling \$185.69, is not compensation for work performed and is therefore not wages. It is therefore not recoverable under the wage and hour statutes. *Johnson v. K & T Manufacturing, Inc.* (1981), 191 Mont. 458, 652 P.2d 66. In that case, the Montana Supreme Court held that expense reimbursements are not “wages” for purposes of the Wage Payment Act. Therefore, Allen is not entitled to reimbursement for expenses.

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, 176 Mont. 31, 575 P.2d 925 (1978).

2. Allen is not entitled to commissions on the units which he did not sell.
3. Allen is not entitled to overtime wages for work in excess of 40 hours per week.
4. Allen is not entitled to reimbursement for expenses.

VI. ORDER

1. Allen’s claim for unpaid commissions, overtime wages and reimbursement of expenses is dismissed.

DATED this 1st day of December, 2005.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ DAVID H. FRAZIER
David H. Frazier
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.