

STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM	)	Case No. 1332-2004
OF PAT E. BEARS,	)	
	)	
Claimant,	)	
	)	<b>FINAL AGENCY DECISION</b>
vs.	)	
	)	
TALON PLUMBING AND HEATING, INC.,)	)	
A Montana Corporation,	)	
	)	
Respondent.	)	

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**I. INTRODUCTION**

On December 17, 2003, Bears filed a claim with the Department of Labor and Industry contending that Talon Plumbing and Heating, Inc., owed him \$3,644.00 in commissions he had earned but was not paid, and \$3,500.00 as a retirement bonus, for a total claim of \$7,144.00. On December 31, 2003, Talon filed a response to the claim, denying that it owed Bears additional compensation.

On March 24, 2004, the Department's Wage and Hour Unit issued a determination finding that Talon owed Bears \$3,360.57 in commissions and \$504.08 in penalty. It found that no retirement bonus was due. On April 6, 2004, Bears requested a redetermination in the case regarding the bonus issue. On April 12, 2004, Talon appealed the determination. The Wage and Hour Unit elected to treat the joint requests 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 June 3, 2004.

Hearing Officer Anne L. MacIntyre held a scheduling conference in this matter on June 14, 2004. Bears was represented by Spencer T. MacDonald and Talon was represented by Rick Waldenberg, its president. During the conference, the parties agreed to a schedule of proceedings including close of discovery on July 30, 2004, final prehearing exchange on August 6, 2004, final prehearing conference on August 27, 2004, and hearing on September 1, 2004. The hearing was to be conducted telephonically.

On August 9, 2004, Bears filed a motion to compel discovery, noting that certain requests for admission to which Talon had failed to respond were deemed admitted. On August 13, 2004,

Patrick F. Flaherty, Attorney at Law, entered an appearance on behalf of Talon, responded to the motion to compel discovery in the case, and requested that the hearing be rescheduled.

On August 27, 2004, the hearing officer conducted a prehearing conference with counsel for the parties. The hearing officer granted the motion to reschedule the proceedings, and set a new schedule for the hearing. The hearing was set for September 29, 2004. Counsel for Talon objected to the hearing being conducted telephonically and requested that it be held in person. Counsel for Bears requested that the hearing be conducted telephonically because of the time and expense involved in traveling, since both Bears and his counsel were in Missoula, and respondent was in Great Falls. Counsel for Talon agreed that the hearing could be held in Missoula, and it was scheduled to be held in Missoula, in person, based on that agreement. Following the prehearing conference, on August 31, 2004, the hearing officer ruled on Bears motion to compel discovery by granting Talon additional time to respond to Bears' discovery requests.

In its prehearing exchange documents, Talon requested that all witnesses except Bears and Talon's president, Rick Waldenberg, be permitted to testify telephonically. At the final prehearing conference, Bears objected to this request. Talon's request to hold the hearing in person was granted to afford the hearing officer an opportunity to observe the demeanor of witnesses during sworn testimony, which enables the hearing officer to better judge the credibility of witnesses. For that reason, among others, during the September 27, 2004, final prehearing conference, the hearing officer denied Talon's request to present telephonic witness testimony.

Hearing Officer Anne L. MacIntyre conducted a hearing in the case on September 29, 2004. The claimant, Pat E. Bears, was present and represented by Spencer T. MacDonald, attorney at law. Patrick F. Flaherty represented the respondent, Talon Plumbing and Heating, Inc. Its president, Rick Waldenberg, was present as Talon's representative. Bears, Waldenberg, Deb McNeese, and Dave Zeak testified. Documents 1, 5, 6 to 7, 11 to 15, 17 to 20, and 49 to 51 and Exhibits A, including attachments A-1 through A-6 were admitted into evidence by stipulation. Exhibits D, E-1, and E-2 were admitted into evidence. Exhibit G was excluded on the grounds that it was not provided to the claimant prior to hearing in accordance with the prehearing order.

## **II. ISSUE**

The issue in this case is whether Talon Plumbing and Heating, Inc., owes wages for work performed, as alleged in the complaint filed by Pat E. Bears, and owes penalties or liquidated damages, as provided by law.

## **III. FINDINGS OF FACT**

1. From May 17, 1999 through September 27, 2002, Pat E. Bears was employed by Talon Plumbing and Heating, Inc. (Talon) as a salesman.

2. Bears and Rick Waldenberg, Talon's president, had an oral employment agreement for Talon to pay Bears 10% of each sale he made when the sale was collected in full. The terms of the agreement were for a commission of 10% of gross sales. The agreement had no conditions requiring that the sales be profitable, or regarding the manner of completion of the sale or the work, the length of time taken to collect the payment, that Bears collect his own payments, or that the commissions be collected during Bears' employment in order to qualify for payment as a commission.

3. On or about June 25, 2001, Bears made a sale in the amount of \$5,548.00 to Mountain View Physical Therapy and the Cabinet Company. Talon accepted counter tops from the Cabinet Company in partial satisfaction of this account on July 1, 2002. Although the value of the counter tops was disputed by Talon, the Cabinet Company submitted an invoice for the counter tops of \$2,975.00. On July 24, 2003, Talon received payment of \$2,273.00 on the account. At the time of hearing, Talon was in negotiations to resolve the dispute for the receipt of additional counter tops.

4. Talon has not paid the \$524.80 commission it owes Bears for the Mountain View Physical Therapy sale.

5. On or about October 4, 2001, Bears made a sale of \$6,860.00 to Ronna DeBolt. On February 21, 2003, Talon received a payment of \$4,116.00 from DeBolt; on August 9, 2003, Talon received a payment of \$1,000.00 from DeBolt; and on December 6, 2002, DeBolt paid her account in full.

6. Talon has not paid the \$686.00 commission it owes Bears for the DeBolt sale.

7. On or about December 28, 2001, Bears made a sale of \$2,800.00 to Robert Brown. On or about January 3, 2002, Bears made an additional sale of \$940.00 to Brown. Bears' sales to Brown totaled \$3,740.00. On November 5, 2002, Talon received a payment of \$1,676.48 toward Brown's account; and on January 21, 2003, Brown's account was paid in full.

8. Talon has not paid the \$374.00 commission it owes Bears for the Brown sale.

9. On or about January 8, 2002, Bears made a sale of \$5,189.00 to Mike Radovich. On August 9, 2002, Talon received a payment of \$815.40 from Radovich; and Radovich's account was paid in full on February 20, 2003.

10. Talon has not paid the \$518.90 commission it owes Bears for the Radovich sale.

11. On or about February 20, 2002, Bears made a sale of \$609.00 to Nancy Vercolen, Waldenberg's sister. On April 12, 2002, Talon received a payment of \$50.00 from Vercolen; on

July 3, 2002, Talon received another payment of \$50.00; on August 19, 2002, Talon received another payment of \$50.00; and on November 18, 2002, Vercolen's account was paid in full.

12. Talon has not paid the \$60.90 commission it owes Bears for the Vercolen sale.

13. On or about May 14, 2002, Bears made a sale of \$8,067.00 to Janet Meissner. Talon installed fewer supply lines and cold air returns than required by the plan Bears prepared and sold to Meissner. As a result, Talon reduced Meissner's bill by \$205.00. Talon received payment in full of \$7,862.00 in May, 2003.

14. Talon has not paid the \$786.20 commission it owes Bears for the Meissner sale.

15. On or about July 8, 2002, Bears made a sale of \$6,467.00 to Jodie Karr. Talon agreed to a reduction of \$323.45 in the amount due from Karr, due to problems with the plan. Karr paid her account, in full, on November 12, 2002, a total of \$6,143.65.

16. Talon has not paid the \$614.37 commission it owes Bears for the Karr sale.

17. In the latter part of Bears' employment, Talon hired another salesperson, Rick Hurd, for the Kalispell area. Hurd was to receive an 8% commission on sales, with a 2% commission override to Bears. Hurd's sales were losing money, and in August or September 2002, Bears helped Waldenberg develop a commission structure for Hurd based on Talon's cost margin. Bears did not propose this cost structure for his own sales, or agree to a change in the commission methodology for them.

18. Bears gave Waldenberg notice in the summer of 2002 that he was leaving employment to retire. In a luncheon meeting about the time Bears was leaving employment, Waldenberg told Bears that he was sorry he could not pay him severance pay, but that he wanted to pay him \$500.00 per month over a period of seven months.

19. Bears last worked on September 27, 2002. Talon never paid Bears \$500.00 per month after his departure.

#### **IV. DISCUSSION AND ANALYSIS<sup>1</sup>**

Montana law requires that employers pay employees wages within 10 days of when they become due in accordance with the employment agreement. 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" include any money due

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<sup>1</sup>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.

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.

#### **A. Earned Commissions**

Talon contends that Bears is not entitled to any of the commissions claimed because he did not meet certain conditions precedent for those commissions. It contends that the agreement was conditioned on Bears obeying Talon's directives, including a directive that he not sell below cost, that he sell in accordance with the employer's directions and specifications, and that the job be completed in a workman-like manner. Although Talon presented evidence that its policies required sales to have written contracts and a 50% down payment prior to installation, these conditions were not part of the commission agreement, and thus do not defeat Bears' claim to be paid the commissions. The evidence also established that these policies were regularly disregarded, and Talon nevertheless paid commissions on the sales.

Further, although both McNeese and Zeak testified to their implicit understanding that sales had to be profitable in order to qualify for commission, that was not part of the agreement between Talon and Bears. Regarding Zeak's heating and ventilation sales, his agreement with Talon was for a percentage of the profit, so he would not have qualified for a commission on an unprofitable sale. His water system sales had a different method for calculating his commission. By contrast, Bears' agreement was for a commission based on a percentage of the gross sale amount.

Talon also presented testimony that the reasons for the failure to pay were the fact that it lost money on the jobs, and that it took too long to collect the payments. Again, there is no evidence that these were conditions of the compensation agreement. Bears' overall record was one of a profitable salesperson for Talon; the fact that some particular sales were not profitable does not defeat his claim for commissions on those sales, in view of the employment agreement between the parties.

Waldenberg conceded at hearing that the commission agreement did not address profitability of sales. He stated that he believed this to have been understood. In support of its contention that Bears was not entitled to commissions on unprofitable sales, Talon pointed to the commission structure that Bears helped to develop for Hurd. Talon did not establish that Bears agreed to this structure for his own commissions. Even if he had, all of the sales in question occurred before the discussion, and there is no suggestion that he agreed to apply any change retroactively to sales he had already made.

Waldenberg also testified that he did not pay Bears the commissions on some of the sales because they were not collected until after Bears left employment. In *Keneally v. Orgain* (1980), 186 Mont. 1, 606 P.2d 127, the Supreme Court rejected a claim for payment under the Wage Payment Act for commissions that became due following termination of employment. In *Keneally*, however, the employment relationship was governed by a contract and employment manuals which provided that the employees were not entitled to commissions on sales until the

subject machines had been installed and invoiced. Further, the contract provided that commissions from sales installed and invoiced after the employee who sold them terminated employment were to be credited to the territory, rather than the employee.

The employment agreement in this instance had no similar terms expressly conditioning entitlement to commissions on continued employment. Although Talon's witnesses testified that this was Talon's "policy," the policy was not reduced to writing, and it was never communicated to Bears during his employment. In fact, Talon paid Bears commissions for some sales collected after he left employment. Thus, under the terms of the agreement, Bears remained entitled to the commissions he earned, even though he had left employment.

For several of the commission amounts claimed by Bears, Talon collected less than the full amount of the sale price. These included the Meissner sale, which Talon discounted by \$205.00 because there were extra supply and return lines, the Karr sale, which Talon discounted by \$323.45, and the Mountain View Physical Therapy sale, addressed below. Although the employment agreement was for 10% of the gross sales, Bears testified that the commission he received was based on the amount finally collected, not the gross sale price. Thus, the commissions due to Bears for these sales have been calculated using the amounts collected.

Regarding the Mountain View Physical Therapy sale, at the time of hearing, Talon and the Cabinet Company were in negotiations over the value of the counter tops it had tendered to Talon as partial satisfaction of its account. The dispute between them notwithstanding, Talon received value of \$2,975.00 in partial satisfaction of the sale, then received a cash payment of \$2,273.00, for a total amount of \$5,248.00, the original sale amount without the extra duct runs. Thus, Talon owes Bears a commission of \$524.80 on this sale.

## **B. Retirement Bonus**

Regarding his claim for payment of the retirement bonus, Bears has not established that he was entitled to this bonus as part of his employment agreement. It was not earned compensation, in the sense that the commissions were earned compensation. His contention that he is due the bonus is based on principles of implied contract and his apparent detrimental reliance on Waldenberg's promise to pay him the bonus.

The department has jurisdiction of claims for the payment of "wages," not to resolve other varieties of contract claims. Mont. Code Ann. § 39-3-209. Although the statute defines "wages" as "*any* money due an employer from the employer,"<sup>2</sup> its purpose is to allow employees to recover earned compensation and fringe benefits. The Montana Supreme Court has previously held that expense reimbursements are not "wages" for purposes of the Wage Payment Act. *Johnson v. K & T Manufacturing, Inc.* (1981), 191 Mont. 458, 652 P.2d 66. Clearly, the expense reimbursement was money owed by the employer to the employee, but the court held it did not qualify as wages for purposes of the wage payment law. Thus, to be recoverable under

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<sup>2</sup>Emphasis added.

the wage payment laws, the claimed sums must have the character of compensation for work performed. In a decision relied on by the Montana Court in *Delaware*, *supra*, to hold that commissions were wages, the Oregon Supreme Court stated:

We construe “wages” to mean all earned compensation contracted to be paid by the employer for the employe’s [sic] personal service regardless of the nature of such compensation. If the employment contract made the granting or withholding of a paid vacation discretionary with the employer it could be argued that vacation pay would be a gift or gratuity rather than quid pro quo for personal services.

*State ex rel. Nilsen v. the Oregon State Motor Association* (1967), 248 Ore. 133, 432 P.2d 512.

The retirement bonus claimed by Bears was not part of the compensation agreed to between the parties, was not “contracted to be paid for the employe’s personal service,” and was therefore not earned compensation. It was in the nature of a gratuity that Waldenberg said he wanted to pay to Bears when Bears announced his retirement. Thus, it was not wages. To the extent that Talon may owe the money to Bears under theories of implied contract or other contract theories, that claim is outside the jurisdiction of the Department.

### **C. Penalty**

Montana law provides for a penalty to be assessed against an employer that fails to pay wages within 10 days of when they become due pursuant to Mont. Code Ann. § 39-3-204. 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). Unless the claim is for minimum wages or overtime, or unless special circumstances are present, the rules of the department provide for a 55% penalty to be imposed. Admin. R. Mont. 24.16.7566(1). *Cf. Delaware, supra*, in which the Supreme Court held that Delaware could recover a penalty pursuant to Mont. Code Ann. §§ 39-3-205(1) and 39-3-206(1) only for commissions which K-Decorators owed Delaware on his last day of employment and did not pay within three days. The question of payment of commissions within 10 days of becoming due under Mont. Code Ann. § 39-3-204 apparently was not raised in the *Delaware* case.

Bears’ commissions became due upon payment in full of the sale by the client. Talon had received payment in full of all of the accounts for which a commission was claimed more than 10 days prior to the hearing. Thus, Bears is entitled to a 55% penalty on the commissions owed to him.

### **D. Attorney’s Fees and Costs**

Talon 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 Talon 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).

## V. CONCLUSIONS OF LAW

1. The State of Montana and the Commissioner of the Department of Labor and Industry have jurisdiction over this claim under Mont. Code Ann. § 39-3-201 *et seq.* *State v. Holman Aviation* (1978), 176 Mont. 31, 575 P.2d 925.

2. Talon Plumbing and Heating, Inc. violated Mont. Code Ann. § 39-3-204 when it failed to pay Pat E. Bears commissions within 10 days of becoming due. It owes him \$3,565.17 in commission as wages, and a penalty of \$1,960.84. Mont. Code Ann. § 39-3-206.

3. The retirement bonus payments claimed by Pat E. Bears were not "wages" for purposes of Mont. Code Ann. §§ 39-3-201(6) and 39-3-206. The department therefore lacks jurisdiction to determine whether Talon Plumbing and Heating, Inc., owes those sums to Bears.

4. Talon Plumbing and Heating, Inc., is not entitled to attorney's fees or costs.

## VII. ORDER

Talon Plumbing and Heating, Inc., IS HEREBY ORDERED to tender a cashier's check or money order in the amount of \$5,526.01, representing \$3,565.17 in unpaid commissions and \$1,960.84 in statutory penalty, payable to the claimant, Pat E. Bears, 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. Talon Plumbing and Heating, Inc., may deduct applicable withholding from the wage portion but not the penalty portion.

DATED this 4th day of February, 2005.

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.

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CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing document were, this day, served upon the parties or their attorneys of record by depositing them in the U.S. Mail, postage prepaid, and addressed as follows:

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DATED this 4th day of February, 2005.

/s/ SANDY DUNCAN