

STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
HEARINGS BUREAU

|                                 |   |                           |
|---------------------------------|---|---------------------------|
| IN THE MATTER OF THE WAGE CLAIM | ) | Case No. 123-2008         |
| OF RONALD A. SCOTT,             | ) |                           |
|                                 | ) |                           |
| Claimant,                       | ) |                           |
|                                 | ) |                           |
| vs.                             | ) | <b>FINDINGS OF FACT</b>   |
|                                 | ) | <b>CONCLUSIONS OF LAW</b> |
|                                 | ) | <b>AND ORDER</b>          |
| ZOOT ENTERPRISES, INC.,         | ) |                           |
|                                 | ) |                           |
| Respondent.                     | ) |                           |

\* \* \* \* \*

**I. INTRODUCTION**

On July 24, 2007, Claimant Ronald A. Scott (Scott) filed a claim with the Montana Department of Labor and Industry, contending that Respondent Zoot Enterprises, Inc. (Zoot) owed him \$6,700.00 in unpaid commissions. On September 25, 2007, the Department issued a determination holding that Zoot did not owe Scott any unpaid commissions and dismissed the claim. On October 9, 2007, the Department received Scott's appeal of its order and determination.

On November 5, 2007, the Department transferred the case to the Hearings Bureau for a contested case hearing. The parties subsequently filed cross motions for summary judgment which were denied. Hearing Officer David Scrimm conducted a telephonic hearing in the case on February 26, 2008. Scott appeared and represented himself. Zoot was represented by Jeanne M. Bender, attorney at law. Travis Tuss, director of sales, Ruth Kronfuss, director of human resources, Jim Franklin, and the claimant testified. Respondent's Exhibits 1-11 were admitted into evidence. Following the hearing, the case was deemed submitted for decision.

**II. ISSUE**

The issue in this case is whether Zoot owes unpaid commissions or draws as alleged in the complaint filed by Scott, and owes penalties or liquidated damages, as provided by law.

**III. FINDINGS OF FACT**

1. Scott began his employment with Zoot on April 30, 2007. His last day of work was July 18, 2007.

2. Scott's letter of hire identified that he would earn an annual base salary of \$110,000.00 and that he would be eligible for additional compensation as defined in the Sales Compensation Plan. Scott signed the letter indicating his agreement and acceptance of the terms and conditions of the offer. The Sales Compensation Plan was not included with the letter of hire.

3. On May 14, 2007, Scott sent an email to Franklin asking about his MBO or stipend plan which he had not yet received. In it he also asked for a copy of the current comp plan, acknowledged that it was being "tweaked," but wanted it so he could have a "sense of his cash flow to some degree." Scott wanted to know what amount he would receive on the MBO plan each month and what current commissions were.

4. On June 6, 2007, Franklin and Tuss held a teleconference with Scott to review his Sales Compensation Plan ("sales plan"). The sales plan included a base salary of \$110,000.00, \$110,000.00 in target commissions and \$40,300.00 for Payment In Lieu of Commissions (PILC). The sales plan provides:

PILC may be instituted at the discretion of the Chief Sales & Marketing Officer to assist newly hired National Account Managers to achieve a portion of anticipated sales commission income (the "Maximum PILC"). If instituted, performance-based goals will be tailored to meet the needs of the National Account Manager and the assigned territory of responsibility. Up to \$3,400.00 is available in any given month.

5. The delay in providing the plan was based on Zoot's desire to tailor the plan to Scott. Scott did not raise any objections to the plan during the meeting.

6. On June 7, 2007, Scott sent an email to Franklin expressing his concerns about the PILC plan. Scott was concerned that he would not be able to earn the \$3,400.00 payments each month because he might not be able to complete enough of the objectives identified in the PILC plan. Scott requested that he receive "a standard non-recoverable draw each month until the crossover with on-plan commission earnings occurs." Scott's email did not mention that he had been promised a monthly draw of \$3,000.00.

7. Scott received a total of \$3,950.00 pursuant to his PILC plan.

8. On July 6, 2007, Scott emailed Franklin and Tuss again complaining about the PILC plan and that it was hardly worth filling out the request if all he was going to earn for July was \$1,150.00. He proposed that a \$5,000.00 per month draw based on current account work and length of sales cycle be instituted. Franklin responded that the amount of "draw" that had been previously discussed was "\$3K."

Franklin also stated that he agreed that the process was not user friendly and that he and Tuss should change the comp plan as soon as possible.

9. Payment in Lieu of Commissions had been part of Sales Compensation Plans for

approximately two years before Scott joined Zoot. No other sales manager received draw compensation.

#### 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” are any money due an employee by the employer. Mont. Code Ann. § 39-3-201(6).

An employee seeking unpaid wages has the burden of proving work performed without proper compensation. *Anderson v. Mt. Clemens Pottery Co.* (1946), 328 U.S. 680; *Garsjo v. Dept. of Labor and Industry* (1977), 172 Mont. 182, 562 P.2d 473. To meet this burden, the employee must produce evidence to “show the extent and amount of work as a matter of just and reasonable inference.” *Garsjo* at 189, 562 P.2d at 476-77, citing *Anderson*, 328 U.S. at 687, and *Purcell v. Keegan* (1960), 359 Mich. 571, 103 N.W. 2d 494, 497; *Marias Health Care Srv. v. Turenne*, 2001 MT 127, ¶¶13, 14, 305 Mont. 419, 28 P.3d 494.

Once an employee has shown as a matter of just and reasonable inference that he or she is owed wages, “the burden shifts to the employer to come forward with evidence of the precise amount of the work performed or with evidence to negate the reasonableness of the inference to be drawn from the evidence of the employee, and if the employer fails to produce such evidence, it is the duty of the court to enter judgment for the employee, even though the amount be only a reasonable approximation.’ \* \* \*.” *Garsjo*, 172 Mont. at 189, 562 P.2d at 477, quoting *Purcell, supra*, 359 Mich. at 576, 103 N.W. 2d at 497.

In *Langager*, the court held that “an employer is free to set the terms and conditions of employment and compensation and the employee is free to accept or reject those conditions.” *In re the Wage Claim of Sharon Langager*, (1998) 287 Mont. 445, ¶25; 954 P. 2d 1169, quoting *Rowell v. Jones & Vining, Inc.* (Me. 1987), 524 A.2d 1208, 1211, *McConkey v. Flathead Elec. Coop.*, 2005 MT 334, ¶21-22, 125 P.3d 1121 ¶21-22.

The terms of Scott’s employment are governed by his letter of hire and his Sales Compensation Plan. Scott signed the letter of hire offering him a salary and additional compensation as defined in the Sales Compensation Plan. Neither the letter of hire or the SCP included a \$3,000.00 a month draw. While Scott believes that Franklin promised him that his compensation would include a \$3,000.00 monthly draw, Franklin testified only that he characterized the Payment In Lieu of Commission plan as “draw-like.” Franklin’s testimony is consistent with other’s that indicated that while PILC was part of all new sales employee’s and

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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.

national account manager's compensation plans and that receiving draws was not.

While one of Franklin's emails mentions \$3,000.00 and draw, other emails put "draw" in quotation marks indicating that the compensation was not exactly draw as Scott might have defined that term. Franklin's testimony and that of other witnesses is convincing that Scott was not offered a monthly \$3,000.00 draw, but was offered the PILC plan in addition to his other compensation.

Scott may have thought he was getting a \$3,000.00 draw and Franklin likely could have done a better job of explaining the compensation package that Scott would be receiving, but the evidence presented in this matter makes clear that the compensation package that Scott initially agreed to did not include such a provision. Although Zoot was under no legal obligation to provide the SCP before Scott began his work there, disclosing it would have avoided a considerable amount of misunderstanding. It also appears that there may have been some miscommunication or differences of opinion about the matter between Franklin and his superiors at Zoot. Scott, as an experienced sales executive also bears some responsibility for uncovering the details of what he obviously felt was a very important part of his compensation package before he began his employment.

Ultimately, Scott has not proven that he is owed unpaid drw compensation. The evidence is clear that no such compensation was included in the terms and conditions of his employment.

## V. CONCLUSIONS OF LAW

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

2. Zoot Enterprises, Inc., is not obligated to pay unpaid draw compensation to Ronald A. Scott.

## VI. ORDER

Scott's claim for unpaid wages is dismissed.

DATED this 30th day of May, 2008.

DEPARTMENT OF LABOR AND INDUSTRY

By: /s/DAVID A. SCRIMM  
David A. Scrimm  
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.