STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM OF LINDA L. OLSON,	)	Case No. 1677-2007
Claimant,	)	
vs.	)	**ORDER ON REQUESTS FOR REHEARING**
JACK LOVE, D/B/A BARRETT WHITMAN,	)	
Respondent.	)	

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The respondent filed a motion for rehearing alleging that there is no substantial basis for the hearing officer's findings that Olson was owed additional unpaid wages of $1,078.00 and the concomitant penalty on that amount. The respondent also asserts in essence that his evidence was more credible than that provided by the claimant on the issue of amounts due for unpaid non-sales administrative work. In response, the claimant argues that the hearing officer properly determined the amounts due in unpaid wages with respect to the non-sales administrative work. In addition, the claimant argues that if the matter is reheard, the hearing officer should reconsider his decision finding that the claimant was not due additional wages for unpaid commissions on sales work. The hearing officer has considered all arguments and has reviewed the audio recordings[1] of the hearing.

While there are no specific rules pertaining to wage and hour cases that prescribe the standard for granting a rehearing, there are analogous standards contained in Montana statute relating to the granting of new trials in civil proceedings before district courts. Among those bases is a determination by the trial court that there is insufficient evidence to justify the determination. Mont. Code Ann. § 25-11-102(6). A trial court's discretion to grant new trial is exhausted when it finds that substantial evidence supports the decision. *Tope v. Taylor* (1988), 235 Mont. 124, 768 P.2d 845, overruled in part on other grounds, Giambra v. Kelsey, 2007 MT 158, 338 Mont 19, 162 P.3d 134. Evidence is not made insubstantial merely because a party does not like the trier of fact's credibility determination. Rather, it has long been the law in Montana that there must be a complete absence of any evidence in order to find the evidence insufficient to justify the determination. *Chancellor v. Hines Motor Supply* (1937), 104 Mont. 603, 69 P.2d 764 (holding that a motion for new trial cannot be granted "unless as a

[1] In his motion for rehearing, the respondent asks for "a copy of the written transcript that the Hearing Officer must have used." Respondent's motion, page 2. There is no written transcript of the proceeding. The hearing officer relied on his notes taken during the hearing and review of the audio recordings of this proceeding, which recordings are available on CD for either party.

matter of law the plaintiff cannot recover upon any view of the evidence, including the legitimate inferences to be drawn therefrom").

Here, Olson's testimony provides substantial evidence upon which to find that she was not paid for all hours she worked on non-sales administrative tasks. The respondent's criticism that the determination misses the true issue of whether the claimant's non-sales administrative activities for which she was entitled to hourly compensation per the parties agreement is pure semantics. Whether denominated circle time or something else, it is clear from Olson's testimony (corroborated by witness Pam Vandersnick) that she was owed but not paid for 91 hours of non- sales administrative tasks worked during the production of 13 newspaper issues plus 7 additional hours that she worked on mailing of one additional issue (a total of 98 hours). Olson testified and has repeatedly held throughout the course of this proceeding (see, e.g., Exhibit 338, Olson's complaint and Olson's final contentions) that she is owed hourly wages for non-sales administrative tasks for which she was not paid. There was no dispute that her employment agreement called for her to be paid on an hourly basis when she was engaging in non-sales administrative tasks. Olson's testimony is alone sufficient to show that her work during these times was not sales work as contemplated by the parties' work agreement. Olson testified at hearing that she was not allowed during "lay up" time to be on the phone making sales calls. She also testified about her filing of other salespersons's contacts for which work other employees, such as Colleen Paduano, were paid an hourly wage. When considered on the whole, her testimony and other corroborating testimony (such as that provided by Pam Vandersnick) provides substantial evidence for the decision in this matter regarding the number of hours worked but not paid for non-sales administrative tasks.

It is clear, however, that the hearing officer erred on the amount to be paid for the non-sales administrative tasks. The $11.00 guarantee relates to the commission issue, not to the non-sales administrative tasks. Even the claimant agrees that she was to be paid only $10.00 per hour for non-sales administrative tasks (as demonstrated in her response to motion for rehearing). Thus, the amounts determined by the hearings officer in his determination are incorrect and must be recalculated at $10.00 per hour. At $10.00 per hour for 98 hours of work, Olson should have been compensated in the total amount of $980.00 (98 hours x $10.00 per hour=$980.00). Penalty on that amount equates to $539.00 ($980.00 x 55%=$539.00). The claimant is thus due a total of $1,519.00, representing $980.00 in unpaid wages and $539.00 in penalty.

The claimant's request to revisit the issue of the commissions is also denied. The substantial evidence in this matter demonstrates that the employment agreement provided that the claimant would not receive commissions for future advertisements run after she left her employment on accounts that she had landed. There is nothing legally impermissible about such an arrangement, as the case law cited in the decision amply demonstrates.

Accordingly, it is ordered:

(1) The respondent's motion for rehearing is granted in part. Claimant is due $980.00 in unpaid hourly wages for non-sales work and $539.00 in penalty. The respondent shall forthwith remit a cashiers check or money order to the Employment Relations Division, P.O. Box 6518, Helena, Montana, 59624-6518, made payable to Linda Olson in the amount of $1,519.00. Respondent may deduct applicable withholding from the wage portion, but not the penalty portion of the amount due.

(2) The claimant's motion for rehearing is denied.

DATED this 15th day of May, 2008.

DEPARTMENT OF LABOR AND INDUSTRY

By: /s/ GREGORY L. HANCHETT
Gregory L. Hanchett, Hearing Officer
Hearing Bureau

NOTICE: Each party is entitled to judicial review of this matter 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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