

STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM )	Case No. 1331-2008
OF PATRICK J. MALAKIE, )	
)	
Claimant, )	<b>FINDINGS OF FACT,</b>
)	<b>CONCLUSIONS OF LAW,</b>
vs. )	<b>ORDER AND NOTICE OF</b>
)	<b>JUDICIAL REVIEW RIGHTS</b>
PATTY SEAMAN HOMES, INC., )	
a Montana Corporation, )	
)	
Respondent. )	

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**I. INTRODUCTION**

Claimant Patrick J. Malakie appealed from a Wage and Hour Unit determination that found respondent Patty Seaman Homes, Inc. (“PSHI”) did not owe him unpaid wages (commissions) from his employment with PSHI.

Hearing Officer Terry Spear convened an in-person contested case hearing in this matter in Kalispell, Montana, on October 8-9, 2009. Malakie appeared in person with his attorney, Dean D. Chisholm, Chisholm & Chisholm, P.C. PSHI appeared in person through its designated representative, Michael Seaman, with its attorney, Daniel D. Johns, Crowley Fleck, PLLP. Patrick Malakie, Jackie R. (“Rip”) Wilfong (by telephone), Guy Adams, Jerry Hanson, Michael Seaman, and Kyle Campbell testified. The parties agreed to telephonic rebuttal and surrebuttal testimony at a later date, and the hearing was again convened, by telephone, on October 22, 2009, at which time Jim Williamson testified and Malakie and Seaman each again testified. Exhibits admitted into evidence are: Bates numbered documents 3-6, 14, 175, 182, and 194-219; Wage and Hour unit investigative file documents (as provided to the parties with the notice of hearing herein) labeled as document numbers 20-21, 53-54, 72, 76, 103-104, 109, and 110-116; and documents labeled (by exhibit stickers on the first page) A through KK and MM through RR. The Hearing Officer’s “Admitted Exhibit List” accompanies this decision.

On November 25, 2009, the Hearings Bureau received the last post-hearing submission and the case was deemed submitted for decision. Based on the evidence,

exhibits, authorities and arguments presented, the Hearing Officer makes the following findings of fact, conclusions of law, and final order.

## II. ISSUE

Is Malakie due unpaid wages as alleged in his complaint, and if so, how much and is a statutory penalty proper?

## III. FINDINGS OF FACT

1. Patty Seaman Homes (“PSHI”) sells and services manufactured homes from its principal place of business in Flathead County, Montana. Its annual gross revenues exceed \$500,000.00. PSHI has been in business more than 35 years and is one of the largest manufactured home dealers in the State of Montana.

2. At all times relevant to this case, the General Manager for PSHI was Michael Seaman. Seaman is an active, hands-on manager, often participating in sales transactions. He is paid on a salary rather than a commission basis. His mother, Patty Seaman, is the sole owner of PSHI.

3. The primary manufacturer of homes sold by PSHI is Nashua Homes of Idaho, Inc., whose manufacturing facilities are located in Boise, Idaho. PSHI has sold Nashua Homes longer than any of its other dealers, and the Company’s primary contact at Nashua Homes for more than 20 years has been Jackie “Rip” Wilfong. PSHI offered other homes through other manufacturers, but Nashua was both their main supplier and their “top of the line” supplier.

4. At all pertinent times, PSHI had written policies regarding commissions earned by its sales persons (“commission policies”), which all sales persons received and signed at the start of employment. The commission policies included the following statements:

Commission request forms must be presented at the end of the month with a copy of the purchase agreement and a copy of the contract. Please have your commission vouchers turned in on the 1st day of every month to Patty for approval. No unfunded or incomplete deals will be paid on.

If a sales person leaves our employment, they will forfeit any and all commissions on any contracts that are not funded.

5. PSHI hired Patrick J. Malakie in December 2006 as a sales person. Prior to his employment with PSHI, Malakie had worked in various commission-based income jobs in the real estate and lending industries. PSHI agreed to pay Malakie as it paid all of its sales persons, on a commission basis.

Malakie received and signed PSHI's commission policies when he began his employment.

6. Malakie made more than 20 sales for PSHI during his employment, and was one of PSHI's most successful sales people. In any given transaction, Malakie was typically responsible for meeting with customers, showing them units, helping them design their unit if it was to be manufactured to their specifications, placing the factory order, assisting with financing, traveling to the home site to determine its suitability, obtaining deposits, preparing contracts, coordinating subcontractors and the setup crew, and handling follow-up questions from the customer after the home was set on their property.

7. In its commission policies, PSHI provided that for new home sales, the responsible sales person would be paid a percentage of the sale price for the home, minus the invoice price of manufacture of that home and "any extras we purchase such as skirting, crane charges, appliances and any physical changes to the home such as switching furnaces, hot water heaters [and so forth]." The net sales price after these deductions was called, in the vernacular of PSHI, the "mark."

8. The commission policies specified the percentages of the mark that constituted the commission on the particular sales. The lowest percentage was 8%, which applied to the bottom dollar range of marks. As the mark increased, so did the percentage, to a maximum of 15%, which applied to the top dollar range of marks.

9. The commission policies also required the responsible sales person to repay PSHI (by deduction from the commission) 25% of the cost of "add-ons," identified as "all accessories such as skirting, appliances, crane charges or physical changes such as exchanging furnaces, hot water heaters, [and so forth]."

10. The commission policies were ambiguous regarding these calculations. "Extras" deducted from the gross sales price in determining the "mark" included skirting. A deduction for an "extra" (including skirting) would reduce the mark by the cost of that "extra," reducing the commission by eight to 15% of that cost, depending upon the commission rate. "Add-ons" also included skirting. A deduction for 25% of that "add-on" (including skirting) would come directly out of the commission after it was calculated.

11. This ambiguity has obvious significance for commission calculations. Under the "extra" approach, skirting would reduce the commission by eight to 15% of its cost, depending upon the size of the mark. But under the "add-on" approach, skirting would reduce the commission by 25% of its cost.

12. There is an example of the calculation of an “add-on” deduction for skirting in the commission policies at the start of employment. The skirting in the example cost \$500.00. Treated as an “extra,” that skirting would reduce the commission earned by \$40.00 to \$75.00, depending upon the size of the mark. Treated as an “add-on” in the example in the commission policies, that same \$500.00 skirting would reduce the commission by \$125.00. The evidence does not explain how PSHI decided whether skirting was an “extra” or an “add-on,” although that decision would cause a larger or smaller reduction to the commission owed.

13. During the summer and fall of 2007, Malakie worked to obtain approval for PSHI to do business in Canada. That work included marketing and advertising, tax and business registration in Canada, and making contact and arrangements for transportation (including customs and immigration services paperwork and costs), and for set-up contractors and subcontractors. Malakie worked extended hours without additional pay, in anticipation of making entry for PSHI in what appeared to be an emerging and profitable Canadian market.

14. Higher than usual delivery and set-up costs reduced PSHI's profit on a new home sale. At least one circumstance that could cause such higher costs (crane charges) was identified in the commission policies as a basis for reduction to commissions. Such higher costs could occur on sales in PSHI's local market, in and around the Flathead valley. They typically would occur for sales requiring delivery and set-up outside of the local market. Seaman sometimes used such costs, typically as an “add-on,” to reduce commissions. There was no credible evidence of any policy, written or unwritten, by which Seaman determined when or why to make such reductions, but apparently he did so in a manner he considered reasonable under the circumstances of each case.

15. Malakie initially did not have his commissions reduced by delivery and set-up costs, even on sales outside of PSHI's local market. Later during Malakie's tenure with PSHI, Seaman reduced Malakie's commissions on some sales involving higher delivery and set-up costs, including a reduction of Malakie's commission on a sale of a new home for delivery and set-up in Canada. Malakie considered the reductions to be arbitrary and unfair, at least in part because there was no policy or explanation for the reductions. He did not file wage and hour claims on those reduced commissions.

16. PSHI sometimes did advance commissions on sales that were not yet fully funded. There were no policies or rules, written or otherwise, to govern or guide or even give notice of the existence of that discretionary power. Seaman authorized advances of up to as much of the apparent commission as could be calculated against the amount of revenue that PSHI had already received or reasonably expected to retain after meeting outstanding costs, even though the sale

was not completely funded. This appears from the evidence to be the sole reasonable basis upon which Seaman would authorize such advances.

17. Malakie received payments, in advance of full funding, on sales of new homes to Howard Mann, [no first name on contract] Lentz, and Bob and Wilma Nesbitt. Malakie testified that after receiving these partial commissions before the sales were fully funded, PSHI did not pay him the rest of the commissions. Malakie did not file wage and hour claims on the remainders he considered due on those commissions.

18. Seaman sometimes “split” a commission, when more than one employee was involved in the sale. Part of the commission might be paid to another sales person who also had worked on the sale. If Seaman had worked on a particular sale to which a “split” was applied, part of that commission would simply be withheld from the responsible sales person’s commission, since Seaman was on salary.

19. There was no policy or rule, written or otherwise, to govern or guide or even give notice of the existence of this discretionary power. In the absence of any policies or rules about whether or when to split a commission, Seaman based his decisions upon his knowledge and experience with PSHI. He used his common sense to decide what was fair and practicable for PSHI and what ought to make reasonable sales people happy. Seaman recognized the importance of having happy sales persons, particularly successful sales persons, but his ultimate loyalty was to PSHI.

20. Malakie had experienced “split” commissions on some of his sales. In sales of new homes to Jerry Hanson, Guy and Tamara Adams, Rod and Terry Johnson, Curtis and Leah Visser, and [no first name on contract] Fleugel, Seaman reduced Malakie’s commission, in each contract by 50%, on the basis that he, Seaman, had been instrumental in each transaction. Malakie thought Seaman had made unfair and arbitrary decisions in reducing his commissions on these transactions. He did not file wage and hour claims on the reduced commissions.

21. In at least one respect, PSHI always adhered to the letter of its written policy and practice – after a sales person left employment with PSHI, the former employee never received a commission on a sale that was not completely funded at the time that person left employment. Having a copy of the written policy against such a payment, signed by the now former sales person, and having no particular need to keep a former employee happy, Seaman always followed that policy.

22. In the March 2007 home sale to Howard Mann, Malakie had worked with Kevin Nelson of CTA Architects & Engineers (who had represented the buyer). In July 2007, as a result of Malakie’s work with Nelson and CTA, PSHI received a formal request for proposal (RFP) from another CTA client, Sletten Construction

Companies. The letter invited PSHI to submit a bid and qualifying information for ten modular homes, with delivery and set-up at a site in St. Marie, Montana (near Glasgow, in northeastern Montana). Sletten was managing a project to develop a test flight facility at that site, for Boeing (the ultimate purchaser of the homes). Part of that development was to construct appropriate housing at the site. The RFP was dated July 18, 2007, and the bids were due by 1:00 p.m. on July 25, 2007. The RFP included 15 pages of detailed, written specifications and eight pages of CTA's architectural/engineering drawings.

23. This kind of a sale was far outside the usual transactions for PSHI. Selling ten homes (or seven, as it eventually turned out to be) to one buyer presented far more complicated specifications and requirements than would arise in selling ten or seven homes to ten or seven individual buyers, who came in over time and each made individual choices about options for their individual homes. Because of the potential value of the transaction, there was an incentive for the sales person to go beyond what PSHI would normally offer, in extras and add-ons. Even if the transaction involved several times the amount of work required for a single sale, it would still generate a much larger commission.

24. The detailed specifications included many provisions outside of the usual scope of the options available through PSHI and its primary source for homes, Nashua. For one pertinent example, Nashua provided a one year manufacturer warranty with its new homes. Extended warranties could be purchased from third parties at a relatively nominal price (a three-year warranty could be bought for between \$150 - \$200 per home), but Nashua did not include them. Warranties on appliances were strictly those available from the manufacturer of each appliance. The Sletten RFP specified two year warranties on the homes and ten year warranties on the appliances. There were many other specifications within the RFP that went beyond the normal sales "package" offered by PSHI.

25. Malakie discussed the RFP with Seaman, and contacted Wilfong at Nashua Homes for cost figures on the homes, to use in preparing PSHI's proposal. Wilfong provided the information he believed was needed, but he had not reviewed the entirety of the specifications included in Sletten's RFP.<sup>1</sup>

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<sup>1</sup> Wilfong testified that most of Nashua's subsequent problems with the bid price and specifications arose because he had not had all of the pertinent materials when he priced the units for Malakie. The credible and substantial evidence of record does not establish whether Malakie failed to provide all of the RFP materials to Nashua (which he found inconceivable, a rather indirect denial of the failure to provide) or whether Wilfong failed to find and to use some of the RFP materials (Wilfong testified at hearing he could not find materials faxed to him by PSHI the day before his testimony, because of the condition of his desk).

26. Seaman had looked at the documentation and the proposed bid prepared by Malakie, and the two had discussed some of the specifications. Malakie prepared PSHI's bid in less than a week, to meet the submission deadline. He prepared it with information from Wilfong. The bid priced the ten homes, in toto, at \$1,209,400.00. It did not address many of the specifications in the RFP. Seaman could have reviewed the bid in detail before it went out, but did not take the time to do so, relying upon Malakie and the information he gleaned in his conversations with Malakie. The bid was timely submitted to Sletten.

27. Sletten chose PSHI as the vendor of the homes for the Boeing site. However, as noted, the bid lacked the degree of detailed specificity in the RFP. This caused uncertainties, misunderstandings, disagreements, negotiations, compromises and modifications to the designs of the homes. During the course of dealing between the parties, Malakie was the principal representative of PSHI, Ron Hagen was the principal representative of Sletten, and Wilfong was the principal representative of Nashua.

28. There were numerous differences between the RFP and Nashua's designs for either modular homes or manufactured homes (sometimes called "HUD homes"). Originally, modular homes, more expensive and constructed to local building codes, were to be provided to the Boeing site. Manufactured homes, less expensive and constructed to national building standards, were eventually provided. The number of homes to be sold was reduced from ten to seven.

29. Throughout the prolonged process of defining and redefining the homes to be purchased, Sletten insisted upon the original specifications in the RFP. PSHI insisted that the homes, as Nashua usually manufactured them, would satisfy the underlying housing requirements without necessarily confirming precisely to the RFP.

30. In October 2007, Malakie sent to Sletten the standard PSHI contract for seven manufactured homes. The price of the homes was \$784,630.00. Malakie included Nashua's production order forms for signatures. The standard PSHI contract was never signed by Sletten, and Nashua's production order forms were not signed by Sletten at that time. Sletten incorporated the terms of the standard PSHI contract into a standard AIA construction contract and provided it to PSHI. Seaman refused to sign it, but instructed Malakie to proceed with the sale, which the parties did, despite the absence of a full and final signed agreement.

31. Over the course of several weeks, Sletten, and other representatives of Boeing, addressed their issues with Malakie, Seaman, and Wilfong. The parties reached multiple agreements about various problems, including some agreements about who would pay for changes from the Nashua designs, changes in other specifications regarding appliances, warranties and other matters, and the costs of

foundation work specifically excluded from Malakie's bid. There appeared to be approximately \$5,156.00 in discrepancies per home (a total of \$36,092.00), to include \$780 per home of "bonus items" that Malakie had added free of charge to the contract.<sup>2</sup> The parties (with Malakie representing PSHI) reached an agreement that PSHI would bear the costs of \$1,856.00 of those per home costs. It is not clear that Seaman ever agreed with Malakie that PSHI would accept that additional cost per home (which would then have been deducted in some fashion from the marks on the homes). It is clear that Seaman considered all additional cost items borne by PSHI to be Malakie's responsibility, as between PSHI and Malakie, in determining any commission due.

32. In their testimony at hearing, Malakie and Seaman disagreed about the content of their discussions regarding the differences between the bid and the RFP specifications. Again using warranties as an example, Malakie's recollection was that when they discussed the warranties, Seaman told him that the two year warranties on the homes would not be a problem and to go ahead with the bid. Seaman recalled stating that PSHI would not provide extended home warranties under the bid. Seaman did not dispute that he had approved sending out the bid. Obviously, there was a factual dispute over whether Seaman authorized inclusion of the two year home warranties in the bid, which Malakie did include.

33. Eventually, Sletten authorized production of the homes, and paid the amounts required so that Nashua produced the homes and PSHI effectuated their delivery and set-up.

34. Nashua covered the first year of the two-year warranties in the contract. At the time of the hearing, less than three months remained on the two-year warranties. PSHI presented no credible evidence that any warranty claim had been or would be made during the second year that would come close to matching or exceeding the 5% of the purchase price retained by Sletten (see Finding of Fact No. 36, below, for the percentage of the purchase price paid). There is no provision in any of PSHI's policies that allow it to deduct such warranty claims from a sales person's commission, although the standard Nashua warranty, as noted, was for one year.

35. There was also some dispute during the performance of the bid regarding payment for the foundations of the homes. Malakie's bid stated that the "4' concrete foundation to be erected, and all other concrete work" was not PSHI's responsibility, but would be "completed on site by other contractors . . . ." Exhibit

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<sup>2</sup> Malakie's common practice was to provide "bonus items" to make sales more attractive to buyers. Until the protracted course of the Sletten transaction, PSHI did not question his practice.



AA at 5. Sletten contended that the metal shims for the foundation should not be its responsibility. Although the foundation issue was resolved as part of the ensuing accommodation among all the parties, Seaman and Malakie disagreed about whether and to what extent any cost for steel shim and other foundation materials for which PSHI was ultimately responsible should be counted against Malakie's commission.

36. By the end of November 2007, Sletten had paid approximately 95% (\$745,398.50) of the ultimate total contract price (\$784,630.00). A signed agreement that specified the terms and conditions of the sale and purchase of the seven homes had still not been executed by PSHI and Sletten. Sletten was already sending letters to PSHI documenting additional costs incurred which it claimed were PSHI's responsibility and which would be set off against the balance retained on the purchase price if not paid. As time continued to pass, Sletten continued to send such letters, documenting its position that PSHI still had not completely performed its obligations in the transaction, that PSHI was obligated to sign the AIA contract submitted to it, and that any costs Sletten believed were PSHI's responsibility and which remained unpaid after exhaustion of the balance retained on the purchase price by offsets would be sought from PSHI.

37. In December 2007, Malakie prepared commission sheets for the seven manufactured homes. The commission sheets were not presented to PSHI along "with a copy of the purchase agreement and a copy of the contract," as required by the policies signed by Malakie on December 14, 2006, since there was not and never had been a single signed purchase agreement or contract.

38. In his commission sheets for the seven homes involved in the Sletten sales, Malakie calculated the mark for each home. For each home he used a sale price of \$112,090.00, which is 1/7th of \$784,630.00. For the one home of the seven with additional modifications to make it an "ADA certified" home, he used an invoice price of \$81,915.00. For the other six identical homes, he used an invoice price of \$80,205.00. For each of the seven homes, he included an addition of \$1,320.00, and a reduction of \$1,856.00 (the other costs to be borne by PSHI according to an agreement between the parties about changes, to which Seaman never actually had agreed on behalf of PSHI), which resulted in a net reduction beyond the invoice cost of \$536.00. He thus generated a mark for the "ADA" house of \$29,639.00. For the other six identical homes, he calculated the mark on each as \$31,349.00. The result was a total commission of 15% of the total mark of \$217,733.00 or \$32,659.95.

39. PSHI established that there was \$40,145.00 of additional costs resulting from shipping and set-up. As previously found, the commission policies are ambiguous regarding some items, which might be "extras" (reducing the commission in this case by 15% of its cost) but might also be "add-ons" (reducing the commission

by 25% of its cost). The commission request adjustments of record regarding multiple sales by Malakie before the Sletten transaction show that PSHI customarily applied such costs as "add-ons." Therefore, 25% of the shipping and set-up costs (\$10,036.25) would properly have been deducted from any advance commission.

40. The total amount retained by Sletten as of hearing was \$39,231.50, although the total amount Sletten showed being due to PSHI, after the set offs claimed by the parties during their negotiations, was \$39,891.43. PSHI did not, at that time, face claims that it must disgorge any of the money it had already received for the homes.

41. Overall, Seaman viewed any and all costs to PSHI above those typical for individual home sales within PSHI's normal market area to be the responsibility of Malakie, including costs of the extended negotiations and costs of any and all adjustments that were not in favor of PSHI. He did not authorize payment of the commissions calculated by Malakie, nor did he calculate reduced commissions, on any of the bases he ordinarily used to derive such reduced commissions.

42. Malakie made several requests for payment of his commissions after his submission of his commission sheets in December 2007. Seaman, at some point, offered to pay Malakie \$10,000.00, perhaps as an advance, although that was not specified. Malakie did not pursue that offer, because he feared that if he obtained it, PSHI would treat it as his entire commission.

43. PSHI did not pay Malakie the commissions requested, or any commission at all, on the Sletten transaction. Because of the complexity of the transaction, and the amount of time involved in the transaction, including the disputes, negotiations and adjustments involved, much of Malakie's work and business for PSHI, beginning in mid-July 2007 and continuing through his departure from his employment in February 2008, involved the Sletten transaction.

44. Malakie resigned his position with PSHI on February 7, 2008, because he had not been paid any commission for the Sletten transaction.

45. It was neither reasonable nor proper for PSHI to withhold all commission payments to Malakie on the Sletten sales, with 95% of the purchase price paid, even with questions about further costs still unresolved.

46. On February 11, 2008, Sletten sent a proposal to PSHI for (1) a change order authorizing an increase in the purchase price to \$789,859.89; (2) reduction of retained funds due to PSHI for the transaction to \$9,000.00; and (3) submission of specified signed documents to complete the transaction. Sletten offered payment to PSHI, upon performance of items of (1) and (3), of the difference between the adjusted purchase price (minus the retained \$9,000.00) and the amount previously

paid. PSHI did not agree. Utilizing these figures, the result would have been a further payment to PSHI of \$35,461.39, with more clearly defined exposure for further claims that might have been less than, equal to, or possibly more than the \$9,000.00 still retained by Sletten. PSHI refused to act upon the proposal.

47. The evidence does not permit the Hearing Officer to determine what actual profit (even without deduction of the costs to PSHI of the prolonged negotiations) PSHI, to date, appears to have realized, or would have realized had PSHI accepted the February 11, 2008 offer from Sletten.

48. The difference between the amount paid by Sletten and the Nashua invoice price for all seven homes as of Malakie's commission calculations in December 2007 was \$182,253.50 (\$745,398.50 minus \$563,145.00). Additional costs of \$1,856.00 per home (the amount Malakie agreed PSHI would shoulder) times seven equals \$12,992.00. Subtracting 100% of those costs generates a total mark of \$169,261.50. At 15% of that mark, Malakie's commission (with no credit for the balance withheld by Sletten), paid before full funding, while he was still employed by PSHI, would have been \$25,389.23, to the nearest penny, based upon the credible evidence of record. Reduction of that commission for 25% of the shipping and set-up costs (\$10,036.25, see Finding of Fact No. 39) would have generated a reasonable and proper advance commission of \$15,352.98.

49. Without this advance commission from the Sletten transaction, Malakie's income for 2007 sales was \$80,911.31. With the advance commission he should have received, his sales income for 2007 would have been \$96,264.29, an increase of almost 20%.

50. Given the uncertainties of the remaining amount due under a contract never reduced to a single document and still in dispute, as well as Malakie's resignation, even though it may have been reasonable under the circumstances, no further commission was then or is now due to him on the Sletten transaction.

51. A 55% penalty on unpaid earned wages of \$15,352.98 is \$8,444.14, to the nearest penny.

52. The total of the wages due and the penalty imposed is \$23,797.12.

#### IV. DISCUSSION<sup>3</sup>

Montana law requires that employers pay wages when due, in accordance with the employment agreement, pursuant to 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

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<sup>3</sup> 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.

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).

PSHI was free to set the terms and conditions of Malakie's employment and compensation, and Malakie was free to accept or reject those conditions, as set forth in the commission policies of PSHI. *In re Langager v. Crazy Creek Products, Inc.*, ¶25, 1998 MT 44, 287 Mont. 445, 954 P.2d 1169. Had PSHI changed (with notice) its commission policies before the Sletten transaction, and given “new and independent consideration for its [new] terms,” which were “bargained for,” such changes would also have applied to this transaction. *Langager at* ¶15, **quoting and applying** *Gates v. Life of Montana Ins. Co.* (1982), 196 Mont. 178, 638 P.2d 1063, 1066. PSHI did not change its commission policies, but it did make exceptions to them and there were ambiguities in them. The commission policies, including those exceptions and ambiguities, apply to determine whether a reasonable and proper advance commission was earned and if so, how much it was. An employment agreement that includes commissions as the form of compensation controls whether an employee is entitled to commissions. *Wage Claim of Olson* (DLI, 4/20/2007), No. 1677-2007, **citing** *Tech Rep., Inc. v. Richardson-Merrell, Inc.*, (Ill.App.3d, 1982), 438 N.E.2d 599; *Richard v. Koury Brothers*, (7th Cir. 1965), 341 F.2d 34; *Schackleton v. F. S. Corp.* (Ill.App.3d 1989), 554 N.E.2d 244.

PSHI did not always follow its “full funding” commission policy. Thus, the first questions of law and fact are whether it would have been reasonable and proper, within the exceptions in PSHI's practice to the “full funding” policy on paper, to make an advance commission payment to Malakie after he submitted his commission requests in December 2007 on the Sletten transaction. PSHI was willing to make at least some payment on the commission earned by Malakie on the Sletten transaction before it was fully funded. The reasonableness of making a payment, and the proper amount for such a payment, are questions of fact.

Generally, an employee seeking payment of unpaid wages must show he has performed work 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*, 562 P.2d **at** 476-77, **citing** *Anderson at* 687, **and** *Purcell v. Keegan* (1960), 103 N.W.2d 494, 497; **see also** *Marias Health Care Services v. Turenne*, ¶¶13-14, 2001 MT 127, 305 Mont. 419, 28 P.3d 494, **and** *Berry v. KRTV Commun.* (1993), 262 Mont. 415, 865 P.2d 1104, 1112.

The same legal reasoning applies here. Malakie had the burden to show that under the circumstances, it would have been reasonable for PSHI to pay him an advance commission on the Sletten transaction before it was fully funded, as it did

sometimes do. He met that burden. The transaction was 95% funded. True, there still was no signed contract or purchase order. True, there remained questions about what the total costs to PSHI finally would be, when the remaining points of dispute were resolved, and even some uncertainty about whether the additional costs to PSHI might be as much as the amount still due to PSHI. Nonetheless, the substantial and credible evidence of record established that PSHI was (and still is) reasonably secure in its right to retain nearly three-quarters of a million dollars it has been paid on the Sletten deal. The substantial and credible evidence of record also established that a major cause of the remaining uncertainty about resolution of the contract disputes was miscommunication between Seaman and Malakie, with no preponderance of the evidence showing that Malakie was more responsible than Seaman for that miscommunication.

Under those circumstances, PSHI's refusal to make any payment before full funding was unreasonable and improper. The appropriate commission was 15% of the mark derived from the amounts already paid to PSHI, less (1) the invoice amounts, (2) the amounts the parties to the transaction (without Seaman's express individual approval) agreed PSHI would pay and (3) the costs of shipping and set-up.

Once an employee has shown that he did perform work for which he has not been paid, "and produces sufficient evidence to show the extent and amount of such work as a matter of just and reasonable inference, 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*, 562 P.2d at 477, *quoting Purcell, op. cit.*

With the evidence of past departures from the "full funding" policy, the reasoning in *Olson*, albeit on somewhat different facts, can be applied here. Malakie presented evidence sufficient to meet his burden to show that he was entitled to wages – an advance commission paid before the Sletten transaction was fully funded – based upon the appropriate calculations. PSHI failed to rebut this inference with substantial and credible evidence establishing that there was a sufficient risk of claims, created by Malakie's misfeasance or nonfeasance, in excess of the money retained by Sletten, to make payment of such a commission unreasonable or improper. PSHI also established the amounts of additional costs for shipping and handling, which were properly applied to reduce that advance commission.

In *Langager*, the Montana Supreme Court held that a vacation pay entitlement policy that required the employee to come back to work after the vacation before the vacation already taken was earned was invalid. "[V]acation pay is earned by virtue of an employee's labor and once it has accrued, it has by definition been earned.

*See, e.g., Wolf v. Sam's Town Furniture, Inc.* (1995), 120 N.M. 603, 904 P.2d 52, 57 . . .; *Kistler v. Redwoods Community College Dist.* (1993), 15 Cal. App. 4th 1326, 19 Cal. Rptr. 2d 417, 421 . . .” *Langager at* c30. In the same fashion, once Malakie established that an advance of his commission was reasonable and proper, under the apparent standards Seaman used to authorize advance commissions, before the Sletten transaction was fully funded, that advance commission was earned. It became earned wages in law and fact, as much as Linda Olson’s commissions for ads she had sold were earned with each publication of the ads before she left her work. *Olson, op cit.*

There still remains the question of whether, under these peculiar facts, Malakie is entitled to a commission on the portion of the Sletten transaction that remained unfunded when he resigned. On the face of the commission policies, leaving his employment ended his commission entitled for the unfunded balance. Malakie knew that PSHI had never deviated from this commission policy. It may have been reasonable for him to leave employment because PSHI failed and refused to pay him any of the portion of his commission which should reasonably and properly have been advanced. However, his departure left PSHI to resolve the further problems delaying full funding without his assistance. He may not have created all of those problems, but he chose to leave before they were solved. The commission policy that PSHI always followed against paying a commission on sales not fully funded before departure of the sales person, applied.

Just as Linda Olson lost, when she left her employment, any right to commissions on subsequent publications of ads she had sold, Malakie lost, when he left his employment, the right to commissions on any payments of funds PSHI had not received as of the date of his resignation. *Olson, op cit.*

The department’s rules on wage and hour cases require imposition of a penalty when wages are found to be due and unpaid. For regular (as opposed to overtime) wages found to be due, the basic administrative rule, which requires imposition of a 55% penalty, applies. Admin. R. Mont. 24.16.7566(1)(a). PSHI owes Malakie the 55% penalty calculated in Finding of Fact No. 50.

## V. CONCLUSIONS OF LAW

1. The State 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. Malakie is due unpaid wages of \$15,352.98 and a statutory penalty of \$8,444.14, on those earned and unpaid wages, for a total due and owing of \$23,797.12. Mont. Code Ann. c 39-3-206(1); Admin. R. Mont. 24.16.7566(1)(a).

3. Malakie is not due any commission on further amounts paid to PSHI on the Sletten transaction after he left his employment.

**VI. ORDER**

Patty Seaman Homes, Inc. is hereby ORDERED to tender a cashier's check or money order in the amount of \$23,797.12, representing \$15,352.98 in unpaid wages and \$8,444.14 in penalty, made payable to Patrick J. Malakie, 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. PSHI may deduct applicable withholding from the wage portion but not the penalty portion of the amount due. This order is a final agency decision.

DATED this 14th day of December, 2009.

DEPARTMENT OF LABOR AND INDUSTRY

By: /s/ TERRY SPEAR  
Terry Spear, Hearing Officer  
Hearings Bureau

\* \* \* \* \*

**NOTICE OF JUDICIAL REVIEW RIGHTS:** 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 this decision. See also Mont. Code Ann. §2-4-702.

If there is no appeal filed and there is no payment made pursuant to this Order, the Commissioner of the Department of Labor and Industry will file an application with 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.