



## I. FINDINGS OF FACT

1. Excel Elevator is a closely held Montana Corporation that services elevators. At all times pertinent to this case, the president and owner has been Patricia Cregan. Victor Wienckowski (Victor) and Cregan's son, Ryan Cregan (Ryan), were employees of Excel.

2. Patricia and Victor are in a romantic relationship and have co-habitated for 22 years. Victor believes he and Patricia are common law married. They have a daughter together. They file separate tax returns. The home in which the couple lives is owned by Patricia in her name.

3. In 2005, Excel entered into a service contract with the University of Montana for Excel to provide maintenance for the elevators on the University of Montana campus. That contract has been renewed periodically. The contract at issue in this case covers the term from July 1, 2007 to June 30, 2008.

4. The contract was subject to the prevailing wage and benefit rates prescribed under Title 18, Chapter 2, Part 4 of the Montana Codes Annotated. The prevailing wage rate applicable here is the one that applies to elevator repairer. The wage rate is \$30.74 per hour. The prevailing benefit rate is \$14.28 per hour. The contract which Patricia signed called for prevailing wages and benefits to be paid to elevator repairers in Excel's employ. Patricia was aware of this at the time she entered into the contract with the University.

5. At the time Excel entered into the prevailing wage contract with the University, it was a "union shop" whose employees were part of the International Elevator Contractor's Union (ICEU) and were covered by a collective bargaining agreement (CBA). That agreement expired on July 7, 2007. After that time, Excel was no longer a union shop.

6. After the expiration of the CBA, Patricia asked Ryan, who was living in Spokane, Washington, to move back to Missoula and begin working for Excel. Ryan's car did not provide him reliable transportation. Patricia provided Ryan a \$5,000.00 down payment in order to permit him to purchase a new car. Ryan used the car both to travel to and from the work site and for personal use. The car is titled in Ryan's name. Excel never provided Ryan either a Form 1099 or a Form W-2 for the \$5,000.00.

7. Between the work week ending on September 7, 2007 and the work week ending on April 26, 2008, Victor worked the number of hours and days and received the pay shown in Department's Exhibit 7. Victor was not paid the full amount of the

prevailing wage rate nor was he paid any of the prevailing fringe benefits he was due during this time period. Victor was getting approximately \$250.00 for each day he worked. Victor was initially paid under a mistaken assumption that he was an independent contractor. As a result, no payroll taxes were deducted from his pay. Excel eventually realized that it erred in treating Victor as an independent contractor. After the audit began, Excel paid the Internal Revenue Service the back payroll taxes that Victor owed.

8. For the work weeks ending September 8, September 15, December 8, December 22, 2007, and March 15 and March 22, 2008, Ryan was not paid the full amount of prevailing wages he was due. Ryan was receiving about \$20.00 per hour as Patricia mistakenly believed he should be paid as an apprentice. Ryan was not in a state recognized apprenticeship program at the time. Therefore, Excel was required to pay Ryan at the prevailing wage rates. Thus, during the time that he was only being paid \$20.00 per hour, Ryan was not paid the prevailing wage required by statute.

9. Dave Luckey is a compliance specialist working for the Department of Labor and Industry. In March 2008, Luckey sent a letter to Excel indicating that he would be completing an onsite review of wages to ensure that Excel was in compliance with the prevailing wage statutes. In the letter, Luckey advised Excel of the prevailing wage and benefit amounts and the type of records that needed to be kept and produced for Luckey's review.

10. On March 25, 2008, Luckey conducted his on-site review at the University campus. Patricia was unable to find the payroll information that Luckey sought. As a result, Luckey interviewed Patricia, Victor, and Ryan to determine whether or not Excel was complying with the prevailing wage requirements. During their interview, neither Patricia nor Victor told Luckey about any agreement regarding Excel's provision of room and board for Victor. Likewise, during the interviews, neither Patricia nor Ryan made any mention about the \$5,000.00 down payment being considered as wages for Ryan.

11. Luckey advised Patricia that she needed to keep certified payrolls and that she needed to produce those payrolls for his review. Luckey also advised Patricia that she needed to provide the certified payroll and hours for both Ryan and Victor.

12. In response to the request, Patricia provided Luckey a summary of the hours and payments, but not the actual hours and payments per pay period. Luckey then sent Patricia a second letter advising her that he needed to see certified payrolls and a daily hour report. In response, Patricia sent Luckey the same summary reports she had previously provided to Luckey. In addition, she included a statement saying

that Victor was a semi-retired employee whom Excel considered to be exempt from the prevailing wage rates.

13. Because Excel had twice failed to provide the required documentation, Luckey undertook a full audit. During the audit, it became apparent that Excel had not kept the certified payroll records that it was required to keep.

14. Upon receiving notice of the audit, Patricia contacted Barbara Pulley, a certified public accountant, for assistance. With Pulley's help, Patricia was able to utilize the maintenance reports she had provided to the University in order to reconstruct the actual hours that Ryan and Victor had worked.

15. Pulley reconstructed the payments made to Ryan and Victor as well as the hours that they worked in order to produce the certified payroll. Exhibits 1 through 4. Pulley's records corroborate Luckey's spreadsheets (Exhibit 7). Pulley credited the \$5,000.00 that Patricia spent for the down payment on Ryan's car as wages paid to Ryan.

16. Pulley also credited the weekly value of providing room and board as wages paid to Victor. Patricia and Victor had not entered into an agreement about provision of Victor's room and board as a portion of his wages at the time his employment commenced. Indeed, they never entered into any agreement about his room and board. Pulley testified at hearing that Victor and Patricia did not have an agreement "per se" as to room and board. Pulley came up with this idea in response to the audit. Pulley also credited payroll taxes that Excel paid on behalf of Victor as wages paid to Victor.

17. Based on Pulley's payroll reports, Luckey created the Exhibit 7 spreadsheet from which he determined the hours worked and amounts owed to Ryan and Victor. Luckey did not credit Excel for the \$5,000.00 paid to Ryan for his car down payment. Luckey also did not credit Excel for the value of room and board allegedly provided to Victor. Luckey did not credit these deductions because he found that they were not customary for employees in that industry.

18. Patricia decided to "back pay" unpaid benefits to both Ryan and Victor for the hourly benefit amounts that Excel had not paid to Ryan and Victor. Patricia "back paid" Ryan a total of \$1,949.22 in benefits. She "back paid" Victor a total of \$2,315.28 in unpaid benefits. This satisfied some of Ryan's unpaid hourly benefits, but not all of it (as demonstrated by Exhibit 7). Likewise, the back payment to Victor satisfied some but not all of his unpaid benefits. This back payment of fringe benefits did not occur until after 199 days of underpaid benefits had elapsed for Victor and 20 days of underpaid benefits had elapsed for Ryan.

19. After conducting an audit of Excel, Luckey concluded that both Ryan and Victor had been paid less than the prevailing wage and benefit amount. Ryan was underpaid by \$971.08. Victor had been underpaid by \$46,740.16. Luckey also found that because of the underpayment, Excel owed a per diem forfeiture to Ryan and Victor. Luckey determined, and the hearing officer finds, that the per diem owed on Ryan's underpaid wages was \$500.00, representing \$25.00 dollars per day for a period of 20 days of underpaid wages. Luckey also determined, and the hearing officer also finds, that the per diem owed on Victor's wages was \$4,975.00, representing \$25.00 per day for a period of 199 days of underpaid wages. Lucky also found that imposition of a 20% penalty as prescribed by Admin. R. Mont. 24.17.851 was appropriate. The 20% penalty for the underpayment to Ryan amounted to \$194.21. The 20% penalty for the underpayment to Victor amounted to \$9,348.03.

20. During the third and fourth quarter of 2008, Excel paid payroll taxes to the Internal Revenue Service on behalf of Victor that it should have but did not withhold from his paychecks between July 2006 and April 26, 2008. These payroll taxes amounted to \$9,199.15. Deducting this amount from the unpaid wages of \$46,740.16 leaves a net unpaid amount of \$37,541.01 (\$46,740.16 - \$9,199.15 = \$37,541.01) due Victor.

21. The Department incurred \$126.67 in audit costs in conducting the audit of Excel.

## II. DISCUSSION<sup>1</sup>

### A. *Excel Failed to Pay Prevailing Wages as Required by Statute.*

In this matter, the parties do not dispute the number of hours that the employees worked nor is there any dispute that the wages were subject to the prevailing wage rates and benefits at the amounts described in the Findings of Fact. The Department has conceded that the tax payments made on behalf of Victor would reduce the total amount due to him (but argues that because those taxes were not paid until after the audit began on wages that were paid long before the audit that the per diem penalty still applies).

The parties' dispute centers on whether Patricia's payment of \$5,000.00 toward Ryan's car and claimed offsets for the cost of Victor's room and board are appropriate methods of payment under the prevailing wage act and can, therefore, be credited toward the amount of prevailing wage Excel was required to pay. For the reasons that

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<sup>1</sup>Statements of fact in this discussion are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

follow, the hearing officer does not find that the \$5,000.00 down payment or the offset for housing can be credited toward payment of the prevailing wage. Because this is so, it follows that Excel has violated the prevailing wage statutes and must pay per diem charges and penalty.

Pursuant to Mont. Code Ann. § 18-2-403(4)(b), for all public works contracts for non-construction projects the contractor must pay employees the prevailing wage rates, which include fringe benefits for health, welfare, and pension contributions. Mont. Code Ann. § 18-2-407 requires employers to pay the prevailing wages on public works contracts or be subject to penalties and fees as provided by the law. Admin. R. Mont. 24.16.9006 provides that the employer is obliged to classify each employee who performs labor on a public works project according to the applicable prevailing rate of wages established by the commissioner and to pay each such employee not less than the standard prevailing wage.

Admin. R. Mont. 24.17.311(1) requires employers to pay each employee not less than the prevailing wage rate unconditionally and without deductions for meals, lodging, transportation or use of small tools except as provided in the immediately following subsection of the same rule. Under Admin. R. Mont. 24.17.311(2), an employer may make deductions if such deductions are in a form prescribed by the commissioner and consistent with federal WH-347 payroll form and are required either by (1) law (i.e., payroll taxes), (2) a collective bargaining agreement, or (3) a written or oral agreement carried out in practice or in fact and mutually understood between the employee and employer and undertaken at the beginning of employment.

Applying the statutes and rules relating to prevailing wages, it is apparent that neither the deductions for Victor's room and board nor the down payment for Ryan's car can be considered a proper offset, in fact or law.

There are a host of factual reasons why the deduction for Victor's room and board is not permissible. Most prominent among these is the fact that no written or oral agreement, carried out in practice or in fact, mutually understood between Victor and his employer and undertaken at the beginning of his employment existed. There is no evidence to show that any amounts were credited toward or deducted from Victor's pay for any room or board at any time throughout the period in question. It was not until Excel's accountant pigeonholed such an arrangement as a credit toward the required prevailing wage, after Excel was being investigated for failing to pay prevailing wages, that the deduction came into existence. Pulley herself testified at hearing "They didn't label it [the arrangement] as room and board per se. It was money owing back and forth between them. I am the one that came up with the \$39.00 per day." All Victor could say about the agreement was that "we talked about it a while ago." When asked by his counsel if Patricia and Victor had ever come up

with specific figures or numbers, Victor responded “I’m not sure. I’m sure we did, but I really can’t remember.” There is no credible evidence that the agreement was entered into at the beginning of the employment agreement. In light of all of these factors, the hearing officer cannot possibly find that there was a mutually understood arrangement for Victor’s compensation to include the expense of room and board that existed at the time the employment relationship began.

Excel argues strenuously, based on the testimony of Patricia and Victor, that the agreement for deduction of room and board existed at the time the employment agreement began. Their testimony is not credible in that regard. Neither Patricia nor Victor mentioned such an agreement to Luckey as a source of Victor’s remuneration for his work despite the passage of months for the investigation and in-person interviews. Moreover, Patricia, not Excel, was providing the room and board. Patricia, not Excel, owns the house that Victor was staying at. Patricia and Victor have had a romantic relationship for years and have a daughter through that relationship. These facts, combined with Pulley’s testimony that no agreement “per se” existed, convinces the hearing officer that categorizing the room and board as compensation was an after-the-fact attempt to demonstrate compliance with the prevailing wage statutes. This is not a permissible deduction under the applicable administrative rule.

Likewise, the deduction for Ryan’s car down payment cannot be countenanced because the evidence preponderantly establishes that Patricia and Ryan did not enter into a mutually understood agreement about the \$5,000.00 down payment at the beginning of the employment agreement. During his testimony, Ryan conceded that he had never received a form 1099 or form W-2 for the \$5,000.00 as wages. During his direct examination, he indicated that the down payment was not a gift or a loan but the most he would say about it was that it was part of a deal “to get him to work.” Ryan was asked point blank “Did you have any agreement about what that \$5,000.00 meant or what it was going to be”. Ryan responded “Oh, not really, it was just a way to get me working and get me a reliable vehicle.” Indeed, Patricia conceded during her testimony that she and Ryan “discussed it as a loan at first” and that Ryan “had intended to pay her back and probably still does.” Neither Patricia nor Ryan mentioned any such agreement at all to Luckey while he was interviewing them. Taking the entirety of the testimony on this issue and considering that Excel never provided Ryan any Form 1099 or W-2 for the \$5,000.00, it is obvious that no mutually understood agreement to provide the down payment in lieu of wages existed at the beginning of Ryan’s employment.

Excel argues that the deductions are permitted under Title 39, subpart 3 and that reading Title 18 *in pari materia* with Title 39 compels the conclusion that the Title 39’s deductions are applicable to this Title 18 proceeding as offsets (wages) for

the provision of room and board to Victor and the down payment for the automobile for Ryan. The hearing officer does not agree. The hearing officer has only such power as is granted by applicable statutes and rules and is constrained to follow the directives contained in each. *Auto Parts of Bozeman v. Employment Relations Div.*, 2001 MT 72, ¶ 38, 305 Mont. 40, 50, 23 P.3d 193, 200. In the face of the very plain language contained in Admin. R. Mont. 24.17.311, the hearing officer is not at liberty to interpret the rule in the manner Excel suggests. The hearing officer is bound to apply the language of the rule to the facts before him. Doing so yields the conclusion that Victor's room and board and Ryan's down payment cannot be credited toward the prevailing wages sought in this case.

Excel correctly points out that there is a disputable statutory presumption that private transactions have been fair and regular. Mont. Code Ann. § 26-1-602(19). *See also, Jones v. Arnold*, 272 Mont. 317, 324, 900 P.2d 917, 920 (1995). The disputable presumption of a "fair and regular" private transaction does not suffice to overcome the very clear requirement of the directly applicable rule requiring payment **without** deduction **unless** an express or oral agreement exists which is carried out in practice or in fact is mutually understood between an employee and an employer, and is undertaken at the beginning of employment.

The burden of proving an exemption rests on the employer who asserts it. *Cf., Holbeck v. Stevi-West, Inc.*, 240 Mont. 121, 125, 783 P.2d 391, 393 (1989); *Rosebud County v. Roan*, 192 Mont. 252, 627 P.2d 1222 (1981). In this case, the employer has not produced sufficient evidence to demonstrate that agreements falling within the purview of Admin. R. Mont. 24.17.311 existed. To the contrary, with respect to Victor's room and board, the preponderant evidence demonstrates that there was no mutually understood oral or written agreement that existed at the beginning of the employment agreement. With respect to Ryan's case, even Ryan's own testimony corroborates that there was "not really" an agreement as prescribed by the rule. In light of the above, Excel underpaid Victor \$37,541.01. Excel underpaid Ryan \$971.08.

#### B. *Excel Owes Per Diem Forfeiture to the Employees and Penalty.*

Mont. Code Ann. § 18-2-407 also provides for a \$25.00 per day penalty for each day that the employee was underpaid. Mont. Code Ann. § 18-2-407 further provides that a contractor to a public works contract who pays employees at less than the prevailing wage as established under the public works contract "shall forfeit to the department a penalty at a rate of **up to** 20% of the delinquent wages plus fringe benefits . . ." (emphasis added).



Admin. R. Mont. 24.17.851 establishes the criteria by which to determine penalty and cost imposition in cases where a contractor fails to pay the prevailing wage. Admin. R. Mont. 24.17.851(1) provides the mitigating and aggravating circumstances that must be used in order to determine the amount of penalty to be imposed. Those circumstances are:

- (a) the actions of the contractor in response to previous violations;
- (b) prior violations;
- (c) the opportunity and degree of difficulty to comply;
- (d) the magnitude and seriousness of the violation;
- (e) whether the contractor knew or should have known of the violation.

Admin. R. Mont. 24.17.851(3) requires consideration of the amount of the underpayment of wages in arriving at the penalty to be imposed. Admin. R. Mont. 24.17.851(4) requires the department to consider all mitigating factors presented by the contractor for the purpose of reducing the amount of the civil penalty to be assessed.

The parties dispute the number of days during which Victor and Ryan were underpaid and to which the per diem penalty would apply. The Department argues that Victor was underpaid for a period of 199 days and Ryan was underpaid for a period of 20 days. Excel contends that Victor was underpaid for a period of at most 35 days and Ryan was only underpaid for 10 days. Because the hearing officer has found that the \$5,000.00 down payment to Ryan cannot be credited against Ryan's prevailing wage and the after-the-fact agreement for deduction of room and board cannot be credited against Victor's prevailing wage, the parties' argument regarding the propriety of Excel's running balance approach to crediting unpaid prevailing wages is largely moot.

There is no offset against Ryan's wages and, therefore, the finding of the wage and hour specialist that 20 days of penalty are due on Ryan's unpaid wages is correct. Ryan is due \$500.00 for a per diem penalty on his unpaid wages.

There is no credit against Victor's wages for the provision of room and board, and therefore the only remaining issue is the impact of payment of the payroll taxes, which the Department has conceded must be credited against the unpaid prevailing wages on the issue of the per diem forfeiture. The Department contends that while the payment of the taxes themselves must be credited against the wages, the failure to pay them until long after they should have been deducted and paid should have no impact on the imposition of the per diem forfeiture. Excel argues that because the taxes have been paid to the IRS and were ultimately Victor's responsibility, the late payment of these taxes should not be a basis for imposing the per diem penalty. The

hearing officer agrees with the Department. The language of the per diem forfeiture in Mont. Code Ann. § 18-2-407 clearly evinces a legislative intent that the employee receive \$25.00 for *each day* that he remains underpaid. It is liquidated damages payable to the employee for each day of underpayment. Paying the amount long after it came due does not erase the harm done by the failure to pay it in a timely manner. To accept Excel's argument that payment long after the failure to pay had occurred satisfies the purposes behind the per diem forfeiture would effectively write the "each day" requirement right out of the rule. The hearing officer thus agrees that payment of payroll taxes in this case does not affect the imposition of the per diem forfeiture. *Cf., Kuhr v. City of Billings*, 2007 MT 201, ¶33, 338 Mont. 402, 168 P.3d 615 (district court erred in Title 39 wage and hour case by reducing 55% penalty to 15% penalty when the administrative rule prescribing the penalty required a 55% penalty). Thus, the determination that Victor went underpaid for 199 days is correct. Victor is due \$4,975.00 for a per diem penalty on all of his unpaid wages, whether paid late or not at all.

With respect to the 20% penalty, the Department argues that both the magnitude and seriousness of the violation and the assertion that Excel must have known that an underpayment was occurring requires imposition of the full 20% penalty. Excel argues that in mitigation that Excel has never before been cited for wage violations, that it was difficult for Patricia to comply with the record keeping requirements, that the payroll accounting entity that Patricia used during the time of the underpayment (it was not Pulley's company) was not aware of the prevailing wage requirements, and that the underpayment of wages did not affect anyone but Patricia's immediate family.

Luckey never engaged in this balancing process while determining the penalty in this case. The hearing officer is obliged to do so. Mont. Code Ann. § 18-2-407 imposes a mandatory penalty of *up to* 20%. Admin. R. Mont. 24.17.851 provides direction for the balancing process to determine the appropriate amount of penalty to be imposed. Accordingly, the hearing officer will engage in the balancing process articulated in Admin. R. Mont. 24.17.851 to determine the proper amount of the penalty to be imposed in both Victor's and Ryan's cases.

Excel has never had any prior issue regarding a failure to pay prevailing wages. In addition, as Excel notes, it did move promptly to rectify its obvious failure to comport with the prevailing wage requirements and its record keeping. Its failure to comport with the requirements was due in least at part to the accounting firm it used, prior to retaining Pulley, that had no understanding of the prevailing wage payment and record keeping requirements. Patricia obviously was not fully aware of the details of comporting with prevailing wage requirements. Once she became aware of Excel's shortcomings, she did move to rectify the situation by retaining Pulley to reconstruct

certified records and to bring Excel into compliance with the prevailing wage requirements. All of these things are mitigating circumstances as Excel has noted.

Balanced against these mitigating circumstances is the underpayment to Victor. In his case, even deducting the taxes that were eventually paid out on his behalf, the unpaid wages exceeded by three fold the amount of wages paid. In Ryan's case, the amount of unpaid wages due is much smaller than the amount of wages paid out. The problems with Victor stemmed in many respects from Patricia's failure to appreciate his status as an employee subject to the prevailing wage rules. Her failure to pay Ryan at the prevailing wage rate was due in large part to her sincerely held belief that Ryan was more in the nature of an apprentice and should be paid at the apprentice wage rate. While the factor of the magnitude of the violation with respect to Victor's underpayment is substantial, the hearing officer does not find that it outweighs the other mitigating factors.

Finally, Patricia signed the contract with the University and presumably read it. She should have known that it was subject to prevailing wage rates. However, her failure to properly classify Victor and Ryan was due to a misunderstanding of their status under the contract, not a desire to circumvent the prevailing wage requirements. Considering all these factors together, the hearing officer finds that a penalty of 10%, amounting to \$3,851.21 ( $\$38,512.09 \times .10 = \$3,851.21$ ) is appropriate to impose in this case (payable to the Department).

### **III. CONCLUSIONS OF LAW**

1. As agreed upon by the parties, Excel Elevator failed to pay Kevin Thompsen \$1,447.72 in prevailing wages as required by Mont. Code. Ann. § 18-2-407 and as a result, owes not only those wages but also \$289.54 in penalty (payable to the Department) and \$875.00 in per diem forfeiture.

2. Excel Elevator failed to pay prevailing wages to Victor Wienkowski as required by Mont. Code. Ann. § 18-2-407. Excel owes Victor \$37,541.01 in unpaid wages.

3. Excel Elevator failed to pay prevailing wages to Ryan Cregan as required by Mont. Code. Ann. § 18-2-407. Excel owes Cregan \$971.08 in unpaid wages.

4. Pursuant to Mont. Code. Ann. § 18-2-407, Excel owes \$25.00 per diem forfeiture to Victor in the amount of \$4,975.00. Excel owes \$25.00 per diem forfeiture to Ryan Cregan in the amount of \$500.00.

5. Pursuant to Mont. Code. Ann. § 18-2-407 and Admin. R. Mont. 24.17.851, Excel owes a penalty in the amount of \$3,851.21 on the wages underpaid to Victor and Ryan.

6. Pursuant to Mont. Code. Ann. § 18-2-407, Excel must pay audit costs in the amount of \$126.67.

#### IV. ORDER

Excel Elevator, Inc. is hereby ORDERED to tender a cashier's check or money order in the amount of \$50,577.23, which is comprised of \$1,447.72 in unpaid prevailing wages due to Kevin Thompsen, \$37,541.01 in unpaid prevailing wages due to Victor Wienckowski, \$971.08 in unpaid prevailing wages due to Ryan Cregan, \$4,140.75 in penalty due to the Department, \$875.00 in per diem forfeiture to Thompsen, \$4,975.00 in per diem forfeiture to Victor, \$500.00 per diem forfeiture to Ryan, and \$126.67 in audit costs, made payable to the Employment Relations Division, and mailed to the Employment Relations Division, P.O. Box 201503, Helena, Montana 59620-1503, no later than 30 days after service of this decision. Excel may make appropriate payroll deductions (but only to the extent it has not already done so) for the wage portion, but not the penalty or forfeiture portions due.

DATED this 8th day of October, 2010.

DEPARTMENT OF LABOR & INDUSTRY  
HEARINGS BUREAU

By: /s/ GREGORY L. HANCHETT  
GREGORY L. HANCHETT  
Hearing Officer

NOTICE: You are entitled to judicial review of this final agency decision in accordance with Mont. Code Ann. § 18-2-407(2), 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.