

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM)	Case No. 226-2012
OF JASVINDER SINGH,)	
)	
Claimant,)	
)	
vs.)	FINAL AGENCY DECISION
)	
AMERICA'S BEST CONTRACTORS, INC.,)	
a North Dakota corporation,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

The respondent, America's Best Contractors, Inc. (hereafter ABC), has appealed from a determination and redetermination that it owed the claimant, Jasvinder (Jesse) Singh, unpaid commissions and penalty on the unpaid commissions as prescribed by law.

Hearing Officer Gregory L. Hanchett convened a contested case hearing in this matter in Billings, Montana, on August 31, 2012. Singh represented himself. Mike McGuinness, attorney at law, represented the respondent. Singh, his brother Harvey Singh, Abe Drury, Janet Gattis, and Dustin DeVito all testified under oath. In addition to the exhibits to which the parties stipulated for admission into the record (see parties' Report of Stipulated Documents dated August 9, 2012, paragraphs 1 through 43), the following exhibits were admitted at hearing: ERD 192 to 197, 243, 289 to 293, 309 to 311, 317, 318, 321, 330, 339 to 345, Singh's Exhibits 3 to 32, 35 to 43, and respondent's A, B, D, G, I, N, O, Q, and R. The parties graciously agreed to provide the hearing officer with post-hearing briefs, the last of which was timely received on October 29, 2012. Based upon the evidence adduced at hearing and the parties' arguments in post-hearing briefing, the following findings of fact, conclusions of law and final decision are made.

II. ISSUES

1. Does this tribunal have jurisdiction over Singh's wage claim where the wages sought were earned by sales agreements which the claimant entered into on behalf of the respondent in Montana for work to be performed in Montana?

2. Is the claimant's wage claim time barred?

3. Is the claimant owed additional commissions and penalty as alleged in his complaint?

III. FINDINGS OF FACT

1. ABC, Inc. is a "storm-chaser" roofing company, doing business in Montana as a registered foreign corporation. ABC maintained an office in Billings, Montana, during the time periods relative to this complaint. Abe Drury is the CEO. Janet Gattis is the office manager there and has been since August 2010. As a storm chaser roof company, ABC operates in several states soliciting business to repair primarily roofs but also siding and gutters that have been damaged by storms.

2. ABC solicited business in several states, including Texas, Nebraska, North Dakota, and Montana.

3. Drury hired Singh as a salesperson/estimator in 2003. Singh's last day of work was on June 29, 2011. Singh was paid on a commission basis. During any given year of employment, Singh would work selling roofing, siding, and gutter repairs from approximately March or April until October or November. Between November and March, he would return to his home state but continue to service the agreements he had sold by staying in contact with his customers.

4. It was customary for ABC to stretch out its payments to its salespersons over the off-season such that it was paid in various increments per week "sometimes up until the next hailstorm." Testimony of Dustin Devito. Sometimes, the commission due would not be paid until the following year because customers did not pay their bills until the following year. Whatever the reason, the employer had a practice of paying out commissions from the proceeding year to its salespersons in increments such that it would not be paid until the following spring.

5. Prior to 2009, Singh's commission was 10% of the contract price on all jobs that he sold and for which he collected full payment.

6. Singh was an exceptional salesperson. Drury testified unconditionally that Singh was his #1 salesperson. Singh obtained a substantial number of contracts for ABC.

7. In 2009, Drury and Singh entered into an agreement whereby Singh would be paid 12% commission on his sales (instead of the 10% on sales that he previously received) as well as 1% of the commission that all other salespersons received. Drury agreed to this arrangement because Singh was such a good salesman. Drury decided, however, that the sales reports compiling Singh's sales would not reflect the additional 2% he was to be paid over the usual 10% commission nor would it show the 1% that Singh would be paid from the other salesmen's sales. At no time did the parties ever have a written employment agreement.

8. In 2010, severe storms wracked Eastern Montana creating a market for ABC to sell re-roofing contracts. Singh arrived in Billings to begin selling roofing, siding, and gutter contracts after those storms. He had been selling roofing contracts for ABC in Midland, Texas, and Bowman, North Dakota.

9. In early 2010, prior to coming to Billings, Singh loaned Drury money so that Drury could pay for hunting trips that Drury wanted to take. The loans to Drury totaled \$25,000.00.

10. When Singh and Drury discussed Singh coming to Billings to begin selling re-roofing jobs, Singh advised Drury that he must first be paid the money he was due from his contracts in Midland, Texas, and Bowman, North Dakota.

11. On several occasions throughout his employment with ABC, Singh would collect or help to collect payment on jobs sold by other ABC salesmen. On many occasions where he did so, he did not receive any part of the commission that ABC paid to the salesman who had obtained the contract.

12. Checks numbered 6906, 6952, 6936, and 7061 (Exhibit B), totaling \$25,000.00, were reimbursement checks that ABC paid to Singh for loans that Singh made to Drury. These were not compensation and cannot be credited against amounts owed to Singh for commissions on Montana sales contracts.

13. Checks numbered 7109 and 7169, totaling \$29,702.38, were compensation due to Singh for work he completed in 2009 in other states. These checks cannot be credited against commissions owed to Singh for the 2010 contracts he secured in Montana.

14. The check numbered 7465 was compensation paid to Singh for managing the Billings office and was not payment for commissions due him on his Montana sales. The check numbered 7466 was reimbursement paid to Singh and not payment for commissions due to him on his Montana sales.

15. In 2010, Singh sold and collected payment from customers in full on \$1,262,049.85 in re-roofing contracts. 12% commission on this amount equals \$151,445.98. Singh was only paid \$125,000.00 on the commissions he was owed on that amount.

16. Singh is only seeking the additional 2% which he claims he was not paid. An additional 2% over the standard 10% commission on the \$1,262,049.85 sales amount equals \$25,240.99. Singh was not paid any portion of this additional 2% that he was owed.

17. Singh was not paid the 1% commission he was owed for the other salesmen's sales. The total amount of commission paid to the other salesmen actually exceeded \$999,746.00.¹ These commissions derived from the following total amount of sales obtained and collected by the following salesmen during 2010: Harvey Singh, \$297,712.55 (\$28,777.04 commission amount); Paul Morgan, \$203,251.00 (\$18,975.10 commission amount) and \$23,813.00 (\$2,314.20 commission amount); John Burgess, \$144,944.44 (\$14,144.85 commission amount); Bo Duggan, \$72,342.86 (\$7,020.38 commission amount); James Neathery, \$75,264.27 (\$7,526.43 commission amount); T.J. Steubs, \$90,624.80 (\$9,062.48 commission amount); Taman VanScoy, \$40,104.48 (\$3,973.60 commission amount); Omar Palacios, \$46,500.06 (\$3,973.60 commission amount); and Joe Peters, \$18,204.15 (\$1,785.22 commission amount). One percent (1%) of the total of the other salesmen's fully collected contracts is at least the \$9,997.46 that Singh is seeking here.

18. Singh also effectively sold four additional jobs on which he earned but was not paid commission. On the Bret Hildreth job, he earned but was not paid \$441.18 in commission. On the Roger Berg job, he earned but was not paid \$794.57 in commission. On the Daryl Shepolov job, he earned but was not paid \$790.23.

¹ The commissions off of which Singh's 1% commission would be calculated appear to total \$1,012,761.60. However, Singh has only sought unpaid amounts of commission on those sales of \$9,997.46. Because of this, the hearing officer has limited his findings to determining whether those commissions off of which Singh's 1% would be calculated meet the threshold of sales where Singh would be due the commission he seeks on those sales, the \$9,997.46 amount.

Finally, on the Fred Kline job, he earned but was not paid \$1,200.00 in commission. The total of these unpaid commissions is \$3,225.98.

19. ABC also withheld \$616.00 for no apparent reason. Singh had no agreement that the money could be withheld from his commission.

20. In total, Singh is owed an additional 2% on the \$1,262,049.85 in re-roofing contracts shown on the claimant's sales report (Exhibit I), a total of \$25,240.99. He is also owed 1% commission on the other salesmen's sales, a total of at least \$9,997.46. He is also due a total of \$3,225.98 on the Hildreth, Berg, Shepolov, and Kline jobs. Finally, he is owed \$616.00 in improperly withheld wages. The total of the wages which he is due but for which he has not been paid is \$39,080.43 ($\$25,240.99 + \$9,997.46 + \$3,225.98 + \$616.00 = \$39,080.43$).

21. The preponderant evidence does not persuade the hearing officer that the claimant was due commission for the Americano Apartments job.

22. From November 2010 through June 29, 2011, Singh and Drury remained in contact with each other through cell phone texts. Among other discussions, on June 29, 2011, Drury told Singh to get a Rapid City cell number so that he [Drury] could make business cards for Singh. Drury also conceded that he owed Singh commissions on the Billings contracts and he promised that he would pay him.

23. On August 1, 2011, Singh filed the instant complaint with the Wage and Hour Division.

24. 55% penalty on the wages due and unpaid to Singh is \$21,494.23 ($\$39,080.43$ in unpaid wages $\times .55 = \$21,494.23$).

IV. OPINION²

A. This Tribunal Has Jurisdiction Over Singh's Wage Claim.

The employer has reiterated its argument (made through a summary judgment motion prior to hearing) that at least a portion of the wages sought by the claimant were earned on jobs he secured in Texas and North Dakota. Mont. Code Ann. § 39-3-204 provides in pertinent part that "every employer of labor in the state of

² 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.

Montana shall pay to each employee the wages earned by the employee . . .” (Emphasis added). When an employer fails to do so, the Department of Labor and Industry has the power to investigate and enforce the provisions of Title 39, Chapter 2. Mont. Code Ann. § 39-3-209. While not defined in Chapter 39, the term “labor” when used as a noun (as it is in the statute) is defined as “the services performed by workers for wages” *Webster’s Ninth New Collegiate Dictionary* (1988). This tribunal must construe all statutes in accordance with their plain meaning and if their language is clear, must apply the statute as written.

In the case before this tribunal, the claimant has alleged that his employer failed to pay him for labor undertaken in Montana, specifically, obtaining re-roofing projects in Montana which were performed in Montana. The claimant has alleged and demonstrated that the wages he seeks relate to contracts he obtained in Montana and not to other contracts which he obtained for the employer outside of Montana. His allegations and proof fall squarely within the subject matter jurisdiction described in Mont. Code Ann. § 39-3-204. Therefore, this tribunal has jurisdiction over this wage claim.

B. The Claim Is Not Time Barred.

The respondent further argues that Singh’s claim is time barred because the last work he performed for ABC occurred in November 2010, more than 180 days before he filed the instant complaint. The factual predicate for this argument, however, does not exist in this case. Therefore, the claim is not time barred.

Mont. Code Ann. § 39-3-207 requires a claimant to file his wage claim “within 180 days of default or delay in the payment of wages.” This is the statute of limitations that this tribunal is constrained to follow.

The employer’s practice and pattern of employment did not involve a “lay off and rehire” of the claimant. The facts here show that Singh was continuously employed by the employer. He would pursue new contracts after storms passed through certain areas. He would continue to work the contracts he garnered throughout the winter and spring months until the next batch of storms would come through and he would once again seek out new re-roofing contracts. The claimant’s testimony demonstrates that this occurred throughout his employment with ABC. Nothing changed in the 2010 through 2011 year. That ABC continued to consider the claimant as one of its employees is demonstrated not only by the claimant’s testimony but also by Drury’s text message to the claimant to get a new cell phone for the work in Rapid City. This is the date that the claimant decided he would no

longer work for ABC, i.e., his last day of employment. And this is the date by which the respondent's statute of limitations argument must be measured.

In addition, the hearing officer finds that the employer's pattern and practice of payment was to pay out commissions incrementally, not completing payment in full until sometime in the spring of the following year. Here (as proven by the testimony of the claimant and Devito), that practice of paying commissions out in increments until the following spring would not make the unpaid commissions due and potentially defaulted upon until sometime in the spring. Here, the claimant, because of the employer's practice, would not have become concerned that the payments were unpaid until roughly the time that he did, in late April 2011. Because he filed his claim within 180 days of the time that the unpaid commissions would have become due in the spring, the statute of limitations has not expired.³

C. *The Employer Owes Singh Wages.*

Montana law requires that employers pay wages when due, in conformity 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 money the employer owes an employee, including 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.

An employee seeking unpaid wages has the initial burden of proving work performed without proper compensation. *Anderson v. Mt. Clemens Pottery Co.* (1946), 328 U.S. 680, *Garsjo v. Department of Labor and Industry* (1977), 172 Mont. 182, 562 P.2d 473. To meet this burden, the employee must produce evidence to "show

³ The claimant also raised two other arguments that he contends demonstrate that his claim is not barred. The first, based upon the decision in *Craver v. Waste Management* (1994) 265 Mont. 37, 874 P.2d 1, is misplaced. *Craver* involved a claim for breach of contract in Montana district court, not an action under the Montana Wage and Hour Act. This tribunal has no power to adjudicate contract disputes between parties. *Auto Parts of Bozeman v. Employment Relations Division*, 2001 MT 72, ¶139, 305 Mont. 40, 23 P.3d 193. This tribunal has only those powers granted to it by statute or rule and it does not have "the power of the district court to hear all facets of a case." *Auto Parts*, ¶138. Mont. Code Ann. § 27-2-202 has no bearing upon the matter before this tribunal which the claimant has brought under the Montana Wage and Hour Act.

The second argument rests on an argument of equitable estoppel. This tribunal need not and will not reach that issue as the statute of limitations has not expired in this matter because of the employer's payment practices.

the extent and amount of work as a matter of just and reasonable inference.” *Id.* 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; *see also, Marias Health Care Srv. v. Turenne*, 2001 MT 127, ¶¶13, 14, 305 Mont. 419, 422, 28 P.3d 494, 495 (holding that lower court properly concluded that the plaintiff’s wage claim failed because she failed to meet her burden of proof to show that she was not compensated in accordance with her employment contract).

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.

The claimant has demonstrated as a matter of just and reasonable inference that the contracts which he obtained for the employer and for which he claims to be owed commissions were in fact earned by him. This is so for at least four reasons. First, Singh’s contention that Drury promised to pay him 12% commission is highly credible. Drury himself could not say enough about how exceptional the claimant was at selling contracts. He outpaced other salespersons in some cases by 10 to 1, bringing in over \$1,000,000.00 in contracts in the Billings area during the time that ABC was operating there. Given his exceptional selling talent and the huge source of sales that the claimant generated for the employer, it is highly likely that Drury in fact agreed to pay the claimant an additional 2% commission on the sales the claimant made over the claimant’s usual 10% commission.

Second, the employer’s argument that salespersons had to do all the work on their contracts or they were not entitled to the commission is not credible in light of the evidence proffered not only through the claimant’s testimony but also the testimony of Harvey Singh and Office Manager Gattis. It is apparent from the testimony that the procuring salesman for the contract was entitled to the commission and that the salesmen then worked out between themselves if and how much they would split with another salesperson collecting the payments from the customer. As the claimant himself recounted at hearing, “Harvey and I had always collected money [for each other] for free.” Indeed, this point was buttressed by Harvey’s testimony that commission splits were usually worked out between themselves and he had gotten paid on some jobs “even though he didn’t get the contract signed.” Gattis also

testified that on occasion she had collected for salespeople and that if a salesperson asked, she would pick up a payment from a customer and that Drury was aware of this practice. It is evident that the employer paid the commission to the procuring salesperson.

Third, at hearing Drury himself conceded that he agreed to pay the claimant 1% of the sales of the other salesmen. This in and of itself is sufficient to demonstrate that the claimant is due the 1% commission on the other salesperson's sales that he claims. Drury's testimony taken in conjunction with the claimant's testimony on this issue makes it clear that the claimant has met his burden of proof with respect to the commissions on the other salesmen's sales.

The claimant has also demonstrated (through his credible testimony) that he was entitled to the commissions on the Hildreth, Berg, Shepolov, and Kline jobs. The evidence demonstrates that it was the procuring salesperson to whom the employer paid commission and the claimant effectively procured the sale and performed work on these contracts by making phone calls and servicing them over the winter of 2010 and into the spring of 2011.

Because the claimant has met his burden of proof, the burden shifts to the employer to come forward with precise evidence of the amount of work done or evidence to negate the reasonableness of the claimant's claim. The claimant's argument that the employer failed to keep any credible records of what the claimant had earned in commissions is well taken. Drury essentially admitted that he did not keep track of records on commissions paid and the records he did provide had all been edited by Drury after the claimant had filed his wage claim. The records Drury did maintain are inconsistent and Drury's testimony was inconsistent. Drury at one point contended that he had paid the claimant \$181,000.00 but even his own records (Exhibit L) belie that claim. Drury's testimony is completely discounted. Drury simply did not keep track of the contracts coming in which Singh procured and for which he was due payment.

Singh's testimony that certain of the checks he received were for repayment of loans he made to Drury is credible and those amounts are not creditable against amounts ABC owed Singh.

The credible evidence in this matter points to the fact that Singh did in fact secure and service the Hildreth, Berg, Shepolov, and Kline jobs. The employer presented no credible evidence to refute what the claimant seeks for those jobs.

Indeed, the employer acknowledged that it did eventually get paid for the Kline job and the company just kept the commission money.

The hearing officer is not persuaded, however, that the claimant procured or serviced the Americano Apartments job. Harvey Singh's testimony that he effectively obtained and serviced that job is as equally credible as the claimant's testimony that he secured and serviced the job. Because of this, the claimant has failed in his burden of proof to show that he is entitled to the commission on the Americano Apartments job.

Weighing all of the evidence and considering the respective burdens of proof and the burden of persuasion that rests upon the claimant, the hearing officer is convinced that the substantial credible evidence in this matter supports the claimant's position that he is owed \$39,080.43 in unpaid wages.

D. Singh Is Due 55% Penalty On The Unpaid Commissions.

Montana's administrative rules applicable to wage and hour cases require imposition of a penalty when wages are found to be due and unpaid. Where the unpaid amounts do not involve minimum or overtime wages or other wages where certain aggravating factors exist are involved, the applicable administrative rules require the imposition of a 55% penalty. Admin. R. Mont. 24.16.7566.

The claimant contends that he is due 110% penalty because aggravating factors exist in this matter that require such a penalty. Specifically, the claimant contends that the employer's records were falsified or intentionally misleading. The hearing officer is not convinced of that fact. Drury had no idea of what the claimant was due as his testimony demonstrated. That is one of the reasons that the hearing officer has found that he did not carry his burden of proof in this matter. His ignorance does not translate into intentional falsification of payroll records. There is no basis to find that an enhanced penalty is due in this matter.

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. Singh's claim is not barred by the statute of limitations.

3. ABC owes Singh \$39,080.43 in unpaid wages.
4. A 55% penalty amounting to \$21,494.23 is due on the unpaid commissions.

VI. ORDER

America's Best Contractors, Inc. is hereby ORDERED to tender a cashier's check or money order in the amount of \$60,574.66, representing \$39,080.43 in unpaid commissions and \$21,494.23 in penalty, made payable to Jasvinder Singh, 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.

DATED this 14th day of November, 2012.

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. § 39-3-216(4), by filing a petition for judicial review in an appropriate district court within 30 days of the date of mailing of the hearing officer's 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.