

STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
OFFICE OF ADMINISTRATIVE HEARINGS

|                                   |                              |
|-----------------------------------|------------------------------|
| IN THE MATTER OF THE WAGE CLAIM ) | Case No. 1318-2016           |
| OF HAYLEY A. MATTHEWS, )          |                              |
| )                                 |                              |
| Claimant, )                       |                              |
| )                                 |                              |
| vs. )                             | <b>FINAL AGENCY DECISION</b> |
| )                                 |                              |
| JACK O. PAULSON, individually, )  |                              |
| D/B/A COWBOY CASINO AND LOUNGE, ) |                              |
| )                                 |                              |
| Respondent. )                     |                              |

\* \* \* \* \*

**I. INTRODUCTION**

On January 28, 2016, Hayley A. Matthews filed a claim with the Wage and Hour Unit of the Montana Department of Labor and Industry (Wage and Hour Unit) alleging Jack O. Paulson, individually, doing business as Cowboy Casino and Lounge, owed her a total of \$72,525.00 in unpaid wages and reimbursement for the period of September 1, 2014 through January 3, 2016. On February 22, 2016, Jack O. Paulson filed a response to Matthews' claim.

On March 14, 2016, the Wage and Hour Unit issued a determination that concluded Paulson owed Matthews \$26,756.97 in unpaid wages for work during the period of her wage claim. Pursuant to Mont. Code Ann. § 39-3-206, the Wage and Hour Unit also imposed a 15% penalty on the unpaid amount which amounted to \$4,013.55. The March 14, 2016 determination further stated a penalty of 55% would be imposed if Paulson failed to pay the wages found to be owed and penalty by March 29, 2016. Both parties filed timely requests for redetermination.

On May 13, 2016, the Wage and Hour Unit issued a redetermination that concluded Paulson owed Matthews \$26,756.97 in unpaid wages for work performed during the period of her wage claim. The Wage and Hour Unit imposed a penalty of 15% on the unpaid amount which amounted to \$4,013.55 for a total amount of \$30,770.52 if paid by May 31, 2016. A 55% penalty of \$14,716.34 would be imposed if the wages were not paid by that date. Paulson timely requested a contested case hearing. Matthews did not appeal the redetermination.

Following mediation efforts, the Wage and Hour Unit transferred the case to the Office of Administrative Hearings (OAH) on June 28, 2016. On July 5, 2016, OAH issued a Notice of Hearing and Telephone Conference setting the date and time for a telephone scheduling conference.

A July 19, 2016, a Scheduling Order was issued setting the date for hearing, as well as other pre-hearing deadlines. At that time, neither party was represented by counsel.

On September 15, 2016, James G. McGuinness, Attorney at Law, filed his Notice of Appearance on behalf of Paulson.

On October 25, 2016, the undersigned conducted a final pre-hearing telephone conference in this matter. Matthews appeared, as did Paulson and McGuinness. Matthews indicated she was in the process of obtaining counsel after having faced difficulties in doing so. Dean Chisholm, Attorney at Law, filed a Notice of Appearance on behalf of Matthews and a Motion for New Scheduling Order. McGuinness filed Respondent's Opposition to Claimant's Motion for a New Scheduling Order shortly thereafter.

On October 27, 2016, the hearing officer issued an Order Granting Claimant's Motion for a New Scheduling Order and vacating the hearing originally scheduled for November 1, 2016. On November 3, 2016, the hearing officer issued an Amended Scheduling Order after conducting a telephone conference at which both parties and their counsel appeared. New deadlines for expert witness disclosure, discovery completion, motions, and a new hearing date were set in this order.

On December 12, 2016, the hearing officer conducted a hearing in this matter at the Kalispell Job Service. Matthews appeared and was represented by Chisholm. Paulson appeared and was represented by McGuinness. Matthews, Darryl Hodge, Kristian Frost, Melissa Clark, Jeff Vittatoe, Judd Lanfear, and Paulson offered sworn testimony. The parties stipulated to the admission of Administrative Record Documents (A.R. Docs) 1 through 172; Claimant's Exhibit (Cl. Ex.) 200, and Respondent's Exhibits (R. Ex.) A through C; G through O; Q through Z; AA through FF; and II. The hearing officer sealed Cl. Ex. II because the documents included in that exhibit contained confidential financial information of Matthews in which her right to privacy outweighed the public's right to access the information.

The parties submitted post-hearing briefs which were timely postmarked January 19, 2017. The parties were asked to address the evidentiary weight of the testimony of Judd Lanfear; the admissibility of Claimant's oral statement to Vittatoe (Exhibit HH); and the admissibility of Claimant's video of the state of the bar on or

about January 4, 2016 in their post-hearing briefing. In her post-hearing brief, Matthews waived her objection to the introduction of R. Ex. HH and withdrew Cl. Ex. 201. Therefore, R. Ex. HH is hereby admitted. The only issue left to address is the evidentiary weight accorded to the testimony of Judd Lanfear, which is addressed in the Discussion section of this decision.

Based on the evidence and arguments presented at the hearing, the hearing officer makes the following findings of fact, conclusions of law, and final agency decision.

## **II. ISSUE**

Whether Jack O. Paulson, individually, d/b/a Cowboy Casino and Lounge owes wages and reimbursement, as alleged in the complaint filed by Hayley A. Matthews, and owes penalties or liquidated damages, as provided by law.

## **III. FINDINGS OF FACT**

1. Jack O. Paulson, individually, d/b/a Cowboy Casino and Lounge (Cowboy Casino) employed Hayley A. Matthews as a bartender beginning on or about May 5, 2014 with an hourly wage of \$10.00, plus tips.

2. Paulson's niece, Janice Calton, was the manager of the Cowboy Casino at the time Matthews began working as a bartender.

3. The Cowboy Casino is located in Bigfork, Montana. The Cowboy Casino was located in the front portion of a building that is divided into three sections that included the bar, an apartment owned by Paulson, and Paulson's private residence.

4. In early July 2014, Matthews became the manager of the Cowboy Casino after Calton quit. As manager, Matthews worked an average of 40 hours per week, with a weekly wage of \$500.00. Matthews' duties included bartending, as well as managing the daily operations of the bar. Matthews continued receiving tips while working as manager.

5. Matthews adopted the previous manager's bookkeeping system, which involved noting in a monthly planner the amount of sales recorded by the cash register; the total amount of cash and credit card sales; the amount of gambling tickets issued; the amount issued as promos; gambling machine payouts; and the pull/split for the gaming machines. Matthews entered this information on a daily basis in the monthly planner. Cl. Ex. 200. Matthews understood this to be the

bookkeeping method preferred by Paulson given Calton's use of the system prior to her departure.

6. In late July 2014, Paulson approached Matthews about purchasing the bar. Paulson and Matthews entered into a verbal agreement in early August 2014 that Matthews would purchase "remaining liquor inventory, ATM money, bar till money, safe deposit money to cover casino payouts [sic], and the business checking account." A.R. Docs. 13-14.

7. On September 1, 2014, Matthews paid Paulson \$20,500.00, as well as \$3,000.00 in rent and a security deposit.

8. Matthews and Paulson executed a Management Agreement at the time Matthews submitted payment for the bar to Paulson. The Management Agreement was a form obtained from the Montana Department of Revenue's website. The form used by the parties in September 2014 outlined both the manager's and employer's duties and responsibilities. Matthews crossed out the portion of the agreement outlining the compensation to be paid to the manager. It was signed by both Matthews and Paulson on September 1, 2014. A.R. Docs. 43-44; 90-91.

9. Paulson sent the Management Agreement to the Montana Department of Revenue with a handwritten note dated September 9, 2014. Paulson wrote, "Enclosed please find a copy of my management agreement with my new prospective manager . . . If things go well and she passes her probationary period she will then be the new manager." A.R. Doc. 100.

10. After September 1, 2014, Matthews considered herself to be the owner of the Cowboy Casino. Matthews made improvements to the bar using a combination of her own funds, as well as profits from the bar. Those improvements included a pool table, jukebox, flat screen television, and fryer.

11. Paulson considered Matthews the "prospective buyer" of the Cowboy Casino during the period following September 1, 2014. Paulson treated the money Matthews gave him as a loan of operating funds that allowed her to keep her job and to keep the bar open. A.R. Doc. 32, ¶4. Paulson considered the September 1, 2014 transaction to be phase one of Matthews' purchase of the bar. See A.R. Doc. 88, ¶4 ("She got her money and took over as complete manager until she could purchase the bar.").

12. Paulson considered phase two of the purchase to include Matthews' second payment to Paulson for the fair market value of the bar under her management.

13. Paulson continued holding the liquor license for the Cowboy Casino in his name after receiving Matthews' payment in September 2014. Paulson never transferred legal title to any of the bar assets to Matthews.

14. Paulson paid no wages to Matthews after September 1, 2014. Paulson did not track the number of hours Matthews worked or require her to record her hours.

15. Paulson issued several written warnings to Matthews during the period following the execution of the first Management Agreement.

16. On December 23, 2014, Paulson gave Matthews a handwritten note outlining his concerns about Matthews' failure to timely file quarterly wage reports for the fourth quarter of 2014. Paulson also noted certain items were missing from the bar that he and his wife had purchased, as well as damage to the rest room. A.R. Doc. 47.

17. In December 2014, Paulson was required to pay the electrical bill when Matthews was unable to do so.

18. On February 16, 2015, Paulson gave Matthews a handwritten note reminding Matthews she needed to file quarterly wage reports for the fourth quarter of 2014 and informing her failure to do so constituted a violation of their Management Agreement. A.R. Doc. 48.

19. On March 5, 2015, Paulson gave Matthews a handwritten note informing her that her failure to file quarterly wage reports for the fourth quarter of 2014 was in violation of their Management Agreement. Paulson also wrote,

In addition, I cannot lease the business as by law I must either have a partnership or sell the business with its license. It is a violation of Montana law to have an "[sic]undisclosed owner of a Montana liquor license as a lessee.

My desire is therefore to sell the Cowboy Lounge and Casino including the license and lease the building on an annual or monthly basis.

Since you are the manager on a probationary time period I am open to entertain your and our options.

A.R. Doc. 49.

20. On March 24, 2015, Paulson gave Matthews a handwritten note tabulating the amount she was in arrears for rent and fees associated with the failure to timely file wage reports for the fourth quarter of 2014.

21. On March 26, 2015, Paulson's wife gave Matthews a handwritten note stating,

Your \$20,000 investment in the Cowboy Bar and Casino was to manage the liquor inventory, provide capital for the ATM machine, safe (casino payments) and bar till. No furniture or accessories were purchased.

It is unlawful to lease a bar with an "undisclosed owner" on a MT state liquor license! Jack Paulson does not want to hire a salaried manager as an employee. Therefore, the Cowboy Bar and Casino will have to be sold with the liquor license, or closed.

"Or a partner on license" was written in parenthesis over ". . . liquor license, or closed." A.R. Doc. 51.

22. In April 2015, Jeff Vittatoe, Western District Supervisor for the Montana Department of Justice Gambling Control Division, was assigned to investigate the Cowboy Bar after the agency received citizen complaints about public drunkenness and patrons being over-served. Vittatoe identified there being an undisclosed ownership issue after conducting his initial investigation.

23. On May 6, 2015, Matthews ran an advertisement in the Bigfork Eagle newspaper promoting the Cowboy Casino and Bar. The advertisement notes Matthews was "in the process of purchasing the bar" from Paulson. A.R. Doc. 54.

24. In May 2015, Matthews completed a second Management Agreement, which both she and Paulson signed, after Paulson brought her a blank form and informed her that it needed to be completed. Matthews understood it was necessary to include the Management Agreement with the liquor license on file with the Department of Revenue. A.R. Docs. 102-103.

25. The second Management Agreement form is different from the first Management Agreement completed by Matthews and Paulson. The form was revised sometime in 2014 or 2015. Matthews noted she was to be paid \$500.00 per week as a manager and would receive no percentage of alcohol beverage sales or gross sales.

26. In October 2015, Vittatoe met with and interviewed both Matthews and Paulson after having made several visits to the bar and speaking with Matthews.

Vittatoe prepared a written report documenting his interviews and forwarded it to the Liquor Control Division and Gambling Control Division for review.  
A.R. Docs. 111-127.

27. On June 26, 2015, Paulson gave Matthews a handwritten note complaining about the state of the parking lot and the dissatisfaction of the bar's customers. A.R. Doc. 55.

28. On July 30, 2015, Paulson gave Matthews a handwritten note that began,

Effective August 13, 2015, you will be terminated as manager of the Cowboy Casino and Lounge. Inasmuch as you control the money, I will demand that half the rent, \$1,000, be paid on or before August 6. Any excess can be returned during the settlement.

Paulson also wrote,

I'm sorry but enough is enough and I've had it. I'll close this place rather than allow it to become trashed as it is presently becoming.

A.R. Doc. 56.

29. Matthews was an employee of Cowboy Bar and Casino during the period of September 1, 2014 through January 3, 2016. Matthews performed work for which she was not paid during this period.

30. Matthews made payments to herself totaling \$8,171.53 during the period of September 1, 2014 through January 3, 2016. Those payments included:

| <u>Check No.</u> | <u>Date</u> | <u>Amount</u> |
|------------------|-------------|---------------|
| 1403             | 09/11/2014  | \$1,000.00    |
| 1411             | 09/18/2014  | \$ 82.53      |
| 1447             | 10/23/2014  | \$ 539.00     |
| 1454             | 10/30/2014  | \$ 400.00     |
| 1455             | 10/30/2014  | \$1,000.00    |
| Withdrawal       | 12/01/2014  | \$ 125.00     |
| Withdrawal       | 12/23/2014  | \$ 48.00      |
| 1497             | 12/03/2014  | \$ 600.00     |
| Withdrawal       | 01/15/2015  | \$ 330.00     |
| Withdrawal       | 04/24/2015  | \$ 9.00       |
| Withdrawal       | 07/06/2015  | \$2,000.00    |
| 1658             | 07/09/2015  | \$1,000.00    |

|            |            |            |
|------------|------------|------------|
| Withdrawal | 08/26/2015 | \$ 288.00  |
| Withdrawal | 11/19/2015 | \$ 750.00  |
| TOTAL:     |            | \$8,171.53 |

31. Matthews performed work for Jack O. Paulson, d/b/a Cowboy Casino and Lounge for which she was not paid a total of 69 6/7 weeks during the period of September 1, 2014 through January 3, 2016. Matthews earned \$34,928.50 in wages for the period of her wage claim - \$34,500.00 (\$500.00 x 69 weeks) + \$428.57 (6 days x \$500.00/7 days) = \$34,928.50.

32. Matthews is owed \$26,756.97 in unpaid wages for the period of her wage claim (\$34,928.50 - \$8,171.53).

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

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 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 the 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).<sup>2</sup>

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 v. Keegan*, *supra*, 359 Mich. at 576, 103 N.W. 2d at 497.

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

<sup>2</sup>Matthews conceded at hearing that she was an administrative employee and is not owed overtime wages.

Neither party disputes the underlying facts in this case.<sup>3</sup> Matthews paid Paulson \$20,000.00, plus \$3,500.00 for rent and a security deposit, on September 1, 2014. At that time, the parties executed a Management Agreement, which initially made no provision for the payment of wages for work performed by Matthews.

The dispute lies in how the transaction between Matthews and Paulson is characterized. Matthews testified she considered herself to be the owner of the Cowboy Casino as of September 1, 2014. Matthews testified she only began to doubt she was the owner once Vittatoe began his investigation and questioned the circumstances surrounding Matthews “purchase” of the bar.

Paulson testified he considered Matthews a “prospective buyer” who loaned the business operating capital in order to keep the bar open and to keep herself working. Paulson testified Matthews never became the owner of the Cowboy Casino because phase two of the transaction never occurred - namely, Matthews never completed the purchase of the bar. Given there was no transfer of title, no transfer of the liquor license, and Paulson continued to exercise control over the business, as evidenced by his many notes to Matthews directing her performance as manager of the business, the substantial evidence of record shows Matthews to be an employee of Paulson continuing after September 1, 2014 and until the business closed on January 3, 2016. See Mont. Code Ann. § 39-3-201(3) (“employ” means to permit or suffer to work). Therefore, Matthews is determined to have been an employee of the Cowboy Casino during the period of her wage claim.

The issue now becomes whether Matthews performed work for Paulson for which she was not compensated during the period of her wage claim.

Neither party offered documentary evidence regarding the number of hours Matthews worked each week during the period of her wage claim. Matthews offered detailed testimony as to the number of hours she worked each week, which was generally in excess of 40 hours per week. Additionally, four witnesses testified that Matthews was regularly observed working at the business at various times throughout the week.

Paulson argues Matthews should not be allowed to profit based upon her failure to maintain adequate records. Paulson further contends Matthews was in full

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<sup>3</sup>There was no evidence offered regarding Matthews having entered into the transaction in the form of a corporation or other legal entity. Similarly, there was no evidence offered showing Matthews had obtained an Independent Contractor Exemption Certificate or any determination from the Independent Contractor Central Unit regarding Matthews’ status during the period of her wage claim.

operational control of the business throughout the period of her wage claim and was responsible for paying herself, as well as other employees. Paulson further argues Matthews has not offered sufficient evidence showing the amount or type of work performed during the period in question.

The Montana Supreme Court addressed a similar situation in which there was a lack of trustworthy documentation of hours worked in *Arlington v. Miller's Trucking, Inc.*, 2015 MT 68, 378 Mont. 324, 343 P.3d 1222 (2012). In that case, the court reasoned:

In short, where an employer has failed to maintain adequate records of an employee's hours, it is expected that the employee will not be able to offer convincing substitutes for the employer's records. Moreover, whatever evidence the employee does produce can be expected to be 'untrustworthy'. The solution in such situations, however, is not to penalize the employee for his inability to accurately prove his hours by denying his claims in their entirety.

*Arlington*, 378 Mont. 324, 331, 343 P.3d 1222, 1229.

Matthews has shown through substantial and credible evidence that she performed work for the Cowboy Casino at least 40 hours each week during the period beginning September 1, 2014 through January 3, 2016. Respondent offered no credible evidence disproving Matthews' contention that she had worked 40 hours or more each week during the period of her wage claim. Given that the last wage paid to Matthews as a manager for the business was \$500.00 per week, it is reasonable to use that amount to determine the amount of wages owed to her for the period of her wage claim. Therefore, the evidence shows Matthews is owed \$26,756.97 in unpaid wages earned during the period of September 1, 2014 through January 3, 2016. See Findings of Fact 30 - 33.

Paulson offered the testimony of Judd Lanfear in support of his contention that Matthews was paying herself under the table or otherwise taking profits from the business during the period of her wage claim. Lanfear testified he operates Time Out Management Services in which he provides consulting services on bookkeeping issues for food, beverage, and casino businesses. Lanfear conceded he does not hold a degree in the area but his formal education in criminology is the equivalent of an Associate of Arts degree. Lanfear also conceded that he had never before testified as an expert.

Lanfear testified that there were several issues with Matthews' bookkeeping system and things such as invoices were missing. Lanfear conceded he had not

reviewed any documentation related to the Cowboy Casino prior to Matthews taking over as manager and his testimony was based upon a best possible estimate of the financial condition of the business under Matthews' management. Lanfear qualified his testimony several times with terms such as "somewhat," "good possibility," and "could be done."

Lanfear was allowed to testify at hearing. However, in reviewing Lanfear's testimony, it is determined that his testimony is due less evidentiary weight than the testimony of those witnesses directly involved in the business. Lanfear's testimony was based almost entirely upon information provided to him by Paulson rather than an independent evaluation of the financial state of the Cowboy Casino prior to Matthews' taking over and during her time as manager. Further, his conclusion that prior to Matthews' taking over as manager the business was on pace to make \$50,000.00 in profits is at odds with Paulson's testimony that he was interested in selling the business because he would make more money as a landlord than as a bar owner. Therefore, the hearing officer did not accord Lanfear's testimony great weight when coming to this decision.

Further, much of Paulson's argument seemed to center around amounts he believed should be used to offset whatever Matthews may be found to be owed in unpaid wages. The hearing officer lacks the authority to order offsets or to address any issue other than what wages are due to Matthews for work performed during the period of her wage claim.

## **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. Jack O. Paulson, individually, d/b/a Cowboy Casino and Lounge owes Hayley A. Matthews \$26,756.97 in unpaid regular wages. A penalty of 55% is appropriate as the employer failed to submit payment for wages found to be owed to the department within the time stated in the May 13, 2016 redetermination. The penalty on the unpaid regular wages is \$14,716.33. Mont. Code Ann. § 39-3-206.

## **VI. ORDER**

Jack O. Paulson, individually, d/b/a Cowboy Casino and Lounge is hereby ORDERED to tender a cashier's check or money order in the amount of \$41,473.30, representing \$26,756.97 in wages and \$14,716.33 in penalty, made payable to

Hayley A. Matthews, 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 8th day of February, 2017.

DEPARTMENT OF LABOR & INDUSTRY  
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ CAROLINE A. HOLIEN  
CAROLINE A. HOLIEN  
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. Please send a copy of your filing with the district court to:

Department of Labor & Industry  
Wage & Hour Unit  
P.O. Box 201503  
Helena, MT 59624-1503