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

IN THE MATTER OF THE WAGE CLAIM OF BRITNEY E. FERENCE, Claimant, vs. BURGARD25, LLC d/b/a DEVIL'S TOBOGGAN, Respondent.	)	Case No. 1436-2020 **FINAL AGENCY DECISION**

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I. INTRODUCTION

On September 9, 2019, Claimant Britney E. Ference (Ference) filed a wage and hour claim with the Wage & Hour Unit of the Montana Department of Labor & Industry (Wage & Hour Unit) alleging Respondent Burgard25, LLC, d/b/a Devil's Toboggan (Devil's Toboggan) owed her $900.00 in benefit payments from February 21, 2019, through May 14, 2019. Ference also asserted Devil's Toboggan should be assessed penalties for late payment of her final wages.

On May 7, 2020, the Wage & Hour Unit issued a determination finding Ference's claim was without merit. Following mediation efforts, the Wage & Hour Unit transferred the case to the Office of Administrative Hearings (OAH) on July 16, 2020.

The Hearing Officer conducted a hearing in this matter via Zoom on November 10, 2020. Ference appeared pro se. Bridget leFeber represented Devil's Toboggan. Ference and Chris Burgard testified under oath. Portions of the administrative record compiled at the Wage & Hour Unit were admitted into the record upon the agreement of the parties. Specifically, documents 26-27, 30-35, and 37-38 were admitted. What is hereby marked as Ference's Exhibit 100 (an unexecuted Separation Agreement and General Release) was rejected on the basis of relevance and under M.R. Evid. 408 because it was an offer to compromise. Devil's Toboggan's Exhibits A through E (pay stubs) were admitted without objection.

The parties were given the opportunity to submit post-hearing briefing. Upon expiration of that timeframe, the record was closed and the case was deemed submitted. Based upon the evidence and argument adduced at hearing, the Hearing

Officer makes the following findings of fact, conclusions of law, and final agency decision.

II. ISSUE

Whether Devil's Toboggan owes wages for work performed, as alleged in the complaint filed by Ference, and owes penalties or liquidated damages, as provided by law.

III. FINDINGS OF FACT

1. Devil's Toboggan is a restaurant in Bozeman, Montana, which is jointly owned and run by Sandy Burgard (S. Burgard) and Chris Burgard (C. Burgard).

2. Ference was hired by Devil's Tobaggan on February 21, 2019, as its General Manager.

3. C. Burgard conducted all meaningful negotiations with Ference on behalf of Devil's Toboggan. S. Burgard was generally not involved.

4. Ference was provided a proposed Employment Agreement by Devil's Toboggan on February 19, 2019.

5. Ference had discussions about the Employment Agreement with C. Burgard, and the parties signed and entered into the Employment Agreement effective February 21, 2019.

6. Ference negotiated and entered into a written Employment Agreement, effective February 21, 2019. (Admin. Docs. 30-35.)

7. At the time the parties entered into the Employment Agreement, C. Burgard provided Ference with information and options about health insurance plans he received from Rocky Mountain Insurance Group, but informed Ference she had no obligation to choose those plans and could look elsewhere.

8. With regard to compensation and benefits, the Employment Agreement provides that, "Employer shall provide Employee with a health care plan chosen by Employer and Employee, and shall pay up to $300.00 of Employee's premium monthly." (Admin. Doc. 31.)

9. Ference did not choose a health insurance plan herself, though also asserts Devil's Toboggan did not respond to her inquiries.

10. Ference and Devil's Toboggan ultimately never chose a health insurance plan, and Ference therefore did not receive any reimbursement for health insurance costs from Devil's Toboggan.

11. Ferrence asserts the parties entered into a verbal agreement immediately prior to the start of her employment that she would be paid an additional $300.00 in salary if she did not choose a health insurance plan. (Admin. Docs. 26-27.) However, the Employment Agreement contains an integration clause:

> **Entire Agreement.** Employee has no verbal representations, understandings, or Agreements with Employer or any of its members, officers, directors, or representatives covering the same subject matter as this Agreement. This Agreement is the final, complete, and exclusive statement and expression of the Agreement between Employer and Employee, and it cannot be varied, contradicted, or supplemented by evidence of any prior or contemporaneous verbal or written agreements.

(Admin. Doc. 32 (emphasis in original).)

12. The Employment Agreement also provides that it ". . . may not be modified except in a writing signed by the parties hereto." (Admin. Doc. 32.)

13. Devil's Toboggan has no employee handbook in place.

14. Ference provided no written documentation she ever inquired about health insurance plans herself or that the parties mutually agreed to an additional $300.00 in salary in lieu of payment of health insurance premiums.

15. Ference was terminated from her employment with Devil's Toboggan on May 14, 2019.

16. Between February 21, 2019, and May 14, 2019, Ference received approximately five paychecks from Devil's Toboggan.

17. Ference did not receive her final paycheck until on or about May 22, 2019, but was paid for all hours worked. The delay was in part–though not entirely–the result of C. Burgard inadvertently sending an e-mail to Ference at her Devil's Toboggan e-mail address rather than her personal e-mail address. The payment was made long prior to Ference's filing of a wage claim on September 9, 2019, and issuance of the determination issued therein.

18. When discussing her final paycheck via e-mail with C. Burgard, Ference requested she be reimbursed for the $300.00 per month she did not receive for health insurance premiums. C. Burgard declined to pay the amount because Ference never

chose a health insurance plan as required under the Employment Agreement. (Admin. Doc. 27.)

IV. DISCUSSION

An employee seeking unpaid wages has the initial burden of proving work performed without proper compensation. *America's Best Contractors, Inc. v. Singh*, 2014 MT 70, ¶ 25, 374 Mont. 254, 321 P.3d 95 (citing *Garsjo v. Dept. of Labor & Indus.*, 172 Mont. 182, 189, 562 P.2d 473, 476-77 (1977) (citing and adopting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946))) (other citations omitted).

> To meet this burden, the employee must produce sufficient evidence showing the amount and extent of such work as a matter of just and reasonable inference. Once an employee has shown as a matter of just and reasonable inference that wages have been earned but not paid, 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 drawn from the evidence of the employee. If the employer fails to produce such evidence, the employee is entitled to judgment in his or her favor, *even though the amount is only a reasonable approximation*.

America's Best Contractors, Inc., ¶ 25 (internal citations omitted) (emphasis added). Employers are required to keep records of employees' hours. Admin. R. Mont. 24.16.6102(1)(g); *see also Arlington v. Miller's Trucking, Inc.*, 2015 MT 68, ¶ 16, 378 Mont. 324, 343 P.3d 1222 (citations omitted). "When an employer fails to record an employee's hours, the employee's records may be used to determine the amount of time worked." *Arlington*, ¶ 16.

If an employee has already left employment at the time a wage claim is filed, ". . . an employee may recover wages and penalties . . . for a period of 2 years prior to the date of the employee's last date of employment." Mont. Code Ann. § 39-3-207(2). However, "[i]f an employer has engaged in repeated violations, an employee may recover wages and penalties . . . for a period of 3 years prior to the date of the employee's last date of employment." Mont. Code Ann. § 39-3-207(3).

A. Health Insurance Benefits

Ference argues that, pursuant to the Employment Agreement, she is due $300.00 in benefit payments for each month she worked for Devil's Toboggan. As stated above, the Employment Agreement provides that, "Employer shall provide Employee with a health care plan chosen by Employer and Employee, and shall pay up to $300.00 of Employee's premium monthly." (Admin. Doc. 31.)

The key issue here is that only *wages*, not benefits, are recoverable in a wage and hour action. Administrative proceedings are limited in jurisdiction by both statute and rule. Here, Ference is seeking reimbursement of monies that were designated to be paid not to Ference herself, but toward health insurance premiums. Claims for reimbursement of benefits are not cognizable in administrative cases brought under the wage and hour laws, and are therefore not within the jurisdiction of this tribunal to render judgment. *See* Mont. Code Ann. §§ 39-3-201 *et seq*.; *State v. Holman Aviation*, 176 Mont. 31, 575 P.2d 925 (1978) (regarding limited jurisdiction of administrative wage and hour proceedings); *see also* Admin. R. Mont. 24.16.2519(2)(a) (regarding calculation of regular rate; payment for expenses are not compensation for services rendered). Because benefits do not qualify as wages, the Hearing Officer has no authority to award payment of such benefit amounts to Ference.

Ference also argues the parties had a separate agreement aside from the Employment Agreement that she would be paid an additional $300.00 per month in compensation if she did not obtain a health insurance plan. If such an agreement existed, it could be considered wages. However, Ference did not present any documentation showing the existence of such an alternative arrangement,[1] and the Employment Agreement itself contains both an integration clause which prohibits the existence of alternative agreements and also a modifications clause that requires any modifications be in writing. (Admin. Doc. 32.) Thus, Ference has failed to meet her burden of showing Devil's Toboggan agreed to pay her an additional $300.00 in monthly wages for which she was not paid.

B. Penalty on Final Wages

Although she does not specify an amount, Ference argues Devil's Toboggan should be assessed a penalty because it did not pay her final wages in their entirety when she left her employment. "[W]hen an employee is separated for cause or laid off from employment by the employer, all the unpaid wages of the employee are due and payable immediately upon separation unless the employer has a written personnel policy governing the employment that extends the time for payment of final wages to the employee's next regular payday for the pay period or to within 15 days from the separation, whichever occurs first." Mont. Code Ann. § 39-3-205(2). Ference was discharged on May 14, 2019, but for a variety of reasons which were all the responsibility of the employer but not necessarily intentional, Ference did not receive her final paycheck until approximately May 22, 2019.

[1] Ference did attempt to present evidence of alternative agreements through the existence of an unexecuted separation agreement, which the Hearing Officer rejected under M.R. Evid. 408, among other bases, since an offer to compromise cannot be used as evidence of liability.

Excluding the benefit payments which are the subject of her present claim, Ference acknowledged receiving her wages in full for all the time she worked. Because the wages claimed were paid by the employer before the commencement of Ference's claim and long before the issuance of a determination, and further because no special circumstances exist which would warrant imposition of a penalty, no penalty will be imposed. *See* Admin. R. Mont. 24.16.755(1), 24.16.7556.

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*, 176 Mont. 31, 575 P.2d 925 (1978).

2. Ference has been fully paid by Devil's Toboggan for all hours she worked.

3. The jurisdiction of the Department of Labor and Industry is limited to determinations of compensation for wages under the wage and hour laws. Ference's claim for benefits does not fall under the guise of the wage and hour laws and is not within the jurisdiction of this tribunal. Mont. Code Ann. §§ 39-3-201 *et seq*.; *State v. Holman Aviation*, 176 Mont. 31, 575 P.2d 925 (1978); *see also* Admin. R. Mont. 24.16.2519(2)(a).

4. The late payment of Ferrence's final wages does not warrant imposition of a penalty. Admin. R. Mont. 24.16.755(1), 24.16.7556.

VI. ORDER

IT IS THEREFORE ORDERED THAT:

Ference's appeal is DISMISSED with prejudice.

DATED this 20th day of April, 2021.

DEPARTMENT OF LABOR & INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ CHAD R. VANISKO
CHAD R. VANISKO
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 59620-1503