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

IN THE MATTER OF THE WAGE CLAIM OF KRISTINE R. IHLI,	)	Case No. 1484-2021
Claimant,	)	
	)	**ORDER ON SUMMARY JUDGMENT AND**
vs.	)	**FINAL AGENCY DECISION**
BBM CONSTRUCTION, LLC,	)	
Respondent.	)	

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I. INTRODUCTION

Claimant Kristine R. Ihli (Ihli) filed a wage claim on September 16, 2020, alleging Respondent BBM Construction, LLC (BBM) owed her a total of $915.66 in overtime wages for work performed during the period beginning April 2020 through August 18, 2020.

On March 8, 2021, the Wage and Hour Unit issued a determination finding Ihli's claim was without merit. Ihli appealed to mediation, which was unsuccessful. On April 16, 2021, the Wage and Hour Unit transferred the matter to the Office of Administrative Hearings (OAH).

On August 26, 2021, BBM, through its attorney Hannah Stone, filed a timely Motion for Summary Judgment arguing it was entitled to judgment as a matter of law. BBM asserted there are no genuine issues of material fact pursuant to Admin. R. Mont. 24.5.329 and M. R. Civ. P. 56, and that Ihli was fully compensated for all of her hours worked with BBM in accordance with Montana law. The parties were given an opportunity to fully brief the motion. Ihli failed to submit a response.

At a scheduling conference on September 23, 2021, Ihli was given until October 11, 2021, to find an attorney to represent her. Ihli was instructed another scheduling conference would occur on October 22, 2021, and she could present oral argument on the summary motion if she was unable to find an attorney. On October 22, 2021, Ihli failed to appear for the final pre-hearing conference and failed to present oral argument on the motion. On April 20, 2022, an attorney's office obtained the record of the case, but did not

file a notice of appearance or contact OAH any further. BBM's Motion for Summary Judgment is granted for the reasons stated below.

II. FACTS

1. Ihli began working as a laborer with BBM on March 16, 2020. Ihli's hiring wage was $18 per hour.

2. At all times relevant to this case, Ihli lived outside of Potomac, Montana.

3. Ihli often car-pooled to remote job sites with a co-worker. Ihli would meet this co-worker at the office when she car-pooled. Specifically, Ihli would drive from Potomac to the office in Missoula, Montana, then reverse course and commute with the co-worker to a worksite in Rock Creek, Montana.

4. Ihli's route when car-pooling caused her to drive through Bonner, Montana, to Missoula to get to BBM's office, then drive back from Missoula through Bonner with the co-worker when going to the work site.

5. Ihli frequently reported her drive time as hours worked on her timecard.

6. BBM does not compensate employees for their commute time to remote job sites unless they are first instructed by BBM to report to BBM's office, and it communicated this policy to employees.

7. When BBM became aware of Ihli's actions in reporting commute time as work time, her drive time was subtracted from her reported hours worked whenever BBM did not require her to first be at the office. BBM used the hours of the co-worker Ihli commuted with to adjust Ihli's reported work time, as the co-worker did not report the drive time as hours worked unless the employees were first required to be at the office.

8. Ihli stated in a text message to her employer: "Now as far as being talked to was when I was hired I would be getting drive time only from office to out of city limit jobs. I have never been told that had changed EVER. . . ." (Hearing Doc. 42 (emphasis included in original).)

9. On August 18, 2020, Ihli separated from her employment with BBM.

III. DISCUSSION[1]

A. STANDARDS FOR SUMMARY JUDGMENT

Summary judgment is an appropriate method of dispute resolution in administrative proceedings where the requisites for summary judgment otherwise exist. *Matter of Peila*, 249 Mont. 272, 280-81, 815 P.2d 139, 144-45 (1991). "The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." M. R. Civ. P. 56.

The moving party "must show a complete absence of any genuine issue as to all facts shown to be material in light of the substantive principle that entitles that party to a judgment as a matter of law." *Bonilla v. University of Montana*, 2005 MT 183, ¶ 11, 328 Mont. 41, 116 P.3d 823. A "material" fact is one capable of affecting the substantive outcome of the litigation. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "'Material issues of fact are identified by looking to the substantive law which governs the claim.'" *Glacier Tennis Club at the Summit v. Treweek Constr. Co.*, 2004 MT 70, ¶ 21, 320 Mont. 351, 87 P.3d 431 (overruled in part on other grounds by *Johnson v. Costco Wholesale*, 2007 MT 43, ¶ 21, 336 Mont. 105, 152 P.3d 727; quoting *Babcock Place P'ship v. Berg, Lilly, Andriolo & Tollefsen, P.C.*, 2003 MT 111, ¶ 15, 315 Mont. 364, 69 P.3d 1145); *see also Anderson*, 477 U.S. 242 at 248; *Bonilla*, ¶¶ 11, 14. A dispute is "genuine" if there is enough evidence for a reasonable trier of fact to return a verdict for the non-movant. *See Scott v. Harris*, 550 U.S. 372, 380 (2007). The inquiry is, essentially, ". . . whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52.

"The party opposing summary judgment must come forward with evidence of a substantial nature; mere denial, speculation, or conclusory statements are not sufficient." *McGinnis v. Hand*, 1999 MT 9, ¶ 18, 293 Mont. 72, 972 P.2d 1126 (citing *Klock v. Town of Cascade*, 284 Mont. 167, 174, 943 P.2d 1262 (1997)). A tribunal reviews the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor and without making findings of fact, weighing the evidence, choosing one disputed fact over another, or assessing the credibility of

[1] Statements of fact in the conclusions of law are incorporated by reference to supplement the findings of fact. *Coffman v. Niece*, 110 Mont. 541, 105 P.2d 661 (1940).

witnesses. *Fasch v. M.K. Weeden Const., Inc.*, 2011 MT 258, ¶¶ 16-17, 362 Mont. 256, 262 P.3d 1117.

B. COMMUTE TIME RULE

Pursuant to the Administrative Rules of Montana: "An employee who travels from home before his regular workday and returns to his home at the end of the workday is engaged in ordinary home to work travel, which is a normal incident of employment. This is true whether he works at a fixed location or at different job sites. Normal travel from home to work is not worktime." Admin. R. Mont. 24.16.1010(2). "Where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked regardless of contract, custom, or practice." *Id.* at (5).

C. BBM IS ENTITLED TO SUMMARY JUDGMENT

Before analyzing if BBM is entitled to judgment as a matter of law, a threshold issue must be addressed. The issue involves the timekeeping records in this matter. Ihli argues BBM must produce the original timesheets she submitted in order for her to prove her claim. This assertion is incorrect. The general rule regarding timekeeping records is that an employee has the initial burden to substantiate the claim by showing "that he did in fact perform . . . work for which he was not properly compensated and produce[s] sufficient evidence to show the extent and amount of such work as a matter of just and reasonable inference." *Garsjo v. Department of Labor & Indus.*, 172 Mont. 182, 188–89, 562 P.2d 473, 476–477 (1977); *see also Arlington v. Miller's Trucking, Inc.*, 2015 MT 68, ¶¶ 30-32, 378 Mont. 324, 343 P.3d 1222. "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." *America's Best Contractors, Inc. v. Singh*, 2014 MT 70, ¶ 25, 374 Mont. 254, 262, 321 P.3d 95, 101. "Employers, not employees, bear the ultimate responsibility for ensuring that employee time sheets are an accurate record of all hours worked by employees." *Arlington*, ¶ 17.

BBM has produced its records of hours worked by Ihli. BBM does not dispute it altered Ihli's timesheets; specifically, BBM does not dispute Ihli spent time commuting, does not dispute Ihli submitted timesheets which show that commute time, and does not dispute it altered her timesheets. BBM produced records that show every alteration it made to Ihli's timesheets, including the day, the amount of time changed on that day, and the reason. Some timesheet

reports also state, "No records to display" which means no time was modified for that week. See for example Document 145 (no alterations to Ihli's timesheet were made for the period April 26, to May 2, 2020). Other time reports show, for example, that Amanda Corcoran (Corcoran), BBM's office manager, altered the timesheet for a particular day and show which date the alternation was made. For example, Document 131 shows the first alteration BBM made to Ihli's timesheets due to this issue. The alteration occurred on June 1, 2020, and the record indicates that Corcoran changed the end of Ihli's work day on May 27, 2020, from 6:57 p.m. to 6:00 p.m. due to the Rock Creek job. BBM altered the timesheets for approximately 20 days removing a few minutes to two hours for commute time depending on the day over those two-and-a-half months. See Documents 91 to 131. BBM altered the days for each pay period when paying out wages for that week, often on the same day when the issue occurred, and always within a couple days. Therefore, it is clear from the records both what the original timecards showed and what alterations were made by BBM. Consequently, Ihli knows what the unaltered timecards she submitted would have shown. If Ihli wanted to demonstrate something that was outside the information reflected in BBM's timekeeping records, it was her burden to produce those records, not BBM's.

The essence of the disagreement here is not on what the total amount of time is that Ihli supposedly spent working for which she was not paid. Rather, the dispute is over whether she should be paid at all for that type of time and whether BBM was correct as a matter of law in altering the timesheets and reducing Ihli's pay. In order to overcome a summary judgment motion, Ihli cannot assert through mere speculation that other material issues exist. She has the burden on her own to produce evidence of a substantial nature to create a material fact in dispute. Ihli did not, however, contest car-pooling with the co-worker. The co-worker, when accounting for his work hours, did not include the drive time in his reporting, and so Ihli's hours were altered to match his. Despite Ihli's argument that she needs her original timecards, BBM does not have an additional burden to produce other records in order to resolve this dispute. BBM's records show what Ihli initially recorded as her time, and show every alteration BBM made down to the minute.

Having resolved this threshold matter, the question that now must be addressed is whether BBM was entitled under the law to alter Ihli's pay even though she thought she was to be compensated for commute time when BBM did not require her be at the office before going to a remote work site.[2] The

[2] The fact that Ihli's timesheet was sometimes altered at her request for her own unrelated misreporting is not in dispute. In addition, the fact that Ihli was paid for some hours she did not work, which was an employment benefit given by BBM during the pandemic, is also not in dispute. Neither fact is relevant to the present claim.

answer is simply that, yes, BBM was entitled to alter Ihli's pay to remove non-compensable time, even though Ihli mistakenly or knowingly believed otherwise.

As noted above, Admin. R. Mont. 24.16.1010(2) makes clear that, as a matter of law, travel from home to work is not worktime. The rule provides an exception that, when an employee is "required to report at a meeting place[,] . . . the travel from the designated place to the work place" is worktime. BBM's policy conformed with these provisions of law. The ultimate question here is whether Ihli's misunderstanding or disagreement creates a dispute, even though BBM was not required by law to pay her.

BBM asserts that Ihli was on notice that she would not be paid for commute time and understood its policy. BBM quotes Ihli's statement, "Now as far as being talked to was when I was hired I would be getting drive time only from office to out of city limit jobs. I have never been told that had changed EVER. . . ." BBM asserts this statement means Ihli was on notice she would not receive compensation for commute time. BBM further asserts Ihli was informed of BBM's policy through text messages,[3] a staff meeting,[4] pay check inserts,[5] and conversations.

In contrast, Ihli stated in the record, "I have never been talked to about my time except for when I was hired and told we get drive time for any out of city limit jobs. I have contested to this since day one." Ihli also stated she was always paid for travel time to remote work sites and was never informed of a policy change. Ihli clearly disputes her knowledge and understanding of BBM's policy. In addition, since she was driving from Bonner to Missoula, only to then turn around and drive back through Bonner when she was not required to, Ihli's actions indicate she either did not understand BBM's policy or was disputing her entitlement to pay for commute time.

Contrary to BBM's argument, the Hearing Officer cannot take as an undisputed fact that Ihli understood its policy. As a matter of law under the summary judgment standard, reasonable inferences regarding facts must be taken in the light most favorable to the non-moving party. Therefore, Ihli's

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[3] The text messages either do not show if Ihli was a recipient or do not show what day or time they were sent.

[4] The record shows Ihli was in attendance at a staff meeting on July 24, 2020, where the fact that commute time would not be paid was discussed. The meeting agenda items include "Drive time not payable for Rock Creek." (Hearing Doc. 40.) However, Ihli still asserts she is entitled to commute time.

[5] There is no paycheck insert in the record.

statement must be taken to mean she did not understand, or that she disputed, she would not be compensated for drive time from the office to the work site when BBM did not require her to be at the office. It must therefore be assumed that Ihli was not on notice or did not understand or did not like BBM's policy.

However, even assuming Ihli did not know or understand BBM's policy, summary judgment still requires Ihli to produce more than a mere allegation of her position. Ihli does not cite to any evidence that there was an agreement between the parties which altered the normal rule set forth in Admin. R. Mont. 24.16.1010(2). Ihli began work on March 16, 2020. BBM's records show Ihli's May 27, 2020, timesheet was the first one altered due to this issue. Cocoran altered this timesheet on June 1st due to Ihli claiming work hours that day for commute time. For each week from June 1 until Ihli left on August 18, BBM constantly and consistently altered Ihli's timesheets when applicable. BBM did this within each pay period for which the issue occurred, for the next paycheck. BBM did not knowingly pay Ihli for commute time, but instead addressed the issue in each paycheck by subtracting this time from her pay. Even assuming Ihli believed she was entitled to pay for commute time, this assumption does not relieve Ihli of her burden to show by more than her statements that she was entitled to pay that the law does not provide for. If former employees could alter the terms of employment contracts by simply stating they believed they were entitled to more pay for a given reason, with no supporting evidence other than their mere allegation, the former employees could unilaterally change employment agreements. Ihli did not produce a contract or any other actual evidence of a variation from the law. BBM consistently adjusted her pay within each pay period. When her paychecks were altered, it was Ihli's burden to address the matter and prove that BBM agreed to something to which it had no obligation to agree. Neither Ihli's potential lack of notice, misunderstanding, nor dislike of the policy–whichever may have caused her to commute and report that time–can be grounds to award her wages. Therefore, the undisputed facts show BBM is entitled to judgment as a matter of law that Ihli was not to be paid for commute time when she was not required by her employer to be at the office before going to a remote work site.

Ihli is not due overtime or other wages for her commute time when she was not required to be at the office in Missoula first, even though she submitted this time for payment. Ihli's reporting of work hours for which she was not entitled does not create a genuine issue of material fact that BBM was obligated to pay her for that time. The record shows Ihli was properly compensated for her time.

IV. 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. There is no genuine issue as to any material fact with regard to whether Ihli was entitled to overtime or other compensation. Ihli was not entitled to be paid for commute time when she was not required to be at the office first by her employer.

3. BBM is entitled to judgment as a matter of law with regard to Ihli's claim because it is not required to pay commute time unless it requires employees to be at its office before going to a remote work site.

V. ORDER

IT IS THEREFORE ORDERED THAT:

1. BBM's Motion for Summary Judgment is GRANTED as to Ihli's claim.

2. Ihli's claim is DISMISSED with prejudice.

DATED this 11th day of May, 2022.

DEPARTMENT OF LABOR & INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ JUDY BOVINGTON
JUDY BOVINGTON
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