

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM)	Case No. 405-2001
OF KEITH KITCHIN,)	
Claimant,)	
)	FINDINGS OF FACT;
vs.)	CONCLUSIONS OF LAW;
)	AND ORDER
NCI TECH LLC, d/b/a GATEWAY CASINO ,)	
Respondent.)	

I. INTRODUCTION

Keith Kitchin filed a wage claim on September 5, 2000, alleging that NCI Tech, LLC, d/b/a Gateway Casino (NCI) owed him a bonus of \$6,213.24, plus a bonus covering 21 weeks of unknown amounts of bar sales. On November 27, 2000, the Wage and Hour Unit of the Department of Labor and Industry issued a redetermination and dismissal, holding that Kitchin failed to substantiate his claim. Kitchin appealed. On November 2, 2001, Bernadine Warren, Hearing Officer for the Department of Labor and Industry, conducted a telephonic hearing in this matter. Steven Hudspeth, attorney, represented the claimant. The claimant testified on his own behalf. Joe Murphy, LLC partner, represented NCI and testified on its behalf. Bill Nebel, LLC partner, appeared as a witness for NCI.

Exhibits 1 and 1-A, proposed by the Hearing Officer, were admitted into the record without objection. Respondent exhibits A, B, E and G were admitted into the record without objection. Neither party objected to proceeding by telephone.

II. ISSUE

Whether NCI Tech, d/b/a Gateway Casino, owes Keith Kitchin wages, bonus and penalties pursuant to § 39-3-201 et seq., MCA

III. FINDINGS OF FACT

1. NCI operates a casino, gas station, convenience store, bar and restaurant in Vaughan, Montana. The bar/casino portion of the business is called Gateway Casino, while the gas station/convenience store portion is named Glacier Gateway BP. In January 1999, Rick Sturdevant, store manager, hired Kitchin as a part time casino bartender. The claimant's spouse, Jerry, was already working in the convenience store.

2. Joe Murphy, Bill Nebel and Jake Neill are partners in NCI. Nebel performed most of the management of Glacier Gateway BP and Gateway Casino. He kept Murphy and Neill informed of store and casino matters.

3. In March 1999, Sturdevant left the company. Murphy, Nebel and Neill met with Kitchin and Jerry sometime during the week beginning March 14, 1999 to discuss store and casino management. The partners offered Kitchin the opportunity to work as casino manager, and Jerry the opportunity to work as store manager, with each receiving a wage plus an annual bonus. The partners gave Kitchin a copy of an employment agreement that stated, in part, the following: the amount of Kitchin's wages; the types of duties Kitchin would be responsible for performing; the supervisory structure; and a bonus structure. Attached to the agreement was "Attachment A", which reads as follows:

**ATTACHMENT 'A'
YEARLY BONUS**

<u>Existing Casino Revenue</u>	
\$ 9,000.00	Monthly Average
7,061.00	Casino
1,940.00	Bar
\$ 9,001.00	TOTAL

Over the next year we expect 25% growth or \$11,251.00 monthly average.

Bonus (paid annually)	<u>Percentage Monthly Average (12 mo.) Revenue</u>	
	4%	\$9,000 - \$11,251
	6%	\$11,252 - \$13,051
	8%	\$13,052 - Above

Example:

If monthly average increases to \$14,000 month of revenue average; bonus would be

$$\begin{aligned}
 & \$2,256 \text{ (sic)} \times 4\% = 90 \times 12 = \$1,080.00 \\
 & \$14,000 - \$11,251 = \$2,749 \times 6\% = 165 \times 12 = 1,980.00 \\
 & \text{Total } \$3,060.00
 \end{aligned}$$

4. In the 34 weeks prior to the claimant becoming casino manager, the casino averaged net revenue of \$7,001.00 per month. In that same time period, the casino averaged gross revenue of

\$27,612.00 per month. Based upon these figures, Attachment "A" used net totals to calculate the proposed bonus. (Exhibit g)

5. Kitchin accepted the offer, but did not sign the employment agreement. None of the partners asked the claimant to sign the agreement. Following the discussion, NCI paid Kitchin in accordance with the employment agreement, Kitchin performed the duties outlined in the employment agreement, and Kitchin was supervised in accordance with the employment agreement.

6. In late March 1999, NCI learned that Jerry's contract was unacceptable to the Montana Department of Justice (DOJ) based upon the way her bonus was attached to revenues, similar to how Kitchin's bonus was calculated. Because the facility included a casino, the DOJ required review of employment agreements. NCI developed a bonus plan acceptable to the DOJ, and offered it to Jerry. NCI did not change Kitchin's bonus plan, nor did it submit the employment agreement and bonus plan to the DOJ for approval.

7. In April 2000, Kitchin began asking Nebel about the bonus. Nebel said he would speak with Murphy and Neill about it.

8. Nebel spoke with Murphy and Neill about giving Kitchin the bonus. Nebel believed that Kitchin was doing a good job, and believed the bonus was due Kitchin according to the employment agreement, even though Kitchin had never signed the agreement. Murphy could not calculate a bonus, however, because he did not have all the accounting paperwork necessary. He instructed Nebel to ask Jerry to send the numbers to the company accountant, Daniel Murphy, Joe Murphy's brother.

9. In July 2000, Nebel told Kitchin that he should receive a \$1,200.00 bonus, and instructed Jerry to send a note to that effect to Daniel Murphy. She did so. On July 12, 2000, Daniel Murphy issued a check to Kitchin that included both his regular wages and the \$1,200.00 bonus amount, and sent it to Kitchin. Daniel Murphy told Nebel what he had done. Nebel told Murphy and Neill about the bonus check. Murphy told Nebel that the bonus check should not have been sent to Kitchin because they still had not received the figures from Jerry. He instructed Nebel to get the check back from Kitchin so that the bonus could be recalculated using actual figures.

10. Nebel contacted Kitchin and instructed him not to cash the \$1,200.00 check because the amount had to be recalculated. Kitchin complied.

11. In early August, 2000, Kitchin asked Nebel about the bonus. Nebel told Kitchin that he earned it, but that there were problems with the other partners. For reasons unrelated to the bonus, Kitchin submitted his resignation effective August 17, 2000. After a few days, Kitchin again asked Nebel about the bonus. At that time, Nebel told Kitchin that he would not receive a bonus because he had failed to sign the employment agreement.

12. From March 17, 1999 through August 14, 2000, a period of 74 weeks, the casino netted an average of \$10,013.75 per month. (See Attachment 1 and exhibit g)

13. From March 17, 1999 through August 14, 2000, a period of 74 weeks, the bar netted an average of \$2,277.00 per month. (Exhibit g)

14. Kitchin has been charged with embezzling money from NCI. At the time of hearing, the matter had not yet gone to trial.

IV. DISCUSSION

Montana law requires that employers pay employees wages when due, in accordance with the employment agreement, pursuant to §39-3-204, MCA. 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. The provisions of Montana law control Kitchin's claim for payment of the bonus he claims was due him. *Berry v. KRTV Communications*, 262 Mont. 415, 865 P.2d 1104 (1993). Wages include bonuses. § 39-3-201(6)(a), MCA. However, Kitchin must establish that he was entitled to the bonus under the terms of his employment agreement. *Berry*, at 426.

Kitchin alleges that NCI owes him a bonus calculated on gross sales, in the amount of \$6,213.24, plus a bonus amount for 21 weeks of unknown bar receipts. He contends that, even though he never signed the employment agreement with its Attachment "A", the employment agreement had been executed. NCI denies the allegations, instead contending that it owes Kitchin no bonus money because Kitchin failed to sign the employment agreement, thus, Kitchin never accepted the terms, and never executed the agreement. Even if it does owe Kitchin a bonus, NCI contends that the bonus should be calculated upon net revenues, not gross, and is in the amount of \$151.62.

1. Does NCI owe Kitchin a bonus pursuant to the employment agreement?

The evidence shows that the employment agreement was offered by NCI, and accepted by Kitchin. From March 1999 through August 2000, NCI followed all provisions of the employment agreement except to pay Kitchin the bonus. Kitchin complied with all provisions of the contract. He performed the outlined duties of a casino manager, NCI paid him the amount outlined in the agreement, and Nebel supervised Kitchin per the agreement. When Kitchin spoke with Nebel in early 2000 about his bonus, Nebel did not tell him that the bonus would not be paid. Instead, Nebel agreed that a bonus was due in accordance with the employment agreement, and discussed the bonus amount with both Kitchin and his partners. He initially offered a bonus of \$1,200.00 to Kitchin, and later indicated that the amount needed to be re-calculated. It was not until Kitchin resigned that NCI decided not to pay the bonus. These facts support the conclusion that a contract was entered into between NCI and Kitchin. Contracts need not be in writing. In *Como v. Rhines*, 198 Mont. 279, 645 P.2d 948 (1982), the claimant believed, in good faith, that he had a job, had notes regarding the terms of employment, told Job Service that he had been offered employment, and moved his family at great expense to the work location. When the proffered work did not immediately appear, the prospective employer did not tell Como that no job was available, but instead told Como to come back later. The court held that, under these conditions, an employment contract had been entered into between Como and Rhines, regardless that no contract was in writing. The facts in this case are similar. The unsigned, written agreement reflected the actual agreement of the parties. Thus, NCI's argument that the

employment agreement was never executed fails. NCI owed Kitchin a bonus, and Kitchin is entitled to recover the bonus through the wage claim process.

NCI further argues that even if it owed Kitchin a bonus, it should not be expected to pay a bonus to an employee who allegedly embezzled money from the business. However, under § 39-3-205(3)(ii), MCA, only a court may order that wages be withheld to offset the value of the theft. NCI cannot choose to do so itself, nor can the Hearing Officer make such an order. The law is clear. NCI owed Kitchin a bonus which it failed to pay. It is obligated under the law to pay Kitchin the bonus.

2. What is the amount of bonus owed to Kitchin?

NCI promised to pay Kitchin a percentage of combined net bar and casino revenues above a base amount of \$9,000.00 per month. The facts show that the bar and casino netted a monthly average of \$12,290.75 during the time that Kitchen managed the casino. Although Attachment "A" indicates that the bonus was to be paid annually, it was calculated on a per month basis. Kitchin worked as manager for 74 weeks, or 17.09 months. Calculated in accordance with Attachment "A" of the employment agreement, then, NCI owes Kitchin a bonus in the amount of \$2,604.85. This amount includes the bonus on the 21 weeks of bar receipts that were unknown to the claimant. (See Attachment 1)

3. Whether NCI owes Kitchin a penalty for its failure to pay the bonus.

An employer who fails to pay an employee as provided by law or who violates any other provision of the law is guilty of a misdemeanor and must pay a penalty of up to 110% of the unpaid wages. § 39-3-206, MCA. ARM 24.16.7566 provides that a penalty equal to 55% of the wages due the employee will be imposed if none of the special circumstances of ARM 24.16.7556 apply. That rule requires that 110% penalty be applied to those cases where the employer fails to cooperate or provide requested information, the employer's records are falsified or intentionally misleading, or the employer has violated similar wage and hour statutes within the three years previous to the wage claim. In this case, NCI cooperated and provided requested information, it did not falsify records and there is no evidence that it violated similar wage and hour laws within the three years previous to Kitchin's claim. Thus, a 55% penalty, or \$1,432.66, is properly assessed.

VI. CONCLUSIONS OF LAW

1. The State of Montana and the Commissioner of the Department of Labor and Industry have jurisdiction over Kitchin's claim for unpaid wages under § 39-3-201 et seq. MCA. *State v. Holman Aviation*, 176 Mont. 31, 575 P.2d 925 (1978).

2. NCI failed to pay Kitchin a bonus in accordance with its employment agreement. It owes him \$2,604.85 in unpaid bonus. Kitchin is entitled to a penalty of \$1,432.66 pursuant to §39-3-206, MCA and ARM 24.16.7566.

VII. ORDER

Respondent NCI Tech, LLC is hereby ORDERED to tender a cashier's check or money order in the amount of \$4,037.51, representing the unpaid bonus and penalties, made payable to Keith Kitchin, and mailed to the Employment Relations Division, PO Box 6518, Helena, Montana, 59624-6518, no later than 30 days from the date of this Order.

DATED this 15th day of November, 2001

HEARINGS BUREAU

By: /s/BERNADINE E. WARREN

Bernadine E. Warren
Hearing Officer