STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM OF JENIFER M. CARRENO, Claimant, vs. BUTCH NULLINER d/b/a BUTCH'S APPLIANCE CENTER, Respondent.	)	Case No. 1885-2009 **FINAL ORDER GRANTING SUMMARY JUDGMENT; NOTICES OF REVIEW RIGHTS AND ENFORCEMENT PROCEEDINGS**

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1. Procedural Background

On May 18, 2009, claimant Jenifer M. Carreno filed a wage and hour complaint with the department, alleging that Butch Nulliner, doing business as Butch's Appliance Center, owed her $10,654.75 in unpaid wages for work performed from January 3, 2008, through June 30, 2008. Nulliner denied that he had employed Carreno, alleging that she was an independent contractor.

On July 15, 2009, the department's Independent Contractor Central Unit (ICCU) issued an employment status decision finding that Carreno was an employee of Nulliner, not an independent contractor.

On July 24, 2009, the department's Wage & Hour Unit (WHU) determined that Nulliner owed Carreno $7,835.18 in regular wages and $1,510.18 in overtime wages, together with penalties (if the wages were not paid by August 11, 2009, as they were not) of $3,478.75 on the unpaid regular wages and $1,661.18 on the unpaid overtime wages.

The department's determination included notice that either party could appeal or request a department redetermination by August 11, 2009, or else the WHU's determination would be final. The determination also included notice that a party dissatisfied with the ICCU employment status decision could request mediation from the department by August 11, 2009, and after completion of mediation, either party could then petition the Worker's Compensation Court for judicial review of the ICCU's employment status decision within 30 days after the mailing of the mediator's report.

On August 12, 2009, the department received a written request from Nulliner for "time to discuss this determination with my lawyer," indicating that he had not gotten his mail (because he had been out of state for major surgery upon his son) from July 26 until August 11, 2009.

On September 3, 2009, Andra Hendrickson, Compliance Technician, ICCU, sent a letter to Nulliner acknowledging his appeal of the ICCU determination, and confirming the ICCU file had been forwarded to the department mediator.

On September 4, 2009, Pam McDaniel, Supervisor, WHU, sent Nulliner a letter (copy to Carreno) confirming receipt of Nulliner's appeal. Her letter contained a notice that "the portion of the case pertaining to the amount of wages determined due is accepted as a timely appeal." The letter also identified two issues in the case: (1) The employment status issue, initially decided by the ICCU and subject to review by the Workers' Compensation Court after mediation, "assuming an appeal is filed with the Court"; and (2) The issue of whether wages were owed, initially determined by the WHU and now to be decided by an administrative hearing after mediation. The letter confirmed that the case was being transferred to the mediator before being forwarded for the formal contested case hearing process. The letter went on to explain that the mediator would try to resolve both issues in the dispute, and if he did, neither contested case hearing nor hearing by the Workers' Compensation Court would be necessary. The letter concluded that if mediation was not successful, the issues would proceed to contested case hearing on the amount of wages due and, if an appeal were filed with the Workers' Compensation Court, to a hearing before that Court on the employment status of Carreno.

On September 4, 2009, Joe Maronick, department mediator, sent a letter to Carreno and Nulliner, outlining the mediation procedure. His letter included the statement, in the 4th paragraph, "If we cannot resolve the dispute the case will be sent to the Hearing Bureau and/or the Worker Compensation Court."

On October 2, 2009, Maronick issued his mediator's report to both Nulliner and Carreno, noting that mediation was unsuccessful and that the file was being forwarded to the Hearings Bureau for the present wage claim contested case hearing proceeding. The third paragraph of Maronick's letter stated:

> This [letter] is considered the "Mediator's Report," concluding our unsuccessful mediation efforts. Pursuant to Section 39-71-415, MCA, appeal of the employee – independent contractor determination may be filed with the Workers' Compensation Court within 30 days of this Mediator's Report.

That same date, the WHU file was transferred to the Hearings Bureau.

The ICCU file has never been transferred to the Hearings Bureau, because review of the ICCU determination is reserved to the Workers' Compensation Court.

On October 6, 2009, the Hearings Bureau issued its Notice of Hearing and Telephone Conference in this contested case proceeding, sending copies to Carreno and to Nulliner at their respective addresses of record, and setting a telephone conference with them for October 19, 2009. The issue for hearing stated in that notice was "whether Butch Nulliner d/b/a Butch's Appliance Center owes wages for work performed, as alleged in the complaint filed by Jennifer M. Carreno, and owes penalties or liquidated damages, as provided by law." The hearing notice did not address the employment status issue.

Counsel for Carreno notified the Hearings Bureau that she would be appearing for Carreno, confirming that message with a faxed letter. When the Hearing Officer attempted to convene the telephone conference on October 19, 2009, Nulliner advised that he also would be represented by an attorney, and the telephone conference was rescheduled for October 27, 2009, to include that attorney.

On October 27, 2009, the Hearing Officer convened the telephone scheduling conference, with both attorneys in attendance, and counsel, on behalf of their respective clients, agreed upon a schedule for the contested case hearing on the wage issue. The Hearing Officer's Scheduling Order issued the next day.

On January 4, 2010, Carreno filed and served her "Notice of Requests for Admission Deemed Admitted Pursuant to Rule 36(a), M.R.Civ.P.," with a copy of the requests for admission. The notice included the statements that: (a) on December 1, 2009, the requests for admission had been served both electronically and by mail upon counsel for Nulliner and (b) responses to the requests for admission, due on December 31, 2009 (the date set for closure of discovery), had not been received.

On January 11, 2010, Carreno filed and served her Motion for Summary Judgment and Supporting Brief, with three exhibits and Carreno's affidavit.

A copy of Nulliner's responses to the requests for admission, with a certificate of service indicating that they had been served by first class mail, postage prepaid, on December 31, 2009, were filed as an attachment to Carreno's motion for summary judgment, including a copy of the envelope in which they were mailed. The envelope was postmarked January 4, 2010.

The Hearing Officer extended Nulliner's deadline to respond to the summary judgment motion to January 29, 2010. On that date, Nulliner timely filed and served his response brief, with two attached documents and Nulliner's affidavit.

On February 4, 2010, Nulliner served and filed (electronically, with paper following by mail) a request for hearing on the summary judgment motion. The Hearing Officer granted that request on February 5, 2010.

Carreno timely filed her reply brief on February 10, 2010, with another copy of the Mediator's Report (document 2 of the WHU file copy forwarded to the Hearings Bureau on October 2, 2009) and an affidavit from a clerk at the Workers' Compensation Court that Nulliner had not filed an appeal from the ICCU decision.

On February 18, 2010, the Hearing Officer set oral argument on the motion, which took place on February 25, 2010. Neither party requested a record of the oral argument.

2. Summary Judgment

Rule 56(c), Mont. R. Civ. Proc., provides that upon a motion for summary judgment, "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." When there is no genuine issue as to any material fact, summary judgment is granted as a matter of law. *Lewis v. Nine Mile Mines, Inc.*, (1994), 268 Mont. 336, 886 P.2d 912. The general purpose of this rule is to dispose promptly of actions in which there is no genuine issue of fact, thereby eliminating unnecessary trial, delay, and expense. *Westmont Tractor Co. v. Continental I, Inc.* (1986), 224 Mont. 516, 731 P.2d 327; ***following*** *Harland v. Anderson* (1976), 169 Mont. 447, 548 P.2d 613.

The purpose of summary judgment is to encourage judicial economy by eliminating unnecessary trials, and it is proper only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Carreno has the burden of showing a complete absence of any genuine issue as all material facts in light of the applicable legal principles entitling her to judgment as a matter of law, with all reasonable inferences from the offered proof drawn in favor of Nulliner. *Sherrad v. Prewett*, 2001 MT 228, 306 Mont. 511, 36 P.3d 378; ***see also***, *Cereck v. Albertson's, Inc.* (1981), 195 Mont. 409, 637 P2d 509.

In this contested case on her wage and hour claim, Carreno had the initial burden of proving work performed for which wages are due and have not been paid. *Anderson v. Mt. Clemens Pottery Co.* (1946), 328 U.S. 680; *Berry v. KRTV Comm.* (1993), 262 Mont. 415, 426, 865 P.2d 1104, 1112; *Garsjo v. DLI* (1977), 172 Mont. 182, 562 P.2d 473. She therefore had the initial burden, on her summary judgment motion, to establish that there were no genuine issues of material fact regarding the "extent and amount of [her] work as a matter of just and

reasonable inference." *Garsjo at* 189, 562 P.2d *at* 476-77, *citing Anderson at* 687, *and Purcell v. Keegan* (1960), 359 Mich. 571, 103 N.W. 2d 494, 497; *see also Marias H.C.S. v. Turenne*, ¶¶13-14, 2001 MT 127, 305 Mont. 419, 28 P.3d 494.

The issue of Carreno's employment status as Nulliner's employee was decided by the written determination of the ICCU on July 15, 2009. If Carreno was not an employee of Nulliner, she would have no entitlement to recover unpaid wages from him, since an employment relationship is really the *sine qua non* for a wage and hour claim. Mont. Code Ann., Chapter 3, Parts 1, 2 and 4 (defining the persons entitled to wage protection as "employees" and so referencing them throughout). Any review of the ICCU decision, establishing that she was an employee of Nulliner, is reserved to the Worker's Compensation Court.

Nulliner's affidavit in this contested case proceeding stated that he believed that his "request for an appeal would entitle me to a hearing to explain everything that happened and to have other witnesses, and if possible, to have an attorney for that hearing." Until his counsel participated in the October 27, 2009, telephone scheduling conference and then confirmed his representation with a written appearance filed on January 20, 2010, Nulliner was a layperson representing himself. It may not always be easy for a layperson to make sense of the various notices contained in typical correspondence with the department regarding a wage and hour claim. Nonetheless, the law itself is, in this instance, clear.

Admin. R. Mont. 24.35.206, titled "Appeal of Determinations Regarding Employment Status," states, in pertinent parts:

> (1) A complaint received by the department is investigated by the ICCU. The ICCU will issue a determination of employment status.
> (2) Except as provided in (3) and (4), disputes over an ICCU determination regarding employment status must be mediated by the department, and then, if mediation does not resolve the dispute, may proceed to the workers' compensation court. The party requesting mediation shall file a written request with the ICCU within 10 days of notice of the ICCU's determination. A party is considered to have been given notice on the date a written notice is personally delivered or three days after a written notice is mailed to the party. The time limits may be extended by the ICCU for good cause shown.
> . . . . [(3) and (4) omitted because they are irrelevant to this proceeding.]

> (5) Whenever a party appeals to the workers' compensation court under this rule, the party must serve its notice of appeal on all interested parties of record.

This rule contemplates that when mediation of an ICCU determination does not resolve the dispute, the case "may proceed," to the Workers' Compensation Court (subsection 1), which will occur, "whenever a party appeals" to that Court (subsection 5, emphasis added).

Mont. Code Ann. § 39-71-415(c) specifically states that "if after mediation the parties have not resolved their dispute regarding a worker's status as an independent contractor or an employee, the party may appeal the decision of the independent contractor central unit by filing a petition with the workers' compensation court within 30 days of the mailing of the mediator's report." This is entirely consistent with the notice in Maronick's mediator's report, that an appeal to the Workers' Compensation Court "may be filed . . . within 30 days" of that report.

With or without an appeal to the Workers' Compensation Court, the Hearing Officer has no power here to address any issue regarding the ICCU determination. Whether Nulliner can still file a late appeal to the Workers' Compensation Court on the ICCU determination is one such issue.

Admin. R. Mont. 24.35.205(1) states, in its entirety:

> (1) Unless appealed pursuant to ARM 24.35.206, written determinations issued by the ICCU are binding on all parties with respect to employment status issues under the jurisdiction of the department of labor and industry and the jurisdiction of any other agency which elects to be included as a member of the ICCU. These determinations may affect a party's liability in matters related to unemployment insurance, the uninsured employer's fund, wage and hour issues, the human rights commission and state income tax withholding.

In this proceeding, the ICCU determination is binding on Nulliner and Carreno – he was her employer and she was his employee. Allegations and proof regarding whether she and her spouse were partners, whether her spouse was her employer, or whether her spouse was an independent contractor are not issues Nulliner can raise in this case. The only issues he can raise here relate to what unpaid wages, if any, he owes to Carreno. No matter why Nulliner failed timely to appeal the ICCU determination, the Hearings Bureau has no power to relieve him of the consequences of that failure.

The Workers' Compensation Court had the power to review the ICCU determination. Whether that power can still be invoked is also a matter over which the Workers' Compensation Court, and not this Hearing Officer, has jurisdiction. In this proceeding, there are no issues of fact or law in dispute regarding Carreno's employment status. Thus, the only issues pertinent to summary judgment are issues about whether Carreno is due unpaid wages for work performed.

Carreno presented evidence to establish the absence of any genuine issue of material fact regarding the extent and amount of her work – her affidavit of the hours and dates she worked. She also pointed out that if Nulliner's late responses to the requests for admission were allowed, he had still presented no factual disputes about the extent and amount of her work.

A technical dispute regarding the requests for admissions that occupied a large portion of the filings on this summary judgment motion will be first addressed.

Carreno served discovery requests, including requests for admission. The responses to the requests were due December 31, 2009. Taking the certification of service on Nulliner's responses as true, those responses were timely (being deposited in the mail before the deadline), but for the scheduling order in this case, which includes, on page 1, a requirement for service by email as well as paper, with the email "sent before close of business on the same day as filing and service of the documents, whether by deposit in the U.S. Mail, postage prepaid, or personal delivery." The requirement goes on to specify that "if filing or service of paper is after filing or service of electronic copies, filing or service relates back, once complete, to the date of filing or service of the electronic copies, provided that the paper is received within 5 business days thereafter." It also states that filing and service "are not complete until both paper and electronic versions are received." Technically, the responses have never been served, since there apparently was no electronic service of them according to the certification of service.

However, the Hearing Officer need not split this hair and officiate over any procedural "'gotcha litigation' tactics" (as alleged by Nulliner) that may be involved in this motion. All of the denials to the requests for admission either are interposed on the basis of the employment status of Carreno (independent contractor rather than employee), an issue that is not before the Hearing Officer, or are denials, qualified or otherwise, unsupported by facts in this summary judgment record. Carreno, in her initial brief, argued in the alternative that even if the late responses were allowed, she still was entitled to summary judgment. In her reply brief, she abandoned the argument that the requests were deemed admitted, treating her alternative argument as the only argument she had advanced. In deciding the summary judgment motion, the Hearing Officer hereby allows the late responses to the requests for admission, as

if they had been timely, and will not deem any of the requests admitted, except to the extent admitted by Nulliner in his responses, now allowed.

Having resolved any remaining technical dispute regarding the requests for admissions, the Hearing Officer now turns to whether Carreno met her initial burden as the party moving for summary judgment.

Carreno's affidavit, filed with her summary judgment motion, established, on this record, the total hours of work she performed. She earned unpaid wages for 1,012 hours of regular time and 161 hours of overtime that she worked for Nulliner. Nulliner has admitted that he did not pay her for her work, qualifying the admission by asserting that she was not an employee and did not work for him. In this proceeding, that issue is resolved in favor of Carreno by the ICCU determination and is not before the Hearing Officer.

Carreno originally claimed entitlement to wages at the rate of $8.50 per hour, based on the regular rate that Nulliner had paid her predecessor. She has abandoned that claim for purposes of her summary judgment motion, and in the absence of proof of a higher agreed upon rate, she is entitled to a minimum wage rate. The Hearing Officer takes administrative notice, as requested by Carreno, that the Montana minimum wage rate in January through June 2008 was $6.25 per hour.

Mont. Code Ann. ¢ 39-3-204(1) states that "every employer of labor in the state of Montana shall pay to each employee the wages earned by the employee . . . on demand . . . and [the employer] may not withhold from any employee any wages earned or unpaid for a longer period than 10 business days after the wages are due and payable." Based on the established facts and the applicable statutory minimum wage rate, Carreno earned $6,325.00 of unpaid regular wages [1,012 x $6.25] and $1,510.18 of unpaid overtime wages [161 x $9.38], for a total amount of unpaid wages of $7,835.18.

Since Carreno established the absence of any genuine issue of material fact and her entitlement to judgment as a matter of law, the burden then shifted to Nulliner to establish a genuine material fact dispute, more substantial than mere denial or speculation. *Ravalli Cnty Bank v. Gasvoda* (1992), 253 Mont. 399, 883 P.2d 1042. To meet this burden, Nulliner had to present facts of a substantial nature, and speculative statements are insufficient to raise a genuine issue of material fact. *Brothers v. Gen. Motors Corp.* (1983), 202 Mont. 477, 658 P.2d 1108. Summary judgment is proper if once Carreno met her initial burden, Nulliner failed to present a genuine issue of material fact of a substantial nature, not fanciful, frivolous, gauzy, or merely suspicious. *Cheyenne W. Bank v. Young v. Zastrow* (1978), 179 Mont. 492, 587 P.2d 401; ***see also*** *Kimble Properties, Inc. v. State* (1988), 231 Mont. 54, 750 P.2d 1095.

Taking the requests for admission regarding hours worked, pay rate and failure to pay Carreno as denied in accord with Nulliner's responses, Nulliner has denied that Carreno worked the regular and overtime hours her affidavit states she worked. He has denied, in complicated language, that he kept any time records for her as an employee (based upon his belief that she was not his employee). He has denied any agreement to pay her, as an employee, $8.50 per hour. He has denied promising to pay her for her work. What Nulliner has not done is submit any substantial or credible evidence to show a genuine issue of material fact regarding her hours, work or entitlement to at least minimum wage for that work. His affidavit addresses, in its entire substance, his position that Carreno was not his employee and that he believed he had timely appealed the ICCU determination, and neither issue is before the Hearing Officer in this proceeding. His affidavit does not support his denials in any particulars other than those related to the ICCU determination.

In his brief, Nulliner has referenced an "affidavit of respondent's counsel filed herewith" (page 3, first full paragraph), but the only affidavit accompanying the brief was that of Nulliner, not his counsel. There is also a reference in Nulliner's brief to Carreno taking "the position that she has no obligation to provide any discovery responses in this proceeding." Nulliner has not documented the status or existence of any discovery requests propounded to Carreno. He has not requested additional time for discovery on the motion, pursuant to Rule 56(f), Mont. R. Civ. P. At the close of oral argument, Nulliner's counsel asked for additional time to file Carreno's response to his discovery requests, asserting that he thought that response had been filed with the Hearing Officer (it had not been filed, and there was no obligation to file discovery responses routinely with the Hearings Bureau). That request was denied, since the time for further filings by the adverse party on a summary judgment motion expired "prior to the day of the hearing." M.R.Civ.P. Rule 56(c).

On this summary judgment record, there is no evidence that Nulliner kept time records or paid wages to Carreno. Nor are there any facts to challenge her affidavit of work performed for which unpaid wages are due. Nulliner has failed to present any genuine issue of a substantial nature regarding any material fact.

The employer has the burden of record keeping under both state and federal law. When the employer does not discharge his duty to keep adequate records, the employee establishes her entitlement to recovery by producing "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *Garsjo*, ***quoting and following*** *Anderson v. Mt. Clemens Pottery Co.* (1946), 328 U.S. 680, 687. Upon such a showing by the employee, "the burden then shifts to the employer to come forward with evidence of the precise amount of

work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate." *Anderson* ***at*** 687-88; ***see also*** *Garsjo,* ***op. cit.***, ***quoting*** *Purcell,* ***op. cit.***

Nulliner's counsel asserted, in oral argument on the motion, that because Nulliner did not employ Carreno, he should not be penalized as an actual employer would be for failure to keep records, and summary ruling therefore would not be proper. Again, for purposes of this proceeding, the ICCU determination is final and binding upon the parties as well as the department. Carreno was Nulliner's employee, for purposes of this proceeding.

There being no genuine issue of material fact, and Carreno's entitlement to judgment as a matter of law being established, summary judgment is proper.

Nulliner did not pay the wages awarded and penalties determined by the department's WHU within the time frame set by that determination. A penalty equal to 55% of the unpaid wages is imposed in cases which do not involve violations of minimum wage law and/or overtime law, and which do not involve any of the special circumstances justifying imposition of the maximum penalty of 110%, is 55% of the wages found due. Admin. R. Mont. 24.16.7566. The penalty imposed in cases involving violations of the minimum wage law and/or overtime law is 110%. Admin. R. Mont. 24.16.7561.

The WHU offered, in accord with its regulations, a 15% penalty on the regular wage award and a 55% penalty on the overtime wage award if both were paid within the time frame set by the determination, otherwise imposing a 55% penalty on the regular unpaid wages and a 110% penalty on the overtime unpaid wages.

There is no evidence in this record that Nulliner ever intended to set Carreno's regular wage rate below the minimum required wage, and there is no evidence in this record of any special circumstances justifying the maximum penalty for unpaid wages other than minimum wage or overtime wage claims. Therefore, a penalty of 55% applies to the regular unpaid wages. On the other hand, for the unpaid overtime wages, the maximum 110% penalty applies.

Nulliner owes Carreno a penalty of $3,478.75 on unpaid regular wages [$6,325.00 x .55], and a penalty of $1,661.20 on unpaid overtime wages [$1,510.18 x 1.1], for a total penalty of $5,139.95. In total, Carreno is entitled to judgment in her favor and against Nulliner in the amount of $12,975.13 [$7,835.18 + $5,139.95].

3. Final Order

Butch Nulliner d/b/a Butch's Appliance Center is hereby ORDERED to tender a cashier's check or money order in the amount of $12,975.13, representing $7,835.18 in unpaid regular and overtime wages and $5,139.95 in statutory penalties on the unpaid regular and overtime wages, made payable to Jenifer M. Carreno. The check and/or money order must be mailed to the Employment Relations Division, P.O. Box 6518, Helena, Montana 59624-6518, no later than 30 days after service of this decision. Butch Nulliner d/b/a Butch's Appliance Center may deduct applicable withholding from the wage but not the penalty portion of the amount due. **This is a final agency decision. Review rights and the possibilities of enforcement action by the department are set forth below in Section 4, following.**

4. Notice of Review Rights and Enforcement Proceedings

NOTICE OF REVIEW RIGHTS: A party aggrieved by this final agency decision can file a petition for judicial review in district court within 30 days of service of this decision. Mont. Code Ann. §§39-3-216(4) and 2-4-702.

NOTICE OF ENFORCEMENT PROCEEDINGS: If no appeal is 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.

DATED this 25th day of February, 2010.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: \s\ TERRY SPEAR
Terry Spear
Hearing Examiner