

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM)	Case No. 1408-2011
OF JASON M. SIMMONS,)	
)	
Claimant,)	
)	
vs.)	FINAL AGENCY DECISION
)	
KANNA KARE OF HELENA, LLC,)	
a Montana Limited Liability Company,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

In this matter, the respondent Kanna Kare, LLC (hereinafter employer) appealed the decision of the Wage and Hour Unit that found Jason Simmons was owed additional wages for work he performed but for which he was not paid. The Wage and Hour Unit’s determination that wages were owed Simmons was based in part on a determination by the department’s Independent Central Contractor’s Unit (ICCU) that Simmons was an employee of Kanna Kare, LLC. The respondent did not appeal the ICCU determination to the Worker’s Compensation Court.

The hearing in this matter was held by telephone on June 25, 2012. Jason Simmons appeared and represented himself. Dave Gallik, attorney at law, represented the employer. Simmons, Sean Kussman, Eugene Trask, Corbin Bursema, and Robert Cyphers, the employer’s CEO, all testified under oath. Documents 5 through 14, 34 through 43, 63 through 67, 69 through 78, 82 through 98, 107 through 113, 134 through 137, 139 through 142, and 145 through 158 were admitted into the record. The parties provided the hearing officer with post hearing briefs, the last of which was timely received on August 17, 2012.¹

¹Though given the opportunity to do so, the claimant did not file a responsive brief to the respondent’s opening brief.

At the hearing in this matter, the only evidence presented by the employer related to the issue of whether Simmons was an employee of the employer. The employer put on no evidence (either at hearing or at any time during this proceeding) to counter Simmons' evidence showing the amount of wages he was due but not paid.

Though given the opportunity to present this tribunal with authority to show that this tribunal could make a determination regarding Simmons' employment status, the employer has failed to do so. Because this tribunal is limited to determining the amount of wages owed and cannot make a determination as to whether an employment relationship existed between Simmons and the employer, the only issue left for this tribunal to determine is whether Simmons is owed wages. As the employer has presented no evidence to refute Simmons' contention regarding the amount of wages owed, this tribunal finds that Simmons is owed \$3,706.25 in unpaid wages and the administratively prescribed 55% penalty of \$2,038.44. The basis for this conclusion is set out below.

II. ISSUES

1. May this tribunal make an independent determination of Simmons' employment status even though by statute that decision is relegated to the ICCU and must be appealed to the Workers' Compensation Court?
2. Is Simmons due additional wages and penalty as prescribed by law?

III. FINDINGS OF FACT

A. Facts Regarding the ICCU's Determination of Simmons' Employment Status and the Employer's Failure to Timely Appeal That Issue.

1. On October 21, 2011, the Wage and Hour Unit issued a determination finding that the employer owed Simmons unpaid wages and penalty. That decision was based in part on a determination from the ICCU that found that Simmons "performed services for Kanna Kare as an employee from June 22, 2010 to November 19, 2010." ERD Document 77, ICCU determination dated October 19, 2011.

2. The ICCU determination regarding Simmon's employment status, while finding that Simmons was an employee of Kanna Kare beginning in June, 2010, nonetheless goes on to state that Kanna Kare, LLC, was formed as a member managed limited liability company "on November 8, 2010," just ten days before Simmons last day of work and almost 4 ½ months after Simmons employment

began. The decision further notes that Kanna Kare, LLC, had previously been known as “The Healing Center of Helena.” ICCU determination, Document 69. Simmons’ complaint to the Wage and Hour Unit stated that Kanna Kare was formerly known as “The Healing Center of Helena” but that as of the date of the complaint it was known as Kanna Kare, LLC. Document 138, Simmons complaint filed with the Department of Labor and Industry on February 24, 2011.

3. On November 4, 2011, Cypers and Knauss, on behalf of the employer, filed an appeal of the Wage and Hour Determination only. Documents 5 through 14.

4. On November 9, 2011, the Wage and Hour Unit acknowledged receipt of the employer’s appeal and, prior to sending the matter to the Hearings Bureau for contested case hearing, referred the matter to mediator John Andrew to complete statutorily required mediation. Document 4. In that letter, the Wage and Hour Unit specifically apprised Cypers and Knauss that *two* issues existed in the case: (1) the issue of Simmons’ employment status and (2) the issue of whether Simmons was owed additional wages. The letter then went on to state:

The question of status is an *issue decided by the Workers’ Compensation Court assuming an appeal is filed with the court*. The question of whether wages are owed is decided by the Department of Labor and Industry through the administrative hearing process . . .” (Emphasis added).

5. On November 22, 2011, Wage and Hour Unit Mediator John Andrew noted in his letter concluding statutorily prescribed mediation that the letter was to be “considered the ‘Mediator’s Report’ concluding mediation efforts [on the issue of the claimant’s independent contractor status] as well.” That letter went on to articulate with specificity the employer’s appeal rights on the independent contractor issue, stating:

Pursuant to Section 39-71-415, MCA, an appeal of the ICCU [Independent Contractor Central Unit] determination may be filed with the Workers’ Compensation Court within 30 days of this Mediator’s Report. An appeal to the Workers’ Compensation Court must include a copy of this “Mediator’s Report” as well as a copy of the ICCU status determination.

6. While the case was pending before the Hearings Bureau, the employer moved to have the matter remanded to the ICCU so that the issue of Simmons’

employment status could be appealed to the Workers' Compensation Court. This tribunal denied that request, noting that nothing about the pendency of the wage and hour claim before the Hearings Bureau precluded the employer from appealing the issue of Simmons' employment status to the Workers' Compensation Court. See generally, Order Requiring Response to Motion for Summary Judgment and Denying Request to Remand to ICCU issued April 18, 2012.

7. Despite being apprised in a timely fashion and many times of the need to appeal the issue of Simmons' employment status to the Workers' Compensation Court, the employer never did so.

8. Because of the facial incongruity of the ICCU determination which found that Simmons was an employee of Kanna Kare, LLC from June 22, 2010 to November 19, 2010 even though Kanna Kare, LLC did not come into existence until November 8, 2010, the hearing officer permitted the parties to present evidence regarding Simmons' employment status between June 22, 2010 and November 8, 2010. The hearing officer also invited the parties to brief the legal issue of whether this tribunal could further adjudicate the question of Simmons' employment status in the face of a statutory scheme which seems to preclude this tribunal from making such a decision.

9. In its' order on post-hearing briefing issued on June 28, 2012, this tribunal specifically invited the respondent to "set out the legal basis upon which [the respondent] believes this tribunal may adjudicate the issue of the claimant's independent contractor status when that issue, at least with respect to Kanna Kare, has already been adjudicated by the ICCU but not appealed to the Workers' Compensation Court." The respondent did not address this preliminary concern of this tribunal in any of its' briefing, but instead went straight to the merits of that issue and argued vociferously that Simmons was not an employee of the respondent.²

²While this tribunal does not have the power to litigate the issue of Simmons' employment status, if it did have such power it would have found Simmons to be an employee of both Kanna Kare and its' predecessor, the Healing Center of Helena. To be an independent contractor, the worker must be free from control over performance of services and the worker must be customarily engaged in an independent trade, occupation, profession and business. *Sharp v. Hoerner Waldorf Corp.*, 178 Mont. 419, 584 P.2d 1298 (1978); *Solheim v. Tom Davis Ranch*, 208 Mont. 265, 677 P.2d 1034 (1984). Simmons' and Kussman's testimony demonstrates that Simmons was an employee of the respondent. Simmons was not free from the employer's control over his work nor was he customarily engaged in an independent trade or occupation.

B. Facts Regarding Wages Owed.

1. The Healing Center, LLC, was a dispensary for medical marijuana. It was organized pursuant to Montana law as a member managed limited liability company (LLC) and came into existence prior to June 2010. Robert Cyphers and Ron Knauss were the two members who organized and managed the LLC. On November 8, 2010, Cyphers and Knauss reformed The Healing Center into Kanna Kare, LLC. It, too, is a member managed LLC and Cyphers and Knauss are the managing members.

2. Cyphers and Simmons entered into a verbal employment agreement that Simmons would work for the employer at its' business location in East Helena. Pursuant to that agreement, Simmons began working for the employer on June 22, 2010. Testimony of Simmons. Simmons last day of work was November 19, 2010. At all times pertinent to this proceeding, Simmons was a licensed medical marijuana provider, authorized to provide medical marijuana to patients.

3. Between June 22, 2010 and November 19, 2010, Simmons worked 603 hours for the employer trimming plants, caring for plants, and cleaning the warehouse where the plants were grown. Cyphers directed Simmons's work for the employer. Testimony of Simmons and Kussman. Simmons would begin working between 10:00 a.m. and 12:00 p.m. and finish between 4 and 6 hours later when the lights went out in the flowering room. (Documents 154 through 156).

4. 603 hours of work at a pay rate of \$7.25 per hour results in compensation due of \$4,386.25. During this time, the Healing Center paid Simmons a total of \$680.00. The difference between the amount paid and the amount due to Simmons is \$3,706.25.

5. Penalty on the amount unpaid is 55% as prescribed by administrative rule. Fifty-five percent of \$3,706.25 is \$2,038.44 ($\$3,706.25 \times .55 = \$2,038.44$).

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IV. DISCUSSION³

A. *Ruling On Admissibility of the Evidence that Simmons Presented After the Hearing.*

Simmons presented several physician's statements and other exhibits which he claimed to have presented to the Wage and Hour Unit but which he did not disclose as Exhibits prior to the hearing. The hearing officer could not find the exhibits in this tribunal's copy of the ERD documents and has no evidence to suggest that these additional documents were in fact presented to the Wage and Hour Unit during its' investigation. Despite this tribunal's admonitions to the parties in its' scheduling order that any exhibits that a party wished to use at hearing had to be disclosed by a certain deadline (which passed long before the hearing), Simmons final contentions (filed April 10, 2012) did not disclose either these documents or Simmons intention to use them at trial. Simmons did not disclose his intent to use them until after the hearing had begun.

The respondent has correctly objected to the admission of these documents on the basis that they were not timely disclosed and on the basis that they are hearsay. Accordingly, the hearing officer refuses to admit the documents Simmons submitted post hearing.

B. *This Tribunal Has No Jurisdiction to Reconsider the Determination of the ICCU.*

Though invited to do so, the employer in its' post-hearing briefing did not seriously address this tribunal's concern about its' ability to adjudicate the question of whether Simmons was an employee of the employer. This tribunal is of the opinion that it has no authority to adjudicate the issue of Simmons' employment status with the employer and this tribunal is bound by the ICCU's determination on that issue.

An issue in a wage and hour case involving the question of whether an employee is an independent contractor must be brought before the ICCU. Mont. Code Ann. § 39-71-415(2)(a). A determination of the ICCU is *final* unless a party dissatisfied with the decision requests mediation within 15 days. Mont. Code Ann. § 39-71-415(2)(b)(I)(emphasis added). If the issue of independent contractor status is not successfully mediated, then a party must appeal the decision of the ICCU to

³Statements 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.

the Workers' Compensation Court within 30 days of the mailing of the mediator's report. Mont. Code Ann. § 39-71-415(2)(c).

The above statute reveals that the legislative scheme for all types of independent contractor issues is that they be decided by the ICCU and reviewed de novo by the Workers' Compensation Court. Nothing in the statute permits this tribunal to adjudicate the issue of Simmons' employment status.

An administrative tribunal has only those powers that are specifically delegated to it by statute or rule. *Auto Parts of Bozeman v. Employment Relations Div.*, 2001 MT 72, ¶138, 305 Mont. 40, 23 P.3d 193. In light of the above statutory scheme regarding determinations related to independent contractor status, and considering the very limited power of this tribunal, this tribunal is not at liberty to revisit the determination of the ICCU. This tribunal is bound by that determination and finds that Simmons was an employee of the employer.

The employer has also suggested that it was never fairly advised that the determination of the Independent Contractors Central Unit (ICCU) would be binding upon the employer unless timely appealed to the Workers' Compensation Court. The reality of the situation is that the employer was timely apprised on at least two occasions of the need to appeal that issue to the Workers' Compensation Court, but it failed to do so. This tribunal finds no basis to conclude that the Wage and Hour Unit in any way misled the respondent about the need to appeal the ICCU determination to the Worker's Compensation Court in order to contest that issue.

C. *The Employer Owes Simmons Wages.*⁴

Montana law requires employers to pay wages when due, and in no event later than 15 days following termination of employment. Mont. Code Ann. §§ 39-3-204 and 39-3-205.

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,

⁴In his opening brief, the claimant contends that he "had figured the state Hearings Bureau would be representing victims of employer manipulation, but of course not." He further complains that when the matter reached the Hearings Bureau, all help was dismissed." The function of the Hearings Bureau is to provide fair and impartial hearings for the parties and to ensure that each party's due process rights are observed throughout the contested case proceeding. The Hearings Bureau does not represent any party to a proceeding.

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 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).

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.

Simmons presented uncontroverted evidence that he had earned but not been paid \$3,706.25 in wages. The employer made no effort to refute that evidence. Simmons has thus proven he is due \$3,706.25 in unpaid wages.

D. *The Employer Owes Penalty.*

Montana law assesses a penalty when an employer fails to pay wages when they are due. Mont. Code Ann. § 39-3-206. A penalty of 55% is required under the circumstances presented in this case. Admin. R. Mont. 24.16.7561. Applying this regulation, the employer owes penalty in the amount of \$2,038.44.

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. Kanna Kare, LLC, owes Simmons additional \$3,706.25 in unpaid wages.

3. Kanna Kare, LLC, owes Simmons 55% penalty in the amount of \$2,038.44.

VI. ORDER

The respondent Kanna Kare, LLC, is hereby ORDERED to tender a cashier's check or money order in the amount of \$5,744.69, representing \$3,706.25 in unpaid wages, and \$2,038.44 in penalty on the unpaid wages, payable to Jason Simmons, 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. Kanna Kare, LLC, may withhold appropriate deductions for income taxes and social security on the wage portion, but not the penalty portion.

DATED this 24th day of August, 2012.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ GREGORY L. HANCHETT
GREGORY L. HANCHETT
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.

If there is no appeal 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.