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

IN THE MATTER OF THE WAGE CLAIM OF GRADY M. BROWN, Claimant, vs. NATURENER USA, LLC, A Delaware limited liability company registered with the Montana Secretary of State, Respondent.	)	Case No. 817-2018 **FINAL AGENCY DECISION**

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I. INTRODUCTION

On November 20, 2017, Grady M. Brown filed a claim with the Wage & Hour Unit of the Department of Labor & Industry alleging that his former employer, NaturEner USA, LLC (NaturEner), owed him unpaid wages in the amount of $31,175.00. After investigating the claim, the Wage & Hour Unit issued a Determination on January 19, 2018 dismissing the claim. Some time prior to February 28, 2018, Brown filed his request for a contested case hearing.[1]

After mediation attempts were not fruitful, the case was transferred to the Office of Administrative Hearings (OAH) on March 14, 2018. On March 16, 2018, OAH issued a Notice of Hearing setting a March 26, 2018 scheduling conference. On that date, the Hearing Officer conferred with the parties and set a June 20, 2018 hearing date.

The parties filed cross-motions for summary judgment that were denied by the Hearing Officer on June 5, 2018. The telephone hearing took place as scheduled. Brown represented himself. The Respondent was represented by Murray Warhank, attorney at law, Jackson, Murdo & Grant, PC.

[1] The letter requesting a hearing is undated and does not have a date stamp on it.

Brown, Sara Brown, Howard Cliver, Scott Rooney, Andy Whelchel, Jonathan Cole, and Isaac Aichlmayr provided sworn testimony. Documents 10-13, 83-91, 93-96, 99-137, 149-155, 177-178, 200-225, and Respondent's Exhibits F (pp. 3 and 5), G, H, I, J, L, M (p. 3), N, Q, and R were admitted into the evidentiary record.

On July 10, 2018, Brown filed his Motion For Post-Hearing Briefing. At the close of hearing, post-hearing briefing was discussed and Mr. Brown stated that his final contentions and summary judgment briefing was sufficient. Mr. Warhank requested submitting proposed findings of fact. The Hearing Officer determined that the parties could submit proposed findings of fact if they wished to. No briefing was agreed to or allowed. Brown's Motion for Post-Hearing Briefing is Denied. Claimant's Brief is stricken.

For the reasons that follow, the Hearing Officer finds that Brown is not due additional wages.

II. ISSUE

Whether NatureEner USA, LLC, a Delaware limited liability company registered with the Montana Secretary of State, owes wages for work performed, as alleged in Grady M. Brown's complaint, and owes any penalties.

III. FINDINGS OF FACT

1. Grady M. Brown lived in Shelby, Montana, prior to taking a job as a Wind Farm Facilities Technician with NaturEner. Brown was employed with NaturEner from December of 2015 through December of 2017. Brown did not initially have on call duty. He was added to the on call list in August 2016.

2. NaturEner operates three wind farms in North Central Montana: Glacier I, Glacier II, and Rim Rock. The Glacier wind farms are located near Ethridge, between Shelby and Cut Bank. Rim Rock is located near Kevin, north of Shelby. Scott Rooney is the supervisor at the Rim Rock farm. Howard Cliver is the supervisor at the Glacier farms.

3. Brown had a copy of his job description when he accepted the job. The job description required Brown to be "[a]ble to be on call for up to two weeks at a time" and that he "must be available for on call duty." Docs. 177-178.

4. The Offer Letter of Employment, which Brown acknowledged and accepted by his signature, includes a provision that his "employment with the Company will also be subject to any additional policies and procedures of the Company. . . ."

5. Brown received and read the Team Handbook when he signed the Acknowledgment of Receipt of the Company Handbook on the first day of his employment. *Id.* The Team Handbook provided that NaturEner had the right to "interpret, modify, or withdraw" any provision of the Team Handbook "at its sole discretion with or without notice." *Id.*

6. The Acknowledgment of Receipt of the Company Handbook provided, "[N]o one has made any promises or commitments to me contrary to the foregoing, and this Acknowledgment supersedes all previous policies, whether written or oral, express or implied, inconsistent with the subjects covered in this Acknowledgment." *Id.*

7. No member of NaturEner management ever promised Brown that he would never be required to be on call.

8. NaturEner had written on call policies to which Brown agreed by taking the job and signing the Offer Letter of Employment. The on call policies provide, "[A] Technician's time starts from the time the call out is received to the time that the work is completed." Docs. 164-165. NaturEner allows technicians to avoid on call duty if they provide two-weeks' notice. *Id.* Brown was trained in these policies as well. *See* Doc. 155.

9. Technicians regularly and freely traded on call responsibilities. Technicians would trade a day or a week with another technician. This allowed them to attend their children's events, fish, or otherwise engage in personal activities. Brown traded responsibilities on multiple occasions with little notice. *See* Ex. F.

10. The on call policies provided that response time "should be within 1.5 hours of the call out." Doc. 151. "All crew members should be able to reach the site within this time period." *Id.* Technicians regularly traveled to Great Falls to shop or engage in recreation an hour or more away from their homes knowing they were not strictly required to respond within 90 minutes.

11. Brown engaged in personal activities while he was on call but had not been called out to work. He was able to use that time for his own purposes. He admitted in his discovery responses that he "ate, slept, watched TV, read, [and] did chores" while on call. *See* Ex. I, p. 6. Brown regularly played with his dogs for around an hour a day, played board games, watched Netflix, and spent time with his children.

12. Brown and the other technicians benefitted financially from being on call. They were each paid $100.00 per pay period. If the technicians were called out, their time started from when they received the call, instead of when they arrived on-site.

13. The call outs were not frequent nor were they dangerous. Brown was only called out once and did not answer the call. Brown would not have been required to perform work for which he was not trained. Brown was placed on call with either Cliver or Rooney, as he could not and would not have been asked to work on electrical equipment. Brown's role if he was called out was to be a backup and an observer to ensure the safety of the electrical technicians and to be there in the event of an emergency or accident.

14. Brown was called out on February 19, 2017, but he did not respond. Rooney documented that incident. *See* Ex. Q. Brown corresponded with Sara Brown, his wife, who worked for NaturEner at the time, about the incident. He said that Scott Rooney had called his cell phone and it went to voice mail. *See* Ex. G. Brown was not subject to discipline for missing this call. Brown later stated he told Rooney he could call him at his home number or get him a company phone. *See* Ex. H.

15. Brown was allowed the use of a company provided cell phone to ease any restrictions on his time while he was on call.

a. Contrary to Brown's prior statements, he admitted that he did actually use his cell phone for on call duty. The phone, which has also been called the "AZ-k phone," was suggested as a number to reach Brown while he was on call. *See* Ex. M. Brown "accepted" that number to be used. *Id.* Brown admitted in his testimony that he told Rooney not to use that number. Brown was therefore allowed to use his personal cell phone, but decided not to take advantage of that opportunity.

b. Brown was issued NaturEner cell phone 026. *See* Ex. R. NaturEner cannot be faulted for his refusal to use it.

c. The evidence proves that NaturEner did not interpret its policies in the draconian way Brown suggests. Personal cellular phones were not considered to be used for business purposes, so there was no requirement for training on the device. There is no evidence to suggest that NaturEner had any interest in, or ever had, searched personal cell phones. Instead, technicians were encouraged to use their personal phones to ease on call restrictions.

d. Brown's past justifications on why he did not use a personal cell phone all proved to be incorrect. Per Exhibit T, the phone traveled with Brown's family

to Washington, so the phone did not need to remain in Brown's residence. Brown testified his wife and his daughters used the phone personally, so very clearly it was not only used for the AZ-k Outfitters business.

e. Brown's protestations about NaturEner's policies regarding cell phones are irrelevant because he agreed to the policies of which he complains when he decided to take the job.

f. Brown was directly asked in discovery about his cell phone use. Even though he had a cell phone that he had actually used while on call, he did not disclose that use. *See* Ex. I, p. 8. He stated that "NaturEner would not allow me the use of a cell phone," even though he knew that NaturEner had so allowed and that its COO, Candace Neufeld, had offered him a company phone. All of the explanations Brown offered for his failure to use the phone have proven to be false.

16. Brown was not required to stay at his house while on call. The only requirement was that he needed to be able to be reached. In addition to the training and handbook he received, Brown was informed that NaturEner's policy did not require him to remain at home by email on July 27, 2017. *See* Docs. 93-96.

17. Each of the other technicians considered NaturEner's on call policies fair. The technicians all agreed they were able to parent their children without problem while on call. Brown had the opportunity to trade on call responsibilities and decided not to use a cell phone to ease any restrictions on his time while on call.

18. Brown was able to engage in adequate commerce while on call. Shelby has a grocery store, a drug store, several hardware stores, a farm store, an auto parts store, and a Shopko. He was able to travel to Cut Bank, which has a grocery store, a sporting goods store, a home décor store, a Ben Franklin's, and a dollar store. He was able to travel to Conrad as well, which has multiple stores as well as a pet store, which the Brown family used. The family was also able to buy goods from Amazon and other internet retailers. While the Brown children liked to travel to Great Falls to buy school supplies, the Browns generally knew when those purchases would be necessary, so Brown could have informed NaturEner that he would not be available for on call duty during those times or traded his on call responsibilities.

19. Brown knew he would not be paid for all of his on call time when he started the job. He raised this issue only when he became disgruntled with the position he accepted. Brown certified he was marking all of his working hours when he submitted his time sheets. *See* Docs. 99-117; 200-225. He never listed on call hours. He also was not paid for those hours for a year after he started on call before

he raised the issue. Brown's explanation is not credible. Even if Brown somehow believed he would not be paid for time he was owed for months, he testified he thought he would get paid for that time in his yearly bonus. That was paid months before he first raised the issue on July 27, 2017.

IV. DISCUSSION

Montana law allows employees owed wages, including wages due under the Fair Labor Standards Act (FLSA), to file a claim with the Department of Labor and Industry to recover wages due. Mont. Code Ann. § 39-3-207; *Hoehne v. Sherrodd, Inc.* (1983), 205 Mont. 365, 668 P.2d 232.

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, 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 the 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.

Through testimony and the exhibits admitted into the evidentiary record Brown failed to prove he is owed unpaid wages.

On call time

The United States Supreme Court has held that time spent waiting "on call" is compensable if the waiting time is spent "primarily for the benefit of the employer and his business." *Armour & Co. v. Wantock*, 323 U.S. 126, 132 (1944). "Whether time is spent predominately for the employer's benefit or for the employee's is a

question dependent upon all the circumstances of the case." *Armour & Co.*, 323 U.S. at 133. The key is whether the employee was engaged to wait, which is compensable, or whether the employee waited to be engaged, which is not compensable. *Skidmore v. Swift & Co.*, 323 U.S. 134, 137-39 (1944).

In *Skidmore*, supra, the Supreme Court found the following factors relevant in determining someone is engaged to be waiting or waiting to be engaged:

(1) the extent to which there was an on-premises living requirement;

This factor clearly weighs in NaturEner's favor. Brown was not required to live on the premises. Brown's argument that he was required to stay at his home when he was on call was a situation he created by his refusal to use the company phone or his own cell phone to receive calls from NaturEner. The idea that he could not use the company cell phone because he had not been trained by the company in its use is absurd and incredulous. All the other technicians working for NaturEner used their personal cell phones to receive call outs and thought it was a fair way to communicate and were not concerned about having and never had the company inspect their phone or records.

(2) the extent to which there were excessive geographical restrictions on employee movements;

This factor also weighs in NaturEner's favor, as there were no excessive geographical restrictions on Brown's movements. NaturEner's wind farms are located far from any of Montana's larger cities. Given the geography, it can be a long drive from the wind farms to those locations. Brown knew these circumstances when he took the job. All Brown had to be able to do was to reach the wind farm within 90 minutes of the call out. Another technician testified he was in Great Falls, which was over a 90-minute drive to the wind farm and, as a result, he drew his activities there to a close but did not rush. He was not disciplined for his response time.

(3) the extent to which the frequency of calls was unduly restrictive;

This factor also weighs in NaturEner's favor. Brown received one call out and failed to respond to the call. His home phone did not receive messages and neither of the cell phones NaturEner tried to call were answered.

(4) the extent to which a fixed time limit for on call response was unduly restrictive;

This factor also weighs in NaturEner's favor. As discussed in subpart (2), Brown only had to respond within 90 minutes, which would allow him to travel to nearby communities to shop or to go fishing in local lakes and streams.

(5) the extent to which employees could easily trade on call responsibilities;

This factor also weighs in NaturEner's favor. The technicians all testified they could trade on call shifts or days with less time than the two-week notice requirement in NaturEner's policy. The company was especially sensitive to allowing technicians to be with their children for doctor's appointments and significant life activities. Technicians would also notify the NaturEner's Operations Center (NOC) to notify it that a different technician would be on call for a given time period. Technicians who were on call could also call NOCS to give them a different phone number to call them in the event they would be in a different location. Doc. 90.

(6) the extent to which the use of a pager or cell phone could ease restrictions;

This factor also weighs in NaturEner's favor. As discussed above, Brown could have used a company cell phone, but he argues he was forbidden from doing so because he was not trained in its usage. As stated above, Brown's argument is totally without merit. At hearing, most of the testimony centered around various issues regarding the company cell phone and whether Brown was trained on how to use it or about Brown's cell phone and how he used it, when he used it, and if he used it. Even if the Hearing Officer were to find, and he does not, that NaturEner should have trained Brown on how to use its cell phone and therefore it had not actually provided a cell phone to Brown, the cell phone issue is only one factor in the analysis and would not be sufficient to tilt the outcome in this case.

(7) the duration and danger of calls;

This factor also weighs in NaturEner's favor. Brown was only called out once, and he failed to respond to the calls made to three different phones he had use of. Because there was no call out, there could be no danger. Even if he had responded to a call, his role was limited to acting as an observer for an emergency response if something went wrong. He was a non-qualified technician meaning he was not allowed to do electrical work of any kind.

(8) the extent to which employees benefitted financially from the on call policy;

This factor also weighs in NaturEner's favor. NaturEner paid Brown and its other technicians $100.00 per on call shift. Brown was not so restricted that he could not use the time for himself so the extra income was a financial benefit to him.

(9) the extent to which the policy was based upon an agreement between the parties;

This factor also weighs in NaturEner's favor. The parties had a signed agreement under which Brown was subject to NaturEners' policies, one of which was the on call policy. His job description also called for him to be on call. Brown failed to prove he was told by anyone in authority that he would not have to be included in the on call rotation. Brown argues he was forced to sign the acknowledgment, but he did not have to sign it, he could have refused to accept the job. Brown asserts he was coerced into signing the acknowledgment. The Hearing Officer interprets Brown's assertion to mean that he was under economic duress when he signed the document - sign or not get the job. There are "three elements of economic duress: 1) a wrongful act that; 2) overcomes the will of a person; 3) who has no adequate legal remedy to protect his interests. *Hoven v. First Bank (N.A.)- Billings* (1990), 244 Mont. 229, 234, 797 P.2d 915, 919. "A claim of economic duress requires a showing that the contract at issue was made under circumstances evincing a lack of free will on the part of the contracting parties. It is not sufficient to show that consent was secured *by the pressure of financial circumstances*." *Hoven*, 244 Mont. at 235, 797 P.2d at 919 (emphasis added).

NaturEner's offer of employment subject to the terms of the agreement and its policies is not a wrongful act. The offer did not overcome Brown's will, he accepted it subject to NaturEner's policies. He had a remedy - turn down the job. Brown has not shown he was under economic duress such that his acknowledgment of NaturEner's policies should be voided. The fact that at the time he signed the acknowledgment he wanted or perhaps needed the income the job would produce is insufficient to show that he did not consent.

(10) the extent to which on call employees engaged in personal activities during on call time.

Brown and the other technicians all testified that they were able to eat, sleep, shop, conduct family activities, fish, hike, and do chores around the house. This testimony demonstrates that they could and did have considerable time to tend to their own personal activities when they were on call.

The Montana Supreme Court has endorsed the use of these same factors when making determinations of whether on call time should be compensable. *See*

Stubblefield v. Town of W. Yellowstone, 2013 MT 78, P17, 369 Mont. 322, 328, 298 P.3d 419, 424. The court held that no one factor was dispositive. *Id.*

When considering the totality of the circumstances, however, all the factors weigh in NaturEner's favor. Brown was waiting to be engaged.

Both parties contend that the FLSA applies in this case, but neither provided any factual basis for their contentions.[2] It seems obvious to the Hearing Officer that the production and distribution of electrical energy from the wind farms where Brown was employed means that NaturEner is engaged in commerce. *See* 29 U.S.C. § 203(b). It also seems obvious to the Hearing Officer that, given the multi-million dollar investment in the wind turbines at the wind farms, that NaturEner would have gross sales exceeding $500,000.00. *See* 29 U.S.C. § 203(s). It also appears obvious that Brown's position supported the movement of electricity into interstate commerce. *See* 29 U.S.C. § 203(j).

Furthermore, USDOL's Field Operations Handbook provides:

> (a) Employees engaged in the production and delivery of electricity, fuel, gas, power, water, or other energy for use and consumption by instrumentalities of interstate commerce to aid the movement of the commerce carried on by the instrumentalities are individually covered. This is so even though the production, sale, distribution, and consumption is wholly intrastate.

Chapter 11e00(a).

Under these circumstances, both individual and enterprise coverage exists and the FLSA applies. Perhaps it is so obvious that wind farms producing electricity and feeding it into the interstate power grid is an enterprise covered by the FLSA that no one disputes it, which would explain why the Hearing Officer could find no case law on the topic.

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.

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[2] The Hearing Officer considered reopening the record to obtain testimony on this issue but decided that given the parties' contentions, the Hearing Officer's determination, and the outcome being the same under the FLSA or the WPA it would not serve anyone to do so.

2. NaturEner USA, LLC is a business enterprise engaged in interstate commerce. *See* 29 U.S.C. § 203(j). This claim is governed by the Fair Labor Standards Act.

3. Brown's on call time was primarily for his own benefit. *Armour & Co. v. Wantock*, 323 U.S. 126, 132 (1944).

4. Brown was waiting to be engaged. *Skidmore v. Swift & Co.*, 323 U.S. 134, 137-39 (1944).

5. Brown failed to prove that his on call hours are compensable. *Id*.

VI. ORDER

Grady M. Brown's claim for unpaid wages and penalties is DISMISSED WITH PREJUDICE.

DATED this 6th day of August, 2018.

DEPARTMENT OF LABOR & INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ DAVID A. SCRIMM
DAVID A. SCRIMM
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 59624-1503