

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

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|---|------------------------------|
| IN THE MATTER OF THE WAGE CLAIM) | Case No. 2117-2017 |
| OF MARYANN H. JENSEN,) | |
|) | |
| Claimant,) | |
|) | |
| vs.) | FINAL AGENCY DECISION |
|) | |
| JON JON, INC., a Montana corporation,) | |
| d/b/a BUCK'S BAR,) | |
|) | |
| Respondent.) | |

* * * * *

I. INTRODUCTION

On June 29, 2017, MaryAnn H. Jensen filed a claim with the Wage and Hour Unit of the Montana Department of Labor and Industry (Wage and Hour Unit) alleging Jon Jon, Inc., a Montana Corporation, d/b/a Buck's Bar (Buck's Bar), owed her a total of \$7,302.40 in unpaid wages for work performed during the period of December 2016 through June 25, 2017. On July 17, 2017, Robert L. Larkin, Jr., C.P.A., the business' accountant, filed a response to Jensen's claim alleging she was never an employee of the business.

On December 18, 2017, the Wage and Hour Unit issued a determination that concluded Buck's Bar owed Jensen \$5,162.60 in unpaid wages and awarded liquidated damages in the amount of \$5,162.60 for a total of \$10,325.20 found to be owing to Jensen.¹ On December 26, 2017, John Skauge, Owner of Buck's Bar, filed a timely request for redetermination.

On April 6, 2018, the Wage and Hour Unit issued a redetermination that concluded Buck's Bar owed Jensen \$5,036.28 in unpaid wages for work performed during the period of her wage claim. The Wage and Hour Unit also awarded \$5,036.28 in liquidated damages for a total of \$10,072.56. On April 17, 2018,

¹The Wage and Hour Unit determined Buck's Bar was engaged in interstate commerce and therefore subject to the Fair Labor Standards Act. It is unclear what information was relied upon in making this determination.

Larkin filed a timely appeal on behalf of Buck's Bar. Jensen did not appeal the redetermination.

Following mediation efforts, the Wage and Hour Unit transferred the case to the Office of Administrative Hearings (OAH) on May 11, 2018. The matter was originally assigned to Hearing Officer Chad R. Vanisko, who conducted the initial scheduling conference in this matter. On August 28, 2018, Hearing Officer Vanisko issued an Order Setting Telephone Conference after receiving Buck's Bar's Motion to Hold Hearing in Billings, MT to Allow Participation In Person by Witnesses. At the telephone conference, the parties agreed Buck's Bar and its witnesses could appear via video conference and Jensen could appear via telephone.

On September 6, 2018, the matter was assigned to Hearing Officer Caroline A. Holien. On September 10, 2018, Buck's Bar filed a Renewed Motion for In-Person Hearing and Motion to Reconsider Hearing Officer Vanisko's decision to implement the parties' agreement to allow Buck's Bar and its witnesses appearing via video conference and Jensen appearing via telephone.

On September 12, 2018, Hearing Officer Holien issued an Order Denying Respondent's Renewed Motion for In-Person Hearing citing the parties' agreement as the basis for her decision. The order also noted there is no specific requirement under the Montana Administrative Procedures Act that an in-person hearing be held where the claim arose and that Mont. Code Ann. § 39-3-216(3) allowed for the hearing to be conducted by either telephone or video conference.

On September 14, 2018, Hearing Officer Holien conducted a final pre-hearing conference in this matter. Jensen participated, as did Jock West, Attorney at Law. The parties agreed to go through the administrative record compiled by the Wage and Hour Unit to identify duplicative documents for their removal from the record at hearing. Those documents were listed in a previous order issued by Hearing Officer Holien following the hearing and were accordingly removed from the record.

On September 18, 2018, Hearing Officer Holien conducted a hearing originating from the Sacajawea Conference Room at the Walt Sullivan Building in Helena, Montana. Jensen appeared telephonically. Chelsea Kemp and Jock West, Attorney at Law, appeared via Skype. At hearing, Jensen, Chelsea Kemp, Gary Jennen, James Blessing, Darci Snively, Shelley Kemp, Jonny Maetzold, Josh Borner, and Mark Owens testified under oath.

Documents 4 through 9, 24, 30, 32, 39, 49, 50, 63, 67, 74, 75, 112 through 120, 129 through 131, 149 through 155, 160, 164 through 214, 218 through 226, 230, 239, 248 through 250, 271, and 272 were admitted into the record.

Respondent's Exhibits A-1 through A-8, B-1, B-2, C-1 through C-14, and D-1 through D-20 were also admitted into the record.

The parties were asked to address the admissibility of Respondent's Exhibits D-15 through D-17 in their post-hearing arguments. Upon the timely receipt of the parties' written arguments on October 5, 2018, the matter was deemed submitted for decision.

Based on the evidence and arguments presented at the hearing, the Hearing Officer makes the following findings of fact, conclusions of law, and final agency decision.

II. ISSUE

Whether Jon Jon, Inc., a Montana corporation, d/b/a Buck's Bar owes wages for work performed, as alleged in the complaint filed by MaryAnn H. Jensen, and owes penalties or liquidated damages, as provided by law.

III. FINDINGS OF FACT

1. Jon Jon, Inc., a Montana corporation, d/b/a Buck's Bar is a bar and casino located in Billings, Montana.

2. Buck's Bar has annual sales in excess of \$500,000.00. It sells food and alcohol supplied by local distributors and local businesses. There is an ATM onsite, as well as gaming machines, pool tables, and a juke box.

3. MaryAnn H. Jensen came to know Chelsea Kemp when she taught Kemp's preschool aged daughter several years earlier. Jensen and Chelsea Kemp lost touch for a few years but later became reacquainted and became friends.

4. Chelsea Kemp suffers from health issues that make it difficult for her to perform various tasks at Buck's Bar such as stocking the cooler at the end of her shift. Chelsea Kemp enlisted the aid of friends and bar patrons to perform those duties and typically paid them \$25.00 for their assistance and gave them a portion of the tips she received that day.

5. Jensen was a regular patron of Buck's Bar. Typically, Jensen was drinking at the bar while Kemp was working.

6. On or about November 26, 2016, Jensen began covering for Chelsea Kemp on a more regular basis. Jensen typically covered for Kemp on Saturdays, Sundays,

Mondays, and Tuesdays. Jensen worked an average of four hours each time she covered for Chelsea Kemp.

7. Jensen was required to print out a ticket from the cash register indicating she had received \$25.00 for the day. Jensen was required to sign the ticket and write the amount paid on the Daily Sheets kept at the bar. Employees were required to note liquor sales, gaming pay outs, change in the pool table and juke box, and other notes about the sales for that day on the Daily Sheets. Buck's Bar typically kept the Daily Sheets after that day's work had been completed. Resp. Exs. A-1 through A-8.

8. During the course of the investigation of Jensen's wage claim conducted by the Wage and Hour Unit, Jensen claimed she worked 10:00 a.m. to 6:00 p.m. the following days in 2016 and 2017 and was paid \$25.00 each day:

November: *12, 13, 14, 15, 19, 20, 22, 22, 26, 27, 28, 29*
December: 3, 4, 5, 6, 10, 11, 12, 13, 17, 18, 19, 20, 24, 25, 26, 27, 31
January: 1, 2, 3, 7, 8, 9, 10, 14, 15, 16, 17, 21, 22, 23, 24, 28, 29, 30, 31
February: 4, 5, 6, 7, 11, 12, 13, 14, 18, 19, 20, 21, 25, 26, 27, 27
[sic]
March: 4, 5, 6, 7, *11, 12*, 13, 14, 18, 19, 20, 21, 25, 26, 27, 28
April: 1, 2, 3, 4, 8, 9, 10, 11, 15, 16, 17, 18, 22, 23, 24, 25, 29, 30
May: 1, 2, 6, 7, 8, 9, 13, 14, 15, 16, 20, *21*, 22, 23, 27, 28, 29, 30
June: 3, 4, 5, 6, 10, *11*, 12, 13, 17, 28 [sic], 29 [sic], 20 [sic], 24

See Ex. A, Resp. Post Hearing Memo (File 10/09/18).²

9. Jensen did not work the following days:

| <u>DATES:</u> | <u>EXHIBITS IN SUPPORT:</u> |
|----------------------------------|-----------------------------|
| November 12, 2016 | Ex. D2 |
| April 4, and April 5, 2017 | Ex. D8 |
| March 26, 2017 | Exs. D9-D10 |
| March 16, through March 17, 2017 | Ex. D11 |
| March 9, through March 12, 2017 | Ex. D14 |
| May 21, 2017 | Doc. 165 |
| May 29, 2017 | Doc. 168 |
| June 6, 2017 | Doc. 171 |

²Italicized dates are those dates for which there is evidence showing Jensen did not work.

June 11, 2017
June 19, 2017

Doc. 172
Exs. D3-D7

10. When Jensen did cover for Chelsea Kemp, she typically worked an average of four hours per day. Jensen rarely, if ever, worked a complete eight hour shift.

11. Buck's Bar employed bartenders, including Jonny Maetzold and Josh Borner, during the period of Jensen's claim that were paid cash "under the table" that was not subject to federal or state tax withholdings.

12. Buck's Bar employed Jensen under a similar arrangement. Jensen worked at the behest of Chelsea Kemp as evidenced by various text message exchanges between the two women. *See* Docs. 218-226.

13. Shelley Kemp, who was identified as the manager of Buck's Bar who had the authority to hire and fire employees, was aware of the arrangement according to a text message exchange between Chelsea Kemp and Jensen.

Yeah!

You helping this weekend it should be busy as it's PBR (Chelsea Kemp)

Yes I will be here (Jensen)

My mom was like you better have her there (Chelsea Kemp)

Doc. 218.

14. Jensen worked a total of 126 days for Buck's Bar. Jensen worked an average of four hours each of those days for a total of 504 hours. *See* Docs. 164 through 214 and 218 through 226.

15. Jensen was paid a total of \$3,150.00 for the 126 days she worked for Buck's Bar (\$25.00 x 126 days).

16. Jensen performed 25 days of work, or 100 hours of work, in November and December 2016 for Buck's Bar. The minimum hourly wage at that time was \$8.05.³ *See* Docs. 164 through 214 and 218 through 226.

³<http://erd.dli.mt.gov/labor-standards/wage-and-hour-payment-act/minimum-wage-history>

17. Jensen was paid \$625.00 for the work she performed in November and December 2016. Jensen's hourly wage amounted to \$6.25 ($\$625.00 / 100$ hours of work).

18. Buck's Bar owes Jensen \$180.00 for the difference in the minimum hourly wage (\$8.05) and the hourly wage she actually received (\$6.25) for work she performed in November and December 2016 ($\$1.80 \times 100$ hours of work = \$180.00).

19. Jensen performed 101 days of work, or 404 hours of work, for Buck's Bar in January 2017 through June 24, 2017. The minimum hourly wage at that time was \$8.15.⁴ See Docs. 164 through 214 and 218 through 226.

20. Jensen was paid \$2,525.00 for work performed from January 2017 through June 24, 2017 ($\$25.00 \times 101$ days). Jensen's hourly wage amounted to \$6.25 ($\$2,525.00 / 404$ hours of work).

21. Buck's Bar owes Jensen \$767.60 for the difference in the minimum hourly wage (\$8.15) and the hourly wage she actually received (\$6.25) for work she performed from January 2017 through June 24, 2017 ($\$1.90 \times 404$ hours of work = \$767.60).

22. Buck's Bar owes Jensen \$947.60 in unpaid wages for work performed from November 26, 2016 through June 24, 2017 ($\$180.00 + \$767.60 = \$947.60$).

23. At hearing, Buck's Bar produced payroll records that appear to have been falsified and intended to mislead the Hearing Officer. As a result, "special circumstances" exist that justify the imposition of a 110% penalty pursuant to Admin. R. Mont. 24.16.7556(1).

24. Liquidated damages, as provided for under the FLSA, are not appropriate in this case as neither enterprise nor individual coverage exists in this case.

⁴<http://erd.dli.mt.gov/labor-standards/wage-and-hour-payment-act/minimum-wage-history>

IV. DISCUSSION⁵

A. Admissibility of Respondent's Exhibits D-15 through D-17

The parties were asked to address the admissibility of Respondent's Exhibits D-15 through D-17, which included a text message exchange that appeared to be between Chelsea Kemp and Jensen. Chelsea Kemp identified those text messages in which she claimed to be the author and those she claimed to have been authored by Jensen. Jensen strenuously denied being the author of the text messages and alleged they had been manufactured after she filed her wage claim and prior to hearing. Jensen noted the marked difference between the language and grammar used in the text messages in D-15 through D-17 and the text messages included in the record that both she and Chelsea Kemp testified they had either authored or received from the other woman.

Buck's Bar argues Chelsea Kemp's authentication of the emails is sufficient for the text messages to be admitted. In support of its argument, Buck's Bar points to *Tienda v. Texas*, 358 S.W.3d 633, 659 (Tex. Crim. App. 2012) in which the court noted that authentication includes "direct testimony from a witness with personal knowledge, . . . **comparison with other authenticated evidence**, or . . . circumstantial evidence." *See* Resp. Brief, p. 2 (filed 10/09/18) (emphasis added).

The Hearing Officer concedes Chelsea Kemp made valiant efforts to authenticate the text messages in D-15 through D-17. Chelsea Kemp testified under oath that she did nothing to alter the text messages and denied creating a contact in her phone to create the text messages as Jensen had accused her of doing at hearing. However, when comparing the text messages in D-15 through D-17 with other text messages that were admittedly authored by and/or received by Chelsea Kemp and Jensen, the Hearing Officer is struck by the significant difference in grammar, as well as word choice. For instance, one text message authored by Jensen during an exchange with Chelsea Kemp in Doc. 191 includes the following:

It got busy and now my mom wants me to train a cook (Chelsea Kemp)

Oh shit lol I'm hailing [sic] ass be there about 1:15 (Jensen)

When you get here I need to run and get Imodium (Chelsea Kemp)

Ok trying to hurry (Jensen)

⁵Statements 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.

Laurel (Jensen)

OK (Chelsea Kemp)

Im so sick (Chelsea Kemp)

Not good (Jensen)

What are u going to do if ur sick tonight (Jensen)

In contrast, the text messages included in D-15 and D-16 read as follows:

Why are you trying to scam Bucks and lie about all these “days” you worked. You never were hired, more than half the time you were there drinking with Gary (Chelsea Kemp)

I will extort money from Bucks and lie my way to the top, just because I was there drinking doesn't mean I can't say I was working. I made plenty of money, revenge (Jensen)

Well it's making me look bad when I know you didn't work hardly any of those shifts and you got paid plenty of money as well as free drinks for you and Gary, and hats and shirts (Chelsea Kemp)

I am going to continue to fight this because I know I can get money from John regardless of whether or not I worked, it's irrelevant. John has money to spare (Jensen).

The Hearing Officer is not convinced that Jensen is the author of the text messages Chelsea Kemp claimed to have received from Jensen; nor is the Hearing Officer convinced Chelsea Kemp is the author of the emails included in D-15 through D-17. Given the obvious lack of reliability of the evidence, Respondent's Exhibits D-15 through D-17 are hereby excluded.

B. Jensen's Wage Claim

Jensen argues Buck's Bar owes her \$5,036.28 in unpaid wages, as well as liquidated damages under the FLSA for a total of \$10,072.56. Buck's Bar contends Jensen was never an employee of Buck's Bar and was merely providing assistance to her friend, Chelsea Kemp, for which she was compensated \$25.00 each day. In contradiction of its contention Jensen was never an employee, Buck's Bar argues Jensen did not work the majority of days she claims. The first issue to address is whether the Fair Labor Standards Act (FLSA) applies in this case.

1. Jensen Has Failed to Establish the FLSA Applies

The FLSA provides that, “Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the [minimum wage rate. . .].” 29 U.S.C. § 206. The threshold inquiry for wage and hour claims under the FLSA is whether the employer is “engaged in commerce or in the production of goods for commerce.” *Lamont v. Frank Soup Bowl, Inc.*, 2001 U.S. Dist. LEXIS 6289 at *5 (S.D.N.Y.)

To establish a violation of FLSA, an employee must show either (1) “individual” coverage, i.e., the employee herself was engaged in commerce or (2) “enterprise” coverage, i.e., the employer was engaged in commerce.

A claimant has the burden of proving three elements in an FLSA claim:

- (1) The existence of an employer-employee relationship;
- (2) Coverage under the Act; and
- (3) A violation of one or more of the statutory standards.

See Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 686–87 (1946). The FLSA provides coverage to employees on two different bases—enterprise coverage and individual coverage.

There clearly was an employer-employee relationship between Buck’s Bar and Jensen. This employment relationship is addressed in greater detail below. While Chelsea Kemp may not have had the authority to hire and fire on behalf of Buck’s Bar, it makes little sense that nobody with such authority was aware that Jensen and others were performing work on behalf of the bar when they covered for Chelsea Kemp. Therefore, Jensen has satisfied the first element of *Mt. Clemens Pottery Co.* However, for reasons outlined below, Jensen’s argument that there is FLSA coverage in this case must fail.

a. *Buck’s Bar is not an enterprise engaged in commerce under the FLSA.*

An “[e]nterprise engaged in commerce or in the production of goods for commerce” means an enterprise with two or more employees that, in relevant part:

- (i) has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; **and**

(ii) is an enterprise whose annual gross volume of sales made or business done is not less than \$500,000 (exclusive of excise taxes at the retail level that are separately stated). . . .

29 U.S.C. § 203(s)(1) (emphasis added).

A party is engaged in interstate commerce if it is in the “channels of interstate commerce as distinguished from [someone] who merely affect[s] that commerce.” *McLeod v. Threlkeld*, 319 U.S. 491, 494, 63 S. Ct. 1248, 1250 (1943) (citation omitted). In *McLeod*, the Supreme Court noted that in drafting the FLSA, Congress indicated its intention that the Act not be coextensive with the power to regulate commerce when it rejected a proposal to extend the FLSA’s coverage to all employees “engaged in commerce in any industry affecting commerce.” *Id.* at 492, 63 S. Ct. at 1249 (citation omitted). Although the Court later recognized that the FLSA should be construed liberally, it also directed that the application of the FLSA be consistent with the congressional intention to limit the scope of the Act. *See Mitchell v. Lublin, McGaughy & Assoc.*, 358 U.S. 207, 211, 79 S. Ct. 260, 264, (1959).

It is clear Buck’s Bar primarily serves a local clientele. There is no evidence showing Buck’s Bar regularly receives direct shipments from suppliers located outside of Montana or regularly produces goods for commerce. Its distributors are local and the food it prepares for sale is purchased locally. The business operations are exclusively based in Billings. While its annual sales are in excess of \$500,000.00, the evidence does not support a finding that Buck’s Bar is an enterprise engaged in interstate commerce. Therefore, enterprise coverage does not apply in this case.

b. *Jensen was not an employee engaged in commerce.*

Employees of non-covered enterprises may still be subject to the FLSA’s protections on an individual basis if they were individually engaged in interstate commerce or in the production of goods for interstate commerce, or in any closely-related process or occupation directly essential to such production. *See* 29 U.S.C. §§ 206-207; *see also Zorich v. Long Beach Fire Dep’t & Ambulance Serv.*, 118 F.3d 682, 685-86 (9th Cir. 1997).

In order to establish individual coverage under FLSA, the employee must be engaged in “interstate commerce.” “[F]or an employee to be “engaged in commerce” under FLSA, she must be directly participating in the actual movement of persons or things in interstate commerce by (i) working for an instrumentality of interstate commerce, e.g., transportation or communication industry employees, or (ii) by regularly using the instrumentalities of interstate commerce in his work, e.g., regular and recurrent use of interstate telephone, telegraph, mails, or travel.” *See, Thorne v.*

All Restoration Servs., Inc., 448 F.3d 1264, 1266 (11th Cir. 2006) (citations and quotations omitted).

No *de minimis* rule applies to coverage under the FLSA, and any regular contact with commerce, no matter how small, will result in coverage. See *Mabee v. White Plains Publishing Co., Inc.*, 327 U.S. 178, 181-84 (1946). A determination is made based on whether the employee's work is actually in commerce or is so closely related to the movement of commerce that it is for practical purposes a part of it, rather than an isolated, local activity. See *Mitchell v. C. W. Vollmer & Co.*, 349 U.S. 427, 429 (1955). "Employees are 'engaged in commerce' within the meaning of the Act when they are performing work involving or related to the movement of persons or things (whether tangibles or intangibles, and including information and intelligence) among the several States or between any State and any place outside thereof." 29 C.F.R. 779.103. "Typically, but not exclusively, employees engaged in interstate or foreign commerce include . . . clerical and other workers who regularly use the mails, telephone or telegraph for interstate communication; and employees who regularly travel across State lines while working." 29 C.F.R. 779.103.

There is no evidence showing that Jensen had regular contact with commerce. She stocked coolers, tended bar, and worked as a bar back on an as-needed basis. If Jensen had any work that was actually in commerce, it was on an isolated basis. Jensen has failed to show that she was an employee engaged in commerce that would invoke the protections of the FLSA.

It is, therefore, determined that the coverages found under the FLSA do not apply in this case. However, the protections of the Montana Wage Protection Act still apply.

2. Buck's Bar Owes Jensen Unpaid Wages

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 the lower court properly concluded 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). As the Montana Supreme Court has long recognized, it is the employer's duty to maintain accurate records of hours worked,

not the employee's. *Smith v. TYAD, Inc.*, 2009 MT 180, ¶46, n.3, 351 Mont. 12, 209 P.3d 228.

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.

Jensen argues she worked from 10:00 a.m. to 6:00 p.m., every Saturday, Sunday, Monday, and Tuesday beginning on or about November 26, 2016 through June 24, 2017. Gary Jennen, who is currently Jensen's husband and who also performed work for Buck's Bar under similar circumstances, generally supported Jensen's testimony, as did Darci Snively, Jensen's friend and former Buck's Bar employee. However, neither Jensen nor any of her witnesses provided specific evidence as to the dates and times Jensen actually performed work for Buck's Bar. Jensen produced no calendars, journals, or other supporting material with contemporaneous entries that would tend to show that she worked the number of hours claimed.

While Buck's Bar did not produce precise records, it produced sufficient evidence to, at the very least, negate the reasonableness of any inference that could be raised by Jensen's testimony that she worked four days per week, eight hours per day. Buck's Bar produced social media posts showing Jensen to be out of town for several of the weekends she claimed to be working. Buck's Bar also produced evidence showing it had other employees working during the period of Jensen's claim, which given the testimony regarding the number of customers at Buck's Bar during daytime hours, at least suggests Jensen's services would not have been required for as many hours per day as she had claimed. While neither party produced adequate time keeping records, Buck's Bar produced sufficient evidence to undercut Jensen's testimony that she was owed more than \$5,000.00 in unpaid wages.

Buck's Bar raised the issue of witness credibility in its post-hearing briefing pointing the Hearing Officer to a Montana Jury Instruction 1.05, with the following language highlighted, “A witness false in one part of his or her testimony may be distrusted in others.” *See* Resp. Brief, Ex. C (filed 10/09/18). The Hearing Officer appreciates the direction, because it certainly guided her assessment of the evidence presented by the parties.

Jensen's testimony that she worked four days per week, eight hours per day was vague and self serving and without much by way of supporting documentary evidence. However, even a cursory review of the text messages between Jensen and Chelsea Kemp shows Jensen worked an average of four hours per shift and did so at the request of Chelsea Kemp during the period of Jensen's wage claim. This undercuts the position of Buck's Bar throughout the investigation conducted by the Wage and Hour Unit and at the time of hearing that it never employed Jensen. Consequently, the veracity of several of its witnesses, including Chelsea Kemp and Shelley Kemp, is called into question.

The other issue affecting the credibility determination in this case is the quality of evidence produced by Buck's Bar. The Hearing Officer allowed the admission of several documents based upon Chelsea Kemp's representation at hearing that they were summaries of Daily Sheets completed by employees each day the bar was open for business showing the amounts paid out to employees for work performed that day.

Respondent's Exhibits A-1 through A-8 include the handwritten Daily Sheets that show Jensen was consistently paid \$25.00 each day she worked. Respondent's Exhibits B-1 and B-2 purport to show "Actual Hours and Dates Worked 2016-2017." The documents show a rate of pay of \$8.33, which was presumably thought to be the minimum wage for that period. However, Respondent's Exhibits B-1 and B-2 show Jensen's pay ranged from \$25.00 to \$77.25.

Respondent's Exhibits C-1 through C-14 are "Employee Daysheet[s]" showing the hours Buck's Bar claims Jensen worked despite its argument that she was never an employee. Respondent's Exhibits C-1 through C-14 conflict with its Exhibits B-1 and B-2. For example, Respondent's Exhibit C-1 shows Jensen worked two hours on March 17, 2017 and was paid \$16.75. Respondent's Exhibit C-2 shows Jensen again worked two hours on March 20, 2017 and was paid \$16.75. However, that information does not appear anywhere in Respondent's Exhibits B-1 and B-2. While Respondent's Exhibits A-1 through A-8, B-1, B-2, and C-1 through C-14 were admitted at hearing, they were not given great evidentiary weight in the Hearing Officer's determination as to the number of hours Jensen worked during the period of her wage claim. However, they were given greater consideration in her assessment of the credibility of the evidence offered by Buck's Bar than they were in determining the hours worked by Jensen.

Another issue concerning the credibility of the witness' testimony is Shelley Kemp's denial that she had any knowledge of Jensen working on behalf of her daughter, Chelsea Kemp. As noted in Finding of Fact 13, Chelsea Kemp as much as informed Jensen that Shelley Kemp was aware of her working for Buck's Bar and

expected her to be at the bar when it was expected to be a busy day. The insistence by both Chelsea and Shelley Kemp that Jensen was not an employee undercuts the credibility of their testimony.

What was particularly troubling to the Hearing Officer is Buck's Bar deliberate failure to adhere to even the most basics of state and federal law, such as requiring the worker to complete the necessary withholding and immigration paperwork. Its willingness to employ workers "off the books," and apparent unwillingness to either understand or to accept that its approach is in direct conflict with state and federal law, further undercuts the credibility of its arguments and the testimony of its witnesses.

The evidence shows there was an employer-employee relationship between Buck's Bar and Jensen despite Buck's Bar's contention that the absence of any employment documentation automatically causes a worker to lose his or her "employee" status. Buck's Bar's position is in direct conflict with Montana law. *See* Mont. Code. Ann. § 39-3-201(3) ("Employ' means to permit or suffer to work"). *See also* Mont. Code. Ann. § 39-3-201(4) ("Employee' includes any person who works for another for hire, except that the term does not include a person who is an independent contractor").⁶ The evidence offered by Buck's Bar not only undercuts its steadfast contention that it never employed Jensen but calls into question the credibility of each and every witness who testified under oath that Jensen was never an employee, never covered for Chelsea Kemp, and was not owed money for work performed during the relevant period. Jensen's testimony, while vague and lacking detail, is deemed more credible than the evidence offered by the employer.

Jensen has shown Buck's Bar owes her \$947.60 in unpaid wages for work performed from November 26, 2016 through June 24, 2017. Therefore, the next issue is what penalty is proper in this case.

C. Penalty

"An employer who fails to pay an employee as provided in this part or who violates any other provision of this part is guilty of a misdemeanor. A penalty must also be assessed against and paid by the employer to the employee in an amount not to exceed 110% of the wages due and unpaid." Mont. Code Ann. § 39-3-206. The imposition of a maximum penalty of 110% is justified under the following special circumstances:

⁶There is absolutely no evidence that Jensen or any other witness performing work for Buck's Bar was an independent contractor.

- (a) the employer fails to provide information requested by the department and/or does not cooperate in the department's investigation of the wage claim;
- (b) there is substantial credible evidence that the employer's payroll records are falsified or intentionally misleading;
- (c) the employer has previously violated similar wage and hour statutes within three years prior to the date of filing of the wage claim; or
- (d) the employer has issued an insufficient funds paycheck.

Admin. R. Mont. 24.16.7556(1)(a)-(d).

At hearing, Buck's Bar produced Respondent's Exhibits B-1, B-2, and C-1 through C-14, which it claimed showed the hours Jensen worked during the period of her wage claim. These documents were clearly produced in anticipation of litigation and were not intended to serve as demonstrative type exhibits. Rather, the documents appear to have been falsified and intended to mislead the Hearing Officer. Therefore, the imposition of a penalty of 110% is proper. Buck's Bar is therefore ordered to pay a penalty of \$1,042.36.

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. Jon Jon, Inc., a Montana Corporation, d/b/a Buck's Bar owes MaryAnn H. Jensen \$947.60 in unpaid regular wages.

3. The Fair Labor Standards Act does not apply in this case. Therefore, liquidated damages are not appropriate.

4. Special circumstances exist in this case that justify the imposition of a penalty of 110% for an amount \$1,042.36. Mont. Code Ann. § 39-3-206; Admin. R. Mont. 24.16.7556(1)(a)-(d).

VI. ORDER

IT IS THEREFORE ORDERED that Jon Jon, Inc., a Montana Corporation, d/b/a Buck's Bar, tender a cashier's check or money order in the amount of

\$1,989.96, representing \$947.60 in unpaid minimum wages and \$1,042.36 in penalty, made payable to MaryAnn H. Jensen, 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. Jon Jon, Inc., a Montana Corporation, d/b/a Buck's Bar, may deduct applicable withholding from the wage portion, but not the penalty portion, of the amount due.

DATED this 16th day of October, 2018.

DEPARTMENT OF LABOR & INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ CAROLINE A. HOLIEN
CAROLINE A. HOLIEN
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