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

IN THE MATTER OF THE WAGE CLAIM OF JASON B. TINGEY, Claimant, vs. MISSOULA ANESTHESIOLOGY, P.C., a professional Montana corporation, Respondent.	)	Case No. 644-2018 **FINAL AGENCY DECISION GRANTING SUMMARY JUDGMENT**

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I. INTRODUCTION AND PROCEDURAL HISTORY

On October 20, 2017, Dr. Jason B. Tingey filed a claim with the Department's Wage and Hour Unit seeking unpaid wages from Missoula Anesthesiology, P.C. (MA) in the amount of $24,375.00.[1] Dr. Tingey alleges he earned this amount during the time period August 24, 2016 through September 29, 2017. On December 18, 2017, the Wage and Hour Unit dismissed Dr. Tingey's claim finding that based on the terms of Dr. Tingey's employment agreement, he was not owed any additional wages.

On January 2, 2018, Dr. Tingey appealed the determination. On February 21, 2018, after mediation attempts were unsuccessful, the case was transferred to the Office of Administrative Hearings (OAH) for further proceedings.

On February 23, 2018, OAH issued a Notice of Hearing setting a March 5, 2018 scheduling conference. After the conference, the Hearing Officer issued a Scheduling Order setting a June 6, 2018 hearing date and a motions deadline of April 27, 2018.

[1] Dr. Tingey originally claimed $18,750.00 but amended the claim to include an additional deduction for a total of $24,375.00.

On April 27, 2018, MA filed its Motion for Summary Judgment. On May 15, 2018, Dr. Tingey timely filed his response. On May 30, 2018, the Hearing Officer conferred with the parties informing them that due to the press of business that he was unlikely to issue an order on the Motion for Summary Judgment before the June 6, 2018 hearing date. The parties agreed that the hearing could be vacated.

II. UNDISPUTED FACTS

1. On August 29, 2016, Dr. Tingey and Missoula Anesthesiology, P.C. (MA) entered into an employment agreement (Agreement) which provided that his compensation would be:

> . . . in such amounts as Company will establish as its Physician's Compensation Policy. Physician acknowledges receipt of a copy of the current policy.

Doc. 87.

2. The Physician Policy and Procedure Manual in effect for all relevant periods was last revised July 1, 2011. Doc. 201. It reads, in pertinent part:

> All MA physicians receive a draw issued the 20th of each month into a checking or savings account designated by the physician. . . . On a quarterly basis, MA will determine the cumulative gross compensation payable to Physician. The cumulative gross compensation will be a summary of the Physician's monthly gross compensation less: (i) payroll paid to date to Physician during the quarter; (ii) all expenses or benefits allocated during the applicable period on the Physician's behalf and (iii) any allocation of corporate expenses made during the period. Any amount still owing to Physician based on the quarterly calculation will be paid as additional compensation in the month following the end of a calendar quarter.

Cumulative Gross Compensation	-	Physician Payroll	-	Personal Expenses and Benefits	-	Net Corporate Expenses	=	Additional Compensation

> Compensation for non-shareholders is the same as above with the addition of one adjustment: $22,500 is also subtracted from Physician Cumulative Gross Compensation on a quarterly basis for both Years 1 and 2.

Doc. 207. As a result of the foregoing formula, Dr. Tingey's income fluctuated based on his productivity. Docs. 207, 233.

3. The Physician Policy and Procedure Manual then continues on for six pages detailing the specifics of the formula and defines "Physician Cumulative Gross Compensation" as "the total of all revenue amounts described above and any other miscellaneous income that is allocated." Docs. 207-212. In other words, "cumulative gross compensation" is revenue, not wages.

4. Dr. Tingey made a salary draw of $17,500.00 per month. Doc. 233. Any "additional compensation" he received was determined by the formula set forth in the Physician Policy and Procedure Manual. Docs. 87, 207-212, 233.

5. As set forth above, the $22,500.00 annual adjustment was a mutually agreed-upon deduction from Dr. Tingey's cumulative gross compensation, not from his wages.

6. There is no provision in the Agreement or Physician Policy and Procedure Manual for a refund of the $22,500.00 annual adjustment in the event Dr. Tingey left his employment with MA before becoming a shareholder.

III. DISCUSSION

Propriety of Summary Judgment in Administrative Proceedings.

The purpose of summary judgment is to eliminate the burden and expense of unnecessary trials. *Klock v. City of Cascade*, 284 Mont. 167, 173, 943 P.2d 1262, 1266 (1997). "Due process does not require development of facts through an evidentiary hearing when there are no material factual issues in dispute." *Dowell v. Mont. Dept. of Pub. HHS*, 2006 MT 55, ¶ 21, 331 Mont. 305, 132 P.3d 520. In cases where the relevant statutes governing an appeal are silent about summary disposition, such a result remains appropriate if "no purpose would be served by conducting an evidentiary hearing where there is an absence of disputed material facts, as testimony is unnecessary." *Anaconda Pub. Schools v. Whealon*, 2012 MT 13, ¶ 16, 363 Mont. 344, 268 P.3d 1258. Thus, summary judgment is allowed in

administrative proceedings where the requisites for summary judgment otherwise exist. *Matter of Peila*, 249 Mont. 272, 281, 815 P.2d 139, 144 (1991).

Summary judgment is proper only when the moving party establishes there are no genuine issues of material fact and an entitlement to judgment as a matter of law. Rule 56(c) Mont. R. Civ. P.; *Knucklehead Land Co. v. Accutitle*, 2007 MT 301, ¶ 10, 340 Mont. 62, 172 P.3d 116. The initial burden is on the moving party to meet the above burden. Once it is satisfied, the non-moving party must respond and prove beyond mere speculation and denial that a genuine issue of material fact remains. *Id*. "If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party." Rule 56(e)(2), Mont. R. Civ. P; *see also, Elk v. Healthy Mothers, Healthy Babies, Inc.*, 2003 MT 167, ¶ 15, 316 Mont. 320, 73 P.3d 795.

i. <u>There are no genuine issues of material fact</u>.

The material fact of this case is that the parties signed an employment agreement and, pursuant to that agreement, Dr. Tingey was to be:

> . . . paid in such amounts as Company will establish as its Physician's Compensation Policy. Physician acknowledges receipt of a copy of the current policy.

Doc. 87. Dr. Tingey does not dispute that he was provided a copy of the Physician's Compensation Policy when he was hired or that he indicated his receipt with his signature. *Id*.

ii. <u>MA is entitled to judgment as a matter of law</u>.

Mont. Code Ann. § 39-3-201(6) defines wages, in pertinent part, as:

> "Wages" includes any money due an employee from the employer or employers, whether to be paid by the hour, day, week, semimonthly, monthly, or yearly, and includes bonus, piecework, ...

This calculation determines what wages are due Dr. Tingey.

The determination of whether Dr. Tingey is entitled to unpaid wages is in this case a matter of interpretation of the employment agreement and MA's compensation policy.

> The interpretation and construction of a contract is a question of law. *Corporate Air v. Edwards Jet Ctr. Mont., Inc.*, 2008 MT 283, ¶ 30, 345 Mont. 336, 190 P.3d 1111 (citation omitted). "'A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.'" *Corporate Air*, ¶ 30 (quoting § 28-3-301, MCA). When a contract is in writing, the parties' intentions are to be determined from the writing alone, if possible. *Corporate Air*, ¶ 30 (citing § 28-3-303, MCA); *State ex rel. Mont. Dept. of Transp. v. Asbeck*, 2003 MT 337, ¶ 18, 318 Mont. 431, 80 P.3d 1272 (citation omitted) ("in interpreting a written contract, the intention of the parties is ascertained 'first and foremost' from the writing alone").

Krajacich v. Great Falls Clinic, LLP, 2012 MT 82, ¶ 13, 364 Mont. 455, 276 P.3d 922.

The employment Agreement is clear and unambiguous with respect to compensation. Accordingly, there is no need to look beyond the Agreement and Physician's Compensation Policy referenced in the Agreement. The Agreement acknowledges Dr. Tingey's receipt of that policy.

The Physician's Compensation Policy contains a calculation for determining Dr. Tingey's additional quarterly compensation above the agreed-upon salary draw of $17,500.00 per month. The calculation subtracts the following from the cumulative gross compensation (*i.e.*, revenue) to determine the amount of any additional compensation (*i.e.*, wages) that were due Dr. Tingey: (1) the draw paid to Dr. Tingey each month; (2) any expenses directly attributable to Dr. Tingey; (3) corporate expenses; and (4) the prorated portion of the $22,500.00 annual adjustment for non-shareholders in their first two years of employment.

"Cumulative gross compensation" is not the amount of wages owed to Dr. Tingey; it is gross revenue from which various deductions are made to determine what Dr. Tingey may be owed in additional compensation (on top of his salary draw) on a quarterly basis. One of those deductions is the $5,625.00 subtraction made each quarter of his first two years of employment. That deduction is not from Dr. Tingey's wages, but rather from the revenue he produced for MA.

The use of the term "cumulative gross compensation" in the policy's calculation is potentially misleading in the context of a wage claim, but the detailed description of what that term means and what it includes clearly identifies it as revenue and not wages. To accept Dr. Tingey's argument to the contrary would lead

to preposterous results. If MA was required to pay the amount of "cumulative gross compensation" as wages, they would not be able to pay the expenses of operating the business. Not even a sole proprietor could pay themselves all the revenue they bring in, as there are costs associated with running the business that must be deducted before any wages can be paid. That is what the compensation calculation does here.

The deduction of $22,500.00 each of the first two years from the revenue generated is not a deduction from wages. It is merely a contractual obligation for those who have not yet become shareholders, whereby they agree to a deduction of that amount when determining additional compensation. Dr. Tingey agreed to that deduction when he signed his employment Agreement.

Dr. Tingey argues that the various Physician Reference manuals he was made aware of called the deduction a "buy-in," and MA has argued that those manuals were drafts and therefore not current policy. There is no dispute that the Physician Policy and Procedure Manual in effect for all relevant periods was last revised July 1, 2011. It is therefore immaterial what is contained in these other documents, as the employment Agreement and the Physician Policy and Procedure Manual are the only documents that display the parties' intent and are sufficient to resolve the issue of whether Dr. Tingey is owed additional wages. Regardless of how the adjustment is characterized (*e.g.*, as a buy-in, adjustment, etc.), the Hearing Officer's analysis would not change. The adjustment was not an impermissible deduction from wages, nor was there any express agreement that it was refundable.

Dr. Tingey's claim is more fairly characterized as a contractual dispute with MA rather than a claim for unpaid wages under the Montana Wage Protection Act. Thus, the $24,375.00 he seeks is not recoverable as wages through this forum.

IV. 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. There is no dispute of material fact in this matter. Missoula Anesthesiology, P.C., is entitled to summary judgment as a matter of law.

3. No wages are due Dr. Tingey because any amounts sought are not wages. Mont. Code Ann. § 39-3-204.

V. ORDER

The Motion for Summary Judgment filed by Missoula Anesthesiology, P.C., is GRANTED and this matter is dismissed.

DATED this 6th day of July, 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