

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

IN THE MATTER OF THE WAGE CLAIM)	Case No. 1440-2020
OF PETER C. RUTLEDGE,)	
)	
Claimant,)	
)	FINAL AGENCY DECISION
vs.)	
)	
QUANTUM IT COMPANY, LLC,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

On April 15, 2019, Claimant Peter C. Rutledge (Rutledge) filed a claim with the Wage & Hour Unit of the Montana Department of Labor & Industry (Wage & Hour Unit) alleging Respondent Quantum IT Company, LLC (QitCo), owed him \$3,000.00 in unpaid salary from January 1, 2018, through March 31, 2018, and \$4,843.50 in unpaid commissions from September 1, 2018, though April 10, 2019, for a total of \$7,843.50.

On May 5, 2020, the Wage & Hour Unit issued a determination finding Rutledge’s claim was without merit. Following mediation efforts, the Wage & Hour Unit transferred the case to the Office of Administrative Hearings (OAH) on November 2, 2020.

The Hearing Officer conducted a hearing in this matter via Zoom on October 7, 2021. Rutledge appeared pro se. Jeffrey W. Dahood represented QitCo, which was in attendance through its agent, Julian Ricci. Due to Rutledge’s failure to submit any final pre-hearing disclosures as ordered in the June 9, 2021, Scheduling Order as well as his failure to appear at the September 13, 2021, final pre-hearing conference or otherwise notify the Office of Administrative Hearings of his unavailability, Rutledge was only permitted to call himself and the designated representative for QitCo as witnesses, and was only permitted to present and submit exhibits already contained in the administrative file. (September 21, 2021, Order Resetting Hearing Date.) Rutledge and Ricci testified under oath. The administrative record compiled at the Wage & Hour Unit, marked as Documents 1-

268, was admitted into the record upon agreement of the parties as Administrative Exhibit 1. Respondent's Exhibits C, D, and F were also admitted into the record without objection.

The parties were given the opportunity to submit post-hearing briefing. Upon expiration of that timeframe, the record was closed and the case was deemed submitted. Based upon the evidence and argument adduced at hearing, the Hearing Officer makes the following findings of fact, conclusions of law, and final agency decision.

II. ISSUE

Whether QitCo owes wages for work performed, as alleged in the complaint filed by Rutledge, and owes penalties or liquidated damages, as provided by law.

III. FINDINGS OF FACT

1. Rutledge began working for QitCo in or around August 14, 2017, as a salesperson for what essentially amounted to QitCo's online advertising business, which included website design and maintenance, digital publishing, logo creation, social media campaigns, and various types of related endeavors. Rutledge's position involved both prospecting new customers for QitCo and servicing existing ones.

2. QitCo's employment arrangement with Rutledge was initially established as that of an independent contractor. An Independent Contractor Agreement was proposed by Rutledge but never signed by either of the parties. (Admin. Ex. 1 at 261-63.)

3. In August, 2017, Rutledge billed QitCo at a rate of \$20.00 per hour for his work. (Admin. Ex. 1 at 265-66.)

4. Subsequent to August, 2017, Rutledge began receiving commissions for his work. Rutledge was to be paid a 30% commission on new sales he generated and a 15% commission on managed and renewed house accounts. (Admin. Ex. 1 at 86, 129, 141-42; Resp. Ex. C.) QitCo alleges it could subtract expenses from the commissions. *Ibid.*

5. Any employment agreements regarding compensation between Rutledge and QitCo were entirely oral in nature.

6. Rutledge asserts that, in addition to commissions, he was also to receive a base pay rate of \$500.00 paid semi-monthly (i.e., twice-a-month), but QitCo denies

this assertion, stating that it only applied to another worker. The evidence cited to by Rutledge does not support his assertion that he received a regular base salary. (Admin. Ex. 1 at 67-83, 261-63; Resp. Ex. D).

7. In August, 2018, Rutledge informed QitCo he was working in another position for another company, but that he would continue working for QitCo. Rutledge estimated that he worked 25-to-40 hours per week for QitCo at the time, but noted his hours varied greatly and testified how, with the exception of social media campaigns, his work for QitCo required a minimal outlay of time.

8. Rutledge had very little contact with Ricci beginning in September, 2018.

9. Rutledge was terminated by QitCo on October 29, 2018. Rutledge's last full day of work was October 28, 2018. Rutledge performed no work on behalf of QitCo after his termination.

10. QitCo issued 1099s to Rutledge showing he was paid \$5,124.10 in 2017 and \$7,099.08 in 2018, for a total of \$12,223.18. (Admin. Ex. 1 at 122, 133; Resp. Ex. C.) QitCo asserts its own accounting done after Rutledge's termination shows he only earned \$8,296.71 in commissions during this same period, and it therefore overpaid Rutledge by \$3,926.47.

11. On April 15, 2019, Rutledge filed a wage claim alleging QitCo owed a total of \$7,843.50 in wages for work performed during the period of January 1, 2018, through April 10, 2019. (Admin. Ex. 1 at 267-268.) Specifically, Rutledge alleged he was owed \$3,000.00 in base salary for the period running from January 1, 2018, through March 31, 2018, and \$4,843.50 in commissions for the period running from September 1, 2018, through April 10, 2019. At hearing, Rutledge stated he was seeking commissions for September, 2018, through January, 2019.

12. Rutledge was paid all commissions for work he originated from August 14, 2017, through October 29, 2018. (Admin. Ex. 1 at 117-138; Resp. Ex. C.)

13. Rutledge was not paid any commissions for ongoing or renewed commissioned work after his termination on October 29, 2018. *Ibid.*

14. During the course of his wage and hour claim, the Independent Contractor Central Unit determined Rutledge was an employee, not an independent contractor. (Admin. Ex. 1 at 5-11.) QitCo did not appeal that determination.

15. Rutledge did not request and did not produce evidence for any unpaid hourly work he performed on behalf of QitCo as an employee.

16. Rutledge asserted at hearing that he should be compensated for out-of-pocket expenses related to employment taxes and related items he paid while classified as an independent contractor by QitCo, but did not provide either evidence of those expenses or a legal basis for their recovery in a wage and hour proceeding.

IV. DISCUSSION

An employee seeking unpaid wages has the initial burden of proving work performed without proper compensation. *America's Best Contractors, Inc. v. Singh*, 2014 MT 70, ¶ 25, 374 Mont. 254, 321 P.3d 95 (citing *Garsjo v. Dept. of Labor & Indus.*, 172 Mont. 182, 189, 562 P.2d 473, 476-77 (1977) (citing and adopting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946))) (other citations omitted).

To meet this burden, the employee must produce sufficient evidence showing the amount and extent of such work as a matter of just and reasonable inference. Once an employee has shown as a matter of just and reasonable inference that wages have been earned but not paid, 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 drawn from the evidence of the employee. If the employer fails to produce such evidence, the employee is entitled to judgment in his or her favor, even though the amount is only a reasonable approximation. *America's Best Contractors, Inc.*, ¶ 25 (internal citations omitted) (emphasis added). Employers are required to keep records of employees' hours. Admin. R. Mont. 24.16.6102(1)(g); see also *Arlington v. Miller's Trucking, Inc.*, 2015 MT 68, ¶ 16, 378 Mont. 324, 343 P.3d 1222 (citations omitted). "When an employer fails to record an employee's hours, the employee's records may be used to determine the amount of time worked." *Arlington*, ¶ 16.

If an employee has already left employment at the time a wage claim is filed, ". . . an employee may recover wages and penalties . . . for a period of 2 years prior to the date of the employee's last date of employment." Mont. Code Ann. § 39-3-207(2). However, "[i]f an employer has engaged in repeated violations, an employee may recover wages and penalties . . . for a period of 3 years prior to the date of the employee's last date of employment." Mont. Code Ann. § 39-3-207(3).

Montana's laws require that employees be compensated for all wages due them at the termination of employment. Mont. Code Ann. § 39-3-205. "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. . . .” Mont. Code Ann. § 39-3-201(6)(a). Under Montana law, the term “wages” includes any money due an employee from an employer, including earned commissions. *Delaware v. K-Decorators, Inc.*, 1999 MT 13, ¶ 32, 293 Mont. 97, 973 P.2d 818 (overruled by statute on other grounds); *see also* Mont. Code Ann. § 39-3-201(6). A claimant must establish they are entitled to commissions under the terms of an employment agreement. *See West v. Club at Spanish Peaks L.L.C.*, 2008 MT 183, ¶¶ 47-54, 343 Mont. 434, 186 P.3d 1228 (discussing ambiguous terms of an employment agreement for commissions); *see also Berry v. KRTV Communs., Inc.*, 262 Mont. 415, 426, 865 P.2d 1104, 1111 (1993) (regarding bonuses). An employer who fails to pay an earned commission is subject to Mont. Code. Ann. § 39-3-206, which sets forth penalties based on the amount of wages due and unpaid. *K-Decorators* at ¶¶ 38-40.

A. Rutledge is Not Due Unpaid Salary

Although the parties treated Rutledge as an independent contractor, the ICCU determined that Rutledge was an employee of QitCo and that decision was not appealed. The decision is therefore binding on this tribunal. Mont. Code Ann. § 39-71-415(2)(b)(i).

The only time for which Rutledge seeks unpaid salary is for the period running from January 1, 2018, through March 31, 2018. During that time, checks totaling at least \$1,863.33 were written to Rutledge. (Admin. Ex. 1 at 71-74.) Rutledge alleges, however, he is owed an additional \$3,000.00 based on a \$500.00 semi-monthly salary that was not paid during that time. The Hearing Officer does not find Rutledge’s argument to be persuasive.

Rutledge has not produced any written agreement supporting the existence of a \$500.00 semi-monthly salary, and his claims of a verbal agreement are denied by QitCo. In support of his claim, then, Rutledge points to several checks written to him by QitCo (Admin. Ex. 1 at 67-83), and specifically one check from December 1, 2017, for \$759.00 (Admin Ex. 1 at 69) which he alleges consists of \$500.00 in salary and \$259.00 in commissions payments. Rutledge does not, however, identify any basis for a \$259.00 commission payment at that point in time, and the check does nothing to support his \$500.00 salary claim. (Admin. Ex. 1 at 69, 117.)

It was Rutledge’s burden to show he was due an additional \$3,000.00 in unpaid salary. *See America’s Best Contractors*, ¶ 25. Rutledge has not shown by a

preponderance of the evidence that he had an agreement with QitCo to receive any base salary, nor that he is owed any money for the time period he claims.¹

B. Rutledge is Not Due Unpaid Commissions

Rutledge also claims he is due unpaid commissions starting in September, 2018, although the majority of his claim for commissions relates to those still being collected by QitCo following his termination. With regard to commissions earned prior to Rutledge's termination, Rutledge did not provide any evidence showing what exactly he believed was owed yet was unpaid. (*See, e.g.*, Admin. Ex. 1 at 54-66.) To the contrary, the evidence provided by QitCo shows Rutledge was paid for all commissions he earned up until his termination. (Admin. Ex. 117-32.) The evidence therefore definitively shows Rutledge is not owed any unpaid commissions earned prior to his termination.

With regard to commissions Rutledge claims are owed after his termination, Rutledge was, by definition, no longer an employee of QitCo once he was terminated. Mont. Code Ann. § 39-3-204, regarding payment of wages, refers exclusively to wages owed "employees." An "employee" is defined as "any person who works for another for hire, except that the term does not include a person who is an independent contractor." Mont. Code Ann. § 39-3-201(4). As the Montana Supreme Court held in the case of *West v. Club Spanish Peaks* case, *supra*, ". . . the Wage Act refers to persons who are actually working for an employer, not former employees," and "[b]ased on the plain language of the statute, § 39-3-204, MCA, applies only to current, not former, employees." *West*, ¶ 90. Thus, where commissions do not come due until an employee is no longer working for an employer, they are "not covered under § 39-3-204, MCA, of the Wage Act." *West*, ¶ 91.

As in *West*, all of the commissions claimed by Rutledge after the termination of his employment would have become due and payable when he was no longer an employee. It does not matter whether Rutledge originated clients and QitCo continued to receive the benefit of their business without having to pay commissions after Rutledge left; claims for post-employment commissions are not covered under the Wage Act, and are not recoverable in these proceedings. *See* Mont. Code Ann. §§ 39-3-201, -204; *West*, ¶¶ 88-92.

¹ Rutledge has not asserted he is owed monies for unpaid hourly wages, nor did he present any proof of the hours he worked.

C. Rutledge May Not Recover Out-of-Pocket Expenses

At hearing (but not in his wage claim), Rutledge also argued that a basis for being due additional wages was that he had to pay items such as self-employment taxes, workers' compensation, etc., even though he was ultimately determined to be an employee by the ICCU. However, Rutledge did not present any evidence of amounts he believes he is owed or a legal basis for recovery of those amounts in a wage and hour action, and any such claims are therefore denied.

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*, 176 Mont. 31, 575 P.2d 925 (1978).

2. Post-employment commissions are not covered under the Wage Act, and are not recoverable in these proceedings. *See* Mont. Code Ann. §§ 39-3-201, -204; *West v. Club at Spanish Peaks L.L.C.*, 2008 MT 183, ¶¶ 88-92, 343 Mont. 434, 186 P.3d 1228.

3. Rutledge has been fully paid by QitCo for all salary and commissions.

VI. ORDER

IT IS THEREFORE ORDERED THAT:

Peter C. Rutledge's appeal is DISMISSED with prejudice.

DATED this 14th day of December, 2021.

DEPARTMENT OF LABOR & INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ CHAD R. VANISKO
CHAD R. VANISKO
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 59620-1503