DISTRICT COURT, CITY & COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202	DATE FILED: March 5, 2024 11:52 AM CASE NUMBER: 2023CV31836 ▲ **COURT USE ONLY** ▲
Appellant-Plaintiff: 303 BEAUTY BAR d/b/a SALON LOHI v. Appellee-Defendant: DIVISION OF LABOR STANDARDS AND STATISTICS Appellee-Interested Party: ELORA BUENGER	Case Number: 23CV31836 Courtroom: 280
ORDER RE: PLAINTIFF'S APPEAL OF COLORADO DIVISION OF LABOR STANDARDS AND STATISTICS HEARING OFFICER'S DECISION AND ORDER	

This matter is before the Court on Appellant-Plaintiff 303 Beauty Bar d/b/a Salon Lohi's Opening Brief on Appeal filed November 2, 2023. Appellee-Defendant Division of Labor Standards and Statistics filed an Answer on January 11, 2024. A Reply was filed on January 25, 2024. The Court having reviewed the briefs, the record, and being otherwise fully advised, finds, and concludes as follows:

Background

I. Initial Claim

Elora Buenger ("Employee") worked as a cosmetologist at two of 303 Beauty Bar d/b/a Salon Lohi's ("Employer") locations from July 2018 to October 2022. Employee signed an agreement that included a product fee deduction clause that provided Employee would receive commission on services and products that she sold, and Employer would deduct from Employee's paycheck for products that Employee used at work. Employee acknowledged that she agreed to the terms set forth in contract because she did not want the responsibility of supplying her own products.

In November 2020, Employee contracted COVID-19 and missed seven days of work. Employee was not paid for the 63 hours of work missed while she was quarantined. While Employee did not submit proof to Employer of a positive COVID-19 test before missing work, she submitted a negative test to Employer before returning to work.

Employee filed a wage complaint with the Colorado Division of Labor Standards and Statistics (the "Division"). Employee contended: (1) Employer had not paid Employee's full commission rate in 2021 and 2022 due to the product fee deduction clause; (2) Employer deducted a "performance penalty" from Employee's commission sales; and (3) Employer had not provided Employee the required public health emergency ("PHE") paid sick leave when Employee quarantined due to contracting COVID-19.

Employer argued that additional wages were not owed because the product fee deduction clause was enforceable. Employer maintained that the products supplied to Employee were the property of Employer and the products were provided for Employee's benefit under a written agreement. Employer contended that the performance penalty was also enforceable because the penalty was not a deduction, but rather, a system of different tiers of commission percentages based on the number of services and retail sold per week. Finally, Employer argued that Employee did not submit a positive COVID-19 test result and that paid sick leave could only be granted if Employee requested leave.

The Division determined that Employer owed wages in the amount of $7,500 and penalties in the amount of $22,500 (the "Determination"). The Division further determined that Employer acted willfully and imposed a penalty of three times the monetary value of wages owed.

The Division first analyzed Employee's "performance penalty" complaint. The Division noted that all full-time stylists were required to sell at least 10% of their overall hair service sales

each week. However, because a stylist's commission would be reduced when the 10% retail sales goal was not met, the Division found this to be an improper performance penalty. The Division held that Employer could not enforce an invalid provision, thus making the clause null and void.

The Division next analyzed Employee's product fee deduction claim. The Division noted that Employer could not avoid deduction or minimum wage requirements by forcing Employee to pay business expenses if the expenses are primarily for Employer's benefit. The Division found that Employer's business depended on the services rendered by Employee, and therefore the products necessary for Employee to perform services on the clients are for the benefit of Employer, not Employee. The Division held that the product fee deduction clause was invalid because the agreement impermissibly shifted business expenses to Employee.

Finally, the Division rejected Employer's contention that Employer was not obligated to provide paid sick leave because Employee never formally requested paid sick leave or provided a positive COVID-19 test. The Division found that because Employer sent an email to address Employee's need to quarantine, Employer was aware that Employee had an illness that qualified as a PHE. The Division found that applicable statutes at the time Employee was sick required Employer to provide up to two weeks of paid sick leave for COVID-19, and that Employee was not required to request paid sick leave.

II. Administrative Appeal of the Initial Claim

Employer appealed the Determination. Employer provided, among other evidence, a copy of its employee handbook. The handbook provided that "[Employer] will abide by all guidelines of the 'Healthy Family and Workplaces Act' (the "HFWA")" and that "[employees] will not receive any compensation when using sick and personal days." Employer produced an email sent to its employees in which Employer incorrectly stated that the "caveat to [the sick pay provision]

is that we must be in a 'pandemic' state to receive the 'covid pay.'" Employer additionally provided a letter from its attorney that advised Employer that the product fee deduction clause was enforceable.

A hearing was held in front of an Administrative Law Judge ("ALJ"). The ALJ first questioned Employer's owner, Tara Dominguez ("Ms. Dominguez"). Ms. Dominguez testified that she remembered sending the email to Employee regarding Employee's illness with COVID-19, and Ms. Dominguez confirmed that she was aware that Employee had COVID-19 at the time of sending the email. Ms. Dominguez stated that while Employee did send a negative COVID-19 test before returning to work, Employee did not provide a positive COVID-19 test before taking the contested sick leave and Employee never formally requested paid sick leave.

The ALJ then questioned Ms. Dominguez regarding the product fee deduction clause. Ms. Dominguez testified that she was unaware the Division posted wage-related decisions online and that she did not communicate with her attorney after receiving notice of Employee's wage complaint.

Employer's Human Resources manager, Kyle Pietak ("Mr. Pietak"), testified that he had previously reviewed some of the Division's decisions online, although Mr. Pietak believed that "there was no way for us or anybody to know the State's position… on improper and proper product charges." Mr. Pietak testified that he had contacted the Division's call center regarding the product fee deductions, but "they basically give you the most vague answer ever, and then they tell you to consult an attorney at the end."

The ALJ next questioned Employee. Employee testified that while she told Employer that Employee was sick with COVID-19, she did not request paid sick leave. Employee stated that she

willingly signed the product fee deduction clause and that the products were used to grow her personal clientele.

III. The Administrative Law Judge's Decision

The ALJ thereafter issued a written decision affirming in part, modifying in part, and reversing in part the Determination (the "Decision"). First, neither party appealed the Determination's finding that Employer owed Employee $413.57 in unpaid commission related to the performance penalty. This aspect of the Determination was undisturbed.

The ALJ held that Employer did not prove clear error in the Determination's finding that the product fee deduction was impermissible. The ALJ ruled that the Determination was consistent with the remedial purpose of C.R.S. § 8-4-105(a)(b) and the Division's historical interpretation of the statute. The ALJ highlighted the fact that the Division's wage-related opinions are publicly available, and thus Employer's argument that the Division's interpretation of C.R.S. § 8-4-105(a)(b) was "unknowable" was unconvincing. However, the ALJ noted that the Division's Interpretive Notice and Formal Opinions ("INFOs") that are released online are not binding authority. Nonetheless, the ALJ concluded that the Determination was consistent with earlier INFOs, and Employer did not show clear error with the Determination.

The ALJ further ruled that Employer had not established clear error in the ALJ's finding that Employer owed Employee sick pay. The ALJ determined that Employer's sick pay obligations were set out in C.R.S. § 8-13.3-406 of the HFWA, not C.R.S. § 8-13.3-405 as asserted by Employer. The ALJ noted that C.R.S. § 8-13.3-406 required Employer to comply with the federal Emergency Paid Sick Leave Act (the "EPSLA"), which mandated that Employer provide paid sick leave if Employee missed work for a qualifying reason. Under the EPSLA, contracting COVID-19 and subsequently quarantining was a qualifying reason that would require Employer

to provide paid sick leave. The ALJ noted that Employer failed to cite any authority for the proposition that Employee had to formally request paid sick leave before paid sick leave could be granted.

Finally, the ALJ partially modified the assessment of penalties and fines against Employer. The ALJ reversed the finding and conclusion that the product fee deduction violation was willful because Employer searched for and reviewed the Division's opinions, and Employer sought advice from the Division's call center and an attorney regarding the legality of product fee deductions. However, the Decision held that there was no clear error regarding the Determination's finding that Employer's sick pay violation was willful. The Decision concluded that, at minimum, Employer showed a reckless disregard for what the HFWA required.

Employer now challenges: (1) the finding that wages are owed to Employee; (2) the conclusion that the product fee deduction is unenforceable; and (3) the penalties assessed against Employer.

Standard of Review

Courts reviewing agency action operate as appellate in nature. *State Bd. Of Chiropractic Examiners v. Stjernholm*, 935 P.2d 959, 967 (Colo. 1997). Doing so requires looking solely at the record presented before the agency and deciding if the agency exceeded its jurisdiction or abused its discretion. *Hammond v. Public Employees' Retirement Ass'n of Colorado*, 219 P.3d 426, 428 (Colo. App. 2009). When examining the record, courts are required to look at the totality of the factual background in which the agency was functioning at the time of the challenged act. *Bennett v. Price*, 449 P.2d 419, 421 (Colo. 1968).

Agency action may then be set aside if it is arbitrary or capricious, beyond the scope of the agency's authority, without substantial evidence based upon the record, or otherwise not in

accordance with the law. *Zamarripa v. Q & T Food Stores, Inc.*, 929 P.2d 1332, 1342-43 (Colo. 1997). Agency action will be affirmed when the agency does not exceed its jurisdiction or abuse its discretion, which occurs if it misapplied the law or had no competent evidence to support its decision. *Johnson v. Department of Safety*, 503 P.3d 918, 922 (Colo. App. 2021). A lack of competent evidence means the body's decision was so devoid of evidentiary support that it can only be explained as arbitrary or capricious in nature. *Id.* Competent evidence is the same as substantial evidence, meaning such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* "Whether the decision is supported by substantial evidence is a question of law." *Zamarripa*, 929 P.2d at 1343.

A challenged agency action is accorded a presumption of validity and regularity. *Kruse v. Town of Castle Rock*, 192 P.3d 591, 601 (Colo. App. 2008). All reasonable doubts about the correctness of the agency's rulings must be resolved in its favor. *Id.* Because a judicial challenge of agency action is appellate in nature, courts cannot weigh the evidence or substitute their findings for that of the agency. *Id.* When inferences can be drawn that are conflicting, "the reviewing court may not displace an administrative agency's choice between two fairly conflicting views, even though the court could justifiably have made a different choice had the matter been before it de novo." *Walton v. Banking Bd.*, 541 P.2d 1254, 1256 (Colo. App. 1975). The credibility of witnesses and experts, and the weight given to their statements, are decisions within the province of the agency. *Charnes v. Lobato*, 743 P.2d 27, 32 (Colo. 1987). These findings do not need to be "a model of clarity, an agency's findings may be express or implied." *Board of Assessment of Appeals of State of Colo. v. Colorado Arlberg Club*, 762 P.2d 146, 150 (Colo. 1988). Finally, a reviewing court must note that the burden is on the challenging party to overcome the presumption that the agency's acts were proper. *Kruse*, 192 P.3d at 601.

Analysis

1. Sick Pay

Employer argues that "the statutes and information on COVID protocol are vague and ambiguous" and that Employer was subject to "an alphabet soup of statutes and regulations" concerning the COVID-19 pandemic.[1] Employer disagrees with the ALJ's finding that there is no indication, through statutes or INFOs, that Employee must request paid sick leave before paid sick leave could be granted. Employer reasons that because Employer was not aware that communications with Employee would be at issue in the Determination, the Court should set aside the Decision and remand for further evidentiary findings.

Employee responds that the EPSLA is written in clear language and that Employer is required to provide paid sick leave for qualifying reasons. Being subject to COVID-19 quarantine requirements is a qualifying reason. Employee contends that the EPSLA does not impose any requirements for Employee to provide Employer a positive COVID-19 test before Employer can grant paid sick leave. Conversely, Employee argues that the only notice required under the EPSLA is for Employer to provide notice of EPSLA obligations to Employee. Employee maintains that Employer's assertion that the statutes were vague is insufficient to establish that the Determination or Decision is arbitrary or capricious.

The HFWA mandates that "[e]mployers in the state shall comply with the federal 'Emergency Paid Sick Leave Act' in the 'Families First Coronavirus Response Act.'"[2] Under the EPSLA,

> "An employer shall provide to each employee employed by the employer paid sick time to the extent that the employee is unable to work [or telework] due to a need for leave because: (1) the employee is subject to a Federal, State, or local quarantine

[1] Opening Br. at 7, 10.
[2] C.R.S. § 8-13.3-406.

> or isolation order related to COVID-19. (2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19. (3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis…"[3]

Further, under the Families First Coronavirus Response Act, the only notice that is required is that an employer "shall post and keep posted, in conspicuous places on the premises of the employer where notices to employees are customarily posted, a notice… of the requirements described in this Act."[4]

INFO #6A provides that, through December 31, 2020, an employer was required to provide paid sick leave to an employee who was experiencing COVID-19 symptoms or who had to quarantine due to a risk of COVID-19.[5] INFO #6A states that "[a]n employer may not require an employee to provide notice in advance of needing to take paid leave. An employer may require 'reasonable' notice 'as soon as practicable'… Notice can be oral and must only provide enough information for an employer to determine whether leave is for an HFWA purpose."[6] INFO #6B provides that, from January 1, 2021, through June 8, 2023, all employers were required to provide up to 80 hours of paid leave for COVID-19-related PHE.[7] While the Division's website notes that INFOs are not binding law, INFOs are the Division's officially approved decisions on how the Division applies and interprets statutes and rules.[8]

In concluding that Employer was liable for sick pay violations, the Division relied on the fact that Employee notified Employer that Employee had contracted COVID-19, and that

[3] Families First Coronavirus Act, Pub. L. No. 116-127, § 5102 Emergency Paid Sick Leave Act, 134Stat. 178, 195-201 (2020).
[4] Families First Coronavirus Act, Pub. L. No. 116-127, § 5103(a) Emergency Paid Sick Leave Act, 134Stat. 178, 195-201 (2020).
[5] Admin. R. Part 6 at 12.
[6] *Id.* at 14.
[7] Admin. R. Part 1 at 85.
[8] Admin. R. Part 6 at 12.

Employee would consequently need to quarantine. The Division applied the plain language of the EPSLA in finding that Employee was not required to request paid sick leave. The ALJ agreed with the rationale of the Division and affirmed the Division's finding that Employer committed sick pay violations.

Based on the evidence presented before the Division and the ALJ, the Court finds that the Determination is not arbitrary or capricious. The Court further finds that there is no basis for setting aside the Decision. As the Decision notes, the record evidence indicates that "[t]he [Employee] missed work for a qualifying reason (getting COVID and needing to quarantine). The [Employer] knew that. Thus, it had to pay sick pay to [Employee] in late 2020."[9] Further, the plain language of the HFWA, the EPSLA, INFO #6A, and INFO #6B support the Decision's rationale. When the language of a statute is clear and unambiguous, the statute must be applied as written.[10]

Employer did not present any evidence to support its position that Employee is required to request paid sick leave before paid sick leave can be granted. Employer additionally did not provide support for the assertion that the Decision should be reversed because Employer views the COVID-19 sick leave regulations as vague and ambiguous. Contrary to Employer's arguments, the Determination is not so devoid of support as to be arbitrary and capricious. For the reasons discussed above, the Determination rested on competent evidence that a reasonable mind might accept as adequate to support the Division's conclusion.[11] The Court finds and concludes that the Determination is not arbitrary or capricious, and therefore the Court affirms the Decision's conclusion that Employer violated sick pay regulations.

[9] Admin. R. Part 6 at 68.
[10] *Tracz ex rel. Tracz v. Charter Centennial Peaks Behav. Health Sys., Inc.*, 9 P.3d 1168, 1176 (Colo. App. 2000).
[11] *Johnson v. Department of Safety*, 503 P.3d 918, 922 (Colo. App. 2021).

2. Product Fee Deductions

Employer argues that the product fee deductions are proper because the deduction clause was memorialized in a negotiated contract. Employer contends that the product fee deduction clause is enforceable because the deductions did not bring Employee's pay below the minimum wage and that Employee acknowledged that she benefited from using the products. Employer asserts that the Division opinions cited by the ALJ are factually distinguishable from this case.

Employee argues that while there is a signed contract between Employee and Employer, an employer may not impose conditions that render the arrangement lawful. Employee further argues that the fact that Employer contacted an employment attorney does not undercut the Division's finding that the product fee deduction clause is invalid. Employee maintains that the Determination is not arbitrary or capricious because similar findings have been made in prior Division decisions. Finally, Employee contends that: (1) the ALJ is solely responsible for weighing any competing evidence; (2) the ALJ found that Employer benefited from furnishing something that Employee needed to do her job; and (3) product fee deductions are only authorized when the items provided are exclusively for Employee's benefit.

Under C.R.S. § 8-4-105(1)(b),

> "An employer shall not make a deduction from the wages or compensation of an employee except as follows… (b) [d]eductions for loans, advances, goods or services, and equipment or property provided by an employer to an employee pursuant to a written agreement between such employer and employee, so long as it is enforceable and not in violation of law."

Additionally, "[a]ny agreement, written or oral, by an employee purporting to waive or to modify such employee's rights in violation of this article shall be void."[12] While not binding authority, INFO #16 states that,

[12] C.R.S. § 8-4-121.

> "An employer may deduct for loans, advances… goods, services, equipment, or property it provided to an employee, under certain conditions:
> 1. The employer has the employee's written agreement to make the deduction;
> 2. The written agreement must be enforceable and lawful;
> 3. The deduction may not bring pay below minimum wage… and
> 4. The thing provided must be for the employee's benefit, not for an employer's cost of doing business."[13]

The Division concluded in the Determination that there is no legal difference between deducting a cost from Employee's wages and shifting a cost for Employee to bear. The Division noted that Employer could not avoid deduction regulations by making Employee pay for business expenses when those business expenses primarily benefited Employer. Because Employer is a service-based company, the Determination stated that,

> "[w]ithout the services rendered by the stylists at the salon, the employer would not have a business, therefore the products necessary for the stylists to perform the services on the clients for the employer are of the benefit of the employer, not the stylists as the employer asserted."[14]

The Division held that the product fee deduction clause is invalid because it amounted to shifting a cost to Employee for items that are necessary for Employee to perform the job's functions and that such items are predominantly for Employer's benefit.

The Decision affirmed the Division's finding that Employer owed Employee wages for product fee deductions. The ALJ noted that the mere fact that a contract exists between Employer and Employee does not necessarily mean that all clauses within that contract are valid. The ALJ noted that while INFO #16 was published before the Determination, the Determination nevertheless aligned with previous Division decisions that resulted in the adoption of INFO #16.[15]

[13] Admin. R. Part 1 at 80.
[14] Admin. R. Part 5 at 22.
[15] The Court notes that the Division and the ALJ found minimal caselaw where Colorado courts have analyzed C.R.S. § 8-4-105(1)(b), and none of the cases are directly analogous to the factual circumstances of this case.

The ALJ accordingly found the Determination is consistent with INFO #16, previous Division decisions, and C.R.S. § 8-4-105(1)(b).

The crux of Employee and Employer's argument regarding the product fee deduction clause is whether the Division and the ALJ correctly applied C.R.S. § 8-4-105(1)(b) in finding that Employer's product fee deductions are unlawful. The Court will first examine whether the Division and the ALJ correctly interpreted and applied C.R.S. § 8-4-105(1)(b).[16]

Courts review an agency's interpretation of a statute de novo.[17] "When interpreting a statute, we seek to give effect to the purpose and intent of the General Assembly in enacting it."[18] Courts first read the words and phrases of the statute in context, according them their plain and ordinary meanings.[19] "If the language is clear, we apply it as written and need not resort to other tools of statutory interpretation."[20] On the other hand, if the statutory language is ambiguous, courts will look to other tools of construction.[21]

The Court finds that C.R.S. § 8-4-105(1)(b) does not clearly and unambiguously define whether a product fee deduction is lawful. In rather open-ended wording, C.R.S. § 8-4-105(1)(b) provides that there is a presumption against product fee deductions unless certain conditions are met, but those conditions are contingent on being "enforceable and not in violation of law."[22] C.R.S. § 8-4-121 provides that "[a]ny agreement, written or oral, by an employee purporting to waive or to modify such employee's rights in violation of this article shall be void." A statute is considered ambiguous when the words chosen by the legislature are unclear or capable of multiple

[16] "In judicial review of administrative action, the court shall determine all questions of law and interpret the statutory and constitutional provisions involved and shall apply such interpretation to the facts duly found or established." *Nededog v. Colorado Dept. of Health Care Policy and Fin.*, 98 P.3d 960, 962 (Colo. App. 2004).
[17] *Arapahoe Cnty. Dept. of Human Serv. v. Velarde*, 507 P.3d 518, 521 (Colo. 2022).
[18] *Id.*
[19] *Doe 1 v. Colorado Dept. of Public Health and Env't*, 451 P.3d 851, 855 (Colo. 2019).
[20] *Id.*
[21] *Arapahoe Cnty. Dept. of Human Serv.*, 507 P.3d at 521.
[22] C.R.S. § 8-4-105(1)(b).

constructions that can lead to different results.[23] Given the broad wording of C.R.S. § 8-4-105(1)(b) and C.R.S. § 8-4-121, and no definitions are provided to guide application of either statute, the Court finds that C.R.S. § 8-4-105(1)(b) and C.R.S. § 8-4-121 are at least susceptible to Employer and Employee's opposing interpretations. Accordingly, the Court will turn to other interpretive aids such as the statute's purpose, its language and structure, and the administrative interpretation of the agency charged with the statute's enforcement.[24]

The Colorado Supreme Court has found that the Colorado Wage Claim Act, to which C.R.S. § 8-4-105(1)(b) and C.R.S. § 8-4-121 are a part, was enacted "to protect employees from exploitation, fraud, and oppression."[25] Because the Colorado Wage Claim Act is a remedial statute, it is to be liberally construed to carry out its purpose.[26] Aligned with the remedial purpose of the Colorado Wage Claim Act, Division decisions interpreting C.R.S. § 8-4-105(1)(b) have consistently held that product fee deductions are invalid.[27]

Here, the Division determined that Employer is a service-based company that provides clients with services such as haircuts, color, and extensions. The Division found that because Employee's primary job function is performing these services for Employer, the products are ultimately for Employer's benefit and Employer cannot shift the product costs to Employee. In finding that Employer's product fee deduction clause is invalid, the Division stated that "[w]ithout

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[23] *Marcellot v. Exempla, Inc.*, 317 P.3d 1275, 1278 (Colo. App. 2012).
[24] *Nieto v. Clark's Mkt., Inc.*, 488 P.3d 1140, 1146 (Colo. 2021).
[25] *Id.*
[26] *Id.* at 1147.
[27] *See In re: Virginia's Kitchen LLC d/b/a BlueKudu*, DLSS Claim No. 5180-16, Hearing Officer Decis. No. 18-005 (2018) (Interpreting C.R.S. § 8-4-105(1)(b) as referring to items for an employee's benefit, not a business expense, and finding that "not having to pay for doing their job" is not an employee benefit.); *In re: Compass Management, LLC*, DLSS Claim No. 0927-19, Hearing Officer Decis. No. 19-086 (2019) (Deduction from an employee's paycheck for company business card expenses was invalid, despite an on-point agreement that authorized such deductions.); *In re: Avalon Communication Services, LLC*, DLSS Claim No. 2715-19, Hearing Officer Decis. No. 20-055 (2020) (Even if a written agreement "could be interpreted as authorizing a deduction from the claimant's wages for using the credit card to purchase supplies, tools, and equipment used at work and left at work, the employer failed to show that such an agreement would be 'enforceable and not in violation of law.'").

the services rendered by [Employee] at the salon, [Employer] would not have a business, therefore the products necessary for [Employee] to perform the service on the clients for [Employer] are for the benefit of [Employer], not [Employee] as [Employer] asserted."[28] When a statute is ambiguous concerning a specific issue, courts give great deference to an agency's interpretation of that statute, given that the agency interpretation of the statute is reasonable.[29] The Determination's interpretation and application of C.R.S. § 8-4-105(1)(b) is consistent with the purpose of the Colorado Wage Claim Act and is aligned with previous Division opinions. The Court therefore concludes that the Determination's application of C.R.S. § 8-4-105(1)(b) is reasonable.

The Court further finds and concludes that the Determination is not arbitrary or capricious in its application of the facts to the Division's interpretation of C.R.S. § 8-4-105(1)(b). The products at issue are those used directly by Employee in performing services for customers, for the ultimate benefit of Employer. Because judicial review of agency action is appellate in nature, courts are not allowed to substitute their view of conflicting evidence for the view of the agency.[30] Here, the Division assessed whether the products supplied were for Employee's benefit or were inherently for Employer's business. Because the Determination relied on competent evidence, and a reviewing court may not displace an administrative agency's conclusion concerning conflicting evidence, the Court affirms the Decision that the product fee deduction clause is invalid.

3. Penalties and Fines

In both the Opening Brief and Reply Brief, Employer "requests this Court reverse the determinations with respect to the penalties assessed to [Employer] in favor of [Employee]."[31] Employee contends that because Employer failed to argue or establish how the ALJ erred and

[28] Admin. R. Part 5 at 22.
[29] *Smith v. Farmers Ins. Exch.*, 9 P.3d 335, 340 (Colo. 2000).
[30] *Kruse v. Town of Castle Rock*, 192 P.3d 591, 601 (Colo. App. 2008).
[31] Opening Br. at 13; Reply Br. at 9.

because the penalties were not contrary to law, the Court should not disturb the assessed penalties and fines.[32]

If an employer fails or refuses to pay all earned, vested, and determinable wages or compensation within fourteen days after a written demand is sent or within fourteen days after an administrative claim is sent or served to an employer, the employer is liable to pay a penalty to the employee.[33] The penalty for non-willful wage violations is the greater of two times the amount of unpaid wages or $1,000.[34] If an employee can show that the employer's failure to pay wages is willful, the penalty assessed will be the greater of three times the amount of unpaid wages or $3,000.[35]

The Division's rules incorporate the definition of "willful" found in federal wage law whereby a violation is willful "where the employer knew that its conduct was prohibited… or showed reckless disregard for the requirements" of the law.[36] Reckless disregard of the law means, "among other situations, that the employer should have inquired further into whether its conduct was in compliance with [the law] and failed to make adequate further inquiry."[37] Finally, if an employer fails to pay an employee the amount the division or a hearing officer determines within sixty days after the division or hearing officer's determination, a penalty equal to the greater of fifty percent of the amount owed or three thousand dollars may be assessed.[38]

The Division first held that Employer's product fee deduction violation was willful. The Division found that the law is clear that items for an employer's benefit cannot be deducted from an employee's wages, and that the products at issue were for employer's benefit. The

[32] Resp. Br. at 25.
[33] C.R.S. § 8-4-109(3)(b).
[34] C.R.S. § 8-4-109(3)(b)(I).
[35] C.R.S. § 8-4-109(3)(b)(II).
[36] 7 Code Colo. Regs. § 1103-7: Rule 2:18; 29 C.F.R. § 578.3(c)(3)
[37] 29 C.F.R. § 578.3(c)(3)
[38] C.R.S. § 8-4-111(2)(f)(III).

Determination stated that "[E]mployer's blatant knowledge of the law and utter failure to comply is indicative of a knowing failure to meet their obligations under Colorado's wage and hour law."[39]

The ALJ reversed the Determination and held that Employer's product fee deduction violation was not willful. The ALJ concluded that there is no evidence that when Employer made the deduction, Employer knew the deduction was unlawful. Rather, the ALJ stated that C.R.S. § 8-4-105(1)(b) is ambiguous and the Division decisions have only interpreted the statute in non-binding INFOs in the same regard as the Decision. Further, the ALJ noted that Employer searched the Division's website for guidance, called the agency call center, and attained legal counsel's advice that the product fee deduction clause is legal.

Courts review a penalty imposed by an ALJ for abuse of discretion.[40] To constitute an abuse of discretion, the decision must have been manifestly arbitrary, unreasonable, or unfair, or based on a misunderstanding or misapplication of the law.[41] Here, the Court finds that the ALJ did not abuse her discretion in finding that the product fee deduction was not willful. As the ALJ noted, there is no evidence that Employer knew that the product fee deduction was illegal or that Employer acted in reckless disregard to the law. To the contrary, although unsuccessful, Employer actively tried to inform itself of the law and to proceed accordingly. Therefore, the Court affirms the ALJ's conclusion that the product fee deduction violation was not willful.

Next, the Division found that Employer showed at least reckless disregard for its sick pay obligations because Employer was aware that Employee contracted COVID-19 and Employer did not offer a justification for its failure to provide paid sick leave beyond ignorance of the law. The Division further noted that Employer knew of HFWA requirements because an email was provided

[39] Admin. R. Part 5 at 26.
[40] *Patterson Recall Comm., Inc. v. Patterson*, 209 P.3d 1210, 1216 (Colo. App. 2009).
[41] *Adams Cnty. Hous. Auth. v. Panzlau*, 527 P.3d 440, 445 (Colo. App. 2022).

to the Division in which Employer incorrectly summarized HFWA obligations. The ALJ affirmed the Determination, finding no clear error in the determination of willfulness. The ALJ concluded that there is no evidence that Employer took affirmative steps to learn of, or comply with, HFWA requirements. The ALJ also noted that there is no evidence that Employer sought legal advice in concluding that Employee was required to request paid sick leave before paid sick leave could be granted. Finally, the ALJ held that the violation was willful as evidenced by Employer's continued withholding of Employee's wages.

The Court finds and concludes that the ALJ did not abuse her discretion in finding that the sick pay violation was willful. There is no evidence that Employer attempted to discover what its actual obligations were under HFWA. From the evidence presented to the Division and the ALJ, Employer misled its employees regarding when sick leave could be taken and how sick leave must be requested under HFWA. At a minimum, Employer exhibited a reckless disregard of whether its conduct complied with applicable laws.[42] The Court therefore affirms the Decision's finding that the sick leave violation was willful.

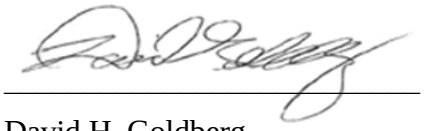
Conclusion

The Court DENIES Appellant-Plaintiff 303 Beauty Bar d/b/a Salon Lohi's Appeal of the Colorado Division of Labor Standards and Statistics Hearing Officer's Decision and Order.

[42] Further, when inferences can be drawn that are conflicting, "the reviewing court may not displace an administrative agency's choice between two fairly conflicting views, even though the court could justifiably have made a different choice had the matter been before it de novo." *Walton v. Banking Bd.*, 541 P.2d 1254, 1256 (Colo. App. 1975).

SO ORDERED: this 5th day of March 2024.

BY THE COURT:



David H. Goldberg
District Court Judge