

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM) Case No. 371-2013
OF NICHOLAS C. SMITH,)

Claimant,)

vs.)

FINAL AGENCY DECISION

BOB HEREFORD, individually, d/b/a BOB)
HEREFORD TRUCKING, not registered)
with the Secretary of State,)

Respondent.)

* * * * *

I. INTRODUCTION

Nicholas C. Smith appealed from a Wage and Hour Unit determination that found the respondent, Bob Hereford, d/b/a Bob Hereford Trucking, a business name not registered with the Montana Secretary of State, owed him \$53.82 in earned and unpaid wages, which had been tendered (after withholding deductions were taken) to the Department before the initial determination, and which is still being held by the Department.

Hearing Officer Terry Spear convened a contested case hearing in this matter on March 12, 2013. Nicholas C. Smith and Bobbi Hereford, spouse and bookkeeper for Bob Hereford (individually the respondent as an unregistered “d/b/a”), both testified under oath. The parties stipulated to the admission of Exhibits 1 through 21, as submitted by Smith, which consisted of the documents from the hearings file. The parties also stipulated to the admission of Exhibits A through D, as submitted by Bobbi Hereford, which consisted of some new documents and some documents from the hearings file. The Hearing Officer also admitted into evidence, as a demonstrative exhibit, without objection, Exhibit “Demo 1,” a new document (as far as the parties could ascertain) consisting of a 2-page letter from attorney Rich Buley (representing the respondent before the Wage and Hour Unit on Smith’s wage claim) to the Wage and Hour Unit Compliance Specialist and dated 10/15/12. Exhibit “Demo 1” was admitted as a clear and concise statement of Hereford’s defense, and not as proof of the matters stated therein.

After completion of the hearing, the Hearing Officer returned to his office in Helena, and began the process of deciding the case by reviewing the exhibits, securing the recordings, and making notes about the evidentiary questions to decide. In course of this process, he realized that there were some questions about Exhibit A to which he did not have answers that he might require to rule upon the case. At his request, the Hearings Bureau arranged a telephone conference with Smith and Bobbi Hereford on the morning of March 13, 2013, at which time the Hearing Officer, without objection, reopened the hearing, reminded both participants they were still under oath, and questioned them regarding the Exhibit. He advised the participants that he intended to review Documents 13-20 and 23-27 in the Hearings Bureau file, which appeared to be 37 receipts documenting log load weights, against the load weights in the last two pages of Exhibit A. Neither participant objected. He also obtained agreement by both participants as to the per ton pay Bob Hereford Trucking received on loads of logs delivered by Smith during his employment from each log sale site to each mill, as reflected in Exhibit A. He then again closed the hearing.

Based on the testimony and exhibits admitted at the hearing, the Hearing Officer issues the following findings of fact, conclusions of law, and final order.

II. ISSUES

Is Smith due any earned and unpaid wages for his work for Bob Hereford, and if so, is there a statutory penalty attached to that entitlement?

III. FINDINGS OF FACT

1. Bob Hereford, individually, d/b/a Bob Hereford Trucking, a business name not registered with the Montana Secretary of State, hired Nicholas C. Smith as a logging truck driver, to drive a logging truck owned by Hereford's spouse and bookkeeper, Bobbi Hereford, which she was unable to drive due to a physical disability. Hereford was responsible for fuel, maintenance, and all other costs of operating the truck. Hereford intended to pay Smith 27% of the total gross tonnage payment (including any fuel adjustment added into that payment) after deduction of \$.82 per ton from the gross tonnage payment for fuel costs. Bobbi Hereford did not know if Smith had been told of the actual payment basis for his work, but believed he knew or reasonably should have known that there was a "fuel surcharge" for the expenses incurred by Hereford in Smith's operations of the truck. Smith denied being told of the "fuel surcharge" when he was hired.

2. Smith began his employment on July 13, 2012, and his last day of work was August 20, 2012, when he left his employment after delivering one load of logs.

3. On July 12, 2012, the day before he was hired, Smith and Bob Hereford delivered two loads of logs with Bobbi Hereford's truck. Smith drove at least part and perhaps all of the time, although he was not yet an employee, as a "trial run" and orientation combined, to give Bob Hereford an opportunity to observe Smith's driving, to decide whether to hire him, and to have him ready to commence work the next day if he was hired. At hearing, Smith testified that he was supposed to be paid for the two loads delivered the day before he was hired. Bobbi Hereford testified that he was not supposed to be paid for the two loads delivered the day before he was hired. The substantial and credible evidence of record does not establish that it is more likely than not that the employer intended to pay and agreed with the claimant to pay him for the "trial run" deliveries on the day before his actual hire.

4. Smith was hired, and commenced work the next day. Over the course of his 38 days of employment, Smith delivered a total gross tonnage of 1,275.43 tons of logs. Exhibit A, page 1.¹ The amount paid per ton for the various loads varied, according to which project the logs involved. As a subcontractor's trucker, Hereford had multiple rates at different times for logs delivered in different projects. During the reopening of the hearing on March 13, 2013, Smith and Bobbi Hereford both agreed to the following per ton pay rates for log loads delivered from each log sale site to each mill:

Log Sale Site	Mill	Per Ton Rate
Trapper	Tricon	\$ 21.47
Trapper	Pyramid	\$ 19.50
Mill Creek	Tricon	\$ 13.00
Mill Creek	Bonner	\$ 9.00
Haacke	Tricon	\$ 19.35
Haacke	Bonner	\$ 9.05
Lower West Fork	Pyramid	\$ 19.80
Elk Wall	Tricon	\$ 15.66

5. Exhibit A, last two pages, and Exhibit 1, pages 18 and 19, appear at first to be identical copies of the same two documents in the Hearings Bureau file (Documents 66 and 67, printed numbers in the lower left hand corner). These documents are all relevant to determine how much Bob Hereford earned (at the applicable rates) for the loads of logs Smith delivered. From that total number, the amount earned by Smith can be readily calculated.

¹ The weight tags (Documents 13-20 and 23-27) correspond to 37 of the load tons reported in Exhibit A, last two pages.

6. On closer review, Exhibit 1, pages 18 and 19, are identical to Hearings file Documents 66 and 67. However, the last two pages of Exhibit A differ in some particulars from Hearings Bureau file Documents 66 and 67, even though Bobbi Hereford submitted both Exhibit A (at hearing) and Hearings Bureau file Documents 66 and 67. There are 27 lines on the last two pages of Exhibit A which differ from the lines on file Documents 66 and 67 and Exhibit 1, pages 18 and 19. In these findings, the Hearing Officer identifies individual line items in all three sets of documents by the agency ticket number appearing on each line, which match on all three sets of documents.

7. Out of the 27 lines in which there are discrepancies, 26 lines involve discrepancies of one penny, which could easily be rounding off differences. In the remaining line, Agency Ticket No. 166254 (Haacke to Tricon), the log tonnage of 28.78 tons is the same on the next to the last page of Exhibit A, on page 18 of Exhibit 1, on Document 67 in the Hearings Bureau file, and on the Agency Ticket, which is part of Document 17 in the Hearings Bureau file. The next to the last page of Exhibit A shows the gross payment to Bob Hereford Trucking to be \$556.89 and the 27% earned by Smith to be \$150.36. Both file Document 67 and page 18 in Exhibit A show the gross payment to Bob Hereford Trucking to be \$374.14 and the 27% earned by Smith to be \$101.01. Multiplying the log tonnage on Document 17 in the Hearings file by the agreed upon per ton payment rate for Haacke to Tricon (Finding 4, \$19.35 per ton), the appropriate payment to Bob Hereford was \$556.89, the number on the next to the last page of Exhibit A. The appropriate payment to Smith (disregarding any fuel surcharge for that load) would have been \$150.36.

8. Further checking of the accuracy of the last two pages of Exhibit A reveals that the load weights (converted to tons) on the trip tickets in the Hearings Bureau file documents (13-20 and 23-27) and the log tonnages reported on the last two pages of Exhibit A match exactly. Since approximately 80% of the numbers match exactly, the Hearing Officer finds the last two pages of Exhibit 8 accurate and reliable regarding load tonnage.

9. Taking the load tonnages reported therein, and multiplying them by the applicable per payment rates, the Hearing Officer finds that the gross pay numbers in the last two pages of Exhibit A are accurate and reliable.

10. Taking the gross pay numbers therein, and multiplying them by 27%, the Hearing Officer finds that the pay earned by Smith (last column on the last two pages of Exhibit A) is accurate and reliable. The total earned by Smith, correctly added on Exhibit A, page 1, was \$5,146.55, according to the testimony of Bobbi Hereford. The total paid to Smith, correctly set forth on Exhibit A, page 1, was \$5,223.40, according to the testimony of Hereford, including \$53.82 (before

withholding) tendered to and still held by the Department by Hereford after the end of Smith's employment and the filing of his wage claim. Smith offered no evidence to contradict that testimony, only his belief that the fuel surcharges had been taken out of his pay, based upon which he multiplied the \$.82 by the total tons delivered and asserted he had been shorted that amount.

11. Based on the foregoing findings, no fuel surcharge ever was actually subtracted from Smith's pay. Subtracting the \$53.82, which Bobbi Hereford testified that she mistakenly sent in before rechecking the payment numbers, the total gross pay received by Smith was \$5,169.57, which is more than he earned.

12. Smith has not earned any wages from Bob Hereford which remain due and unpaid.

IV. DISCUSSION²

Every employer of labor in the State of Montana is required by law to pay each employee the wages that employee has earned. Mont. Code Ann. § 39-3-204. When an employer fails to do so, the Department of Labor and Industry has the power to investigate and enforce the provisions of Title 39, Chapter 2. Mont. Code Ann. § 39-3-209. While not defined in Chapter 39, the term "labor" when used as a noun (as it is in the statute) is defined as "the services performed by workers for wages . . ." *Webster's Ninth New Collegiate Dictionary* (1988). This tribunal must construe all statutes in accordance with their plain meaning and if their language is clear, must apply the statute as written.

In the case before this tribunal, Smith has alleged that his employer failed to pay him for labor undertaken in Montana, specifically, by taking a "fuel surcharge" that he contends was wrongfully deducted from his wages earned. An employee seeking unpaid wages has the initial burden of proving work performed without proper compensation. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), *Garsjo v. Department of Labor and Industry* (1977), 172 Mont. 182, 562 P.2d 473. To meet this burden, the employee must produce evidence to "show the extent and amount of work as a matter of just and reasonable inference." *Id.* at 189, 562 P.2d at 476-77, citing *Anderson*, 328 U.S. at 687, and *Purcell v. Keegan* (1960), 359 Mich. 571, 103 N.W. 2d 494, 497; see also, *Marias Health Care Srv. v. Turenne*, 2001 MT 127, ¶¶13, 14, 305 Mont. 419, 422, 28 P.3d 494, 495 (holding that lower court properly concluded that the plaintiff's wage claim failed because she failed to meet her burden

² Statements of fact in this discussion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece*, 110 Mont. 541, 105 P.2d 661 (1940).

of proof to show that she was not compensated in accordance with her employment contract).

Smith did not present any evidence of the amount he had earned, nor did he disprove the amount Bobbi Hereford testified the employer had paid. Instead, he took the agreed upon number of tons he hauled, calculated the “fuel surcharge” he asserted that the employer had deducted from his wages, and sought that amount, plus the amount paid in to the Department of Labor and an additional amount he claimed was due for the “trial run” deliveries the day before he was hired.

The employer established, through Bobbi Hereford’s testimony, that Smith was paid more than 27% of the entire gross payments made to Bob Hereford for the log loads delivered by Smith during his employment, without the \$53.82. There is no substantial and credible evidence that the employer ever actually took the \$.82 per ton fuel charge out of the amounts paid to Smith. Smith did not establish that he was entitled to payment for the “trial run” the day before he was hired. There is no substantial and credible evidence that the employer owes Smith any earned and unpaid wages. Therefore, his complaint should now be dismissed, with money tendered to the Department by the employer returned to the employer. Since there is no money owed, no penalty attaches.

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. Bob Hereford, individually and doing business as Bob Hereford Trucking (not registered in Montana), does not owe Nicholas Smith any earned and due unpaid wages.

VI. ORDER

The complaint herein is dismissed with prejudice. The Department is ordered to return to the employer the check tendered in error as additional wages for Smith.

DATED: March 15, 2013.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ TERRY SPEAR
TERRY SPEAR
Hearing Officer

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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.