

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM)	Case No. 2384-2005
OF JOSE P. SANDOVAL,)	
)	
Claimant,)	FINDINGS OF FACT;
)	CONCLUSIONS OF LAW;
vs.)	AND ORDER
)	
MIKE ROY, D/B/A DOLPHIN PACIFIC)	
INTERNATIONAL,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

Respondent Mike Roy, doing business as Dolphin Pacific International, appealed a determination of the Wage and Hour Unit which found that he owed claimant Jose P. Sandoval wages of \$2,102.75 plus applicable penalties for work performed from February 13, 2005, through March 11, 2005.

Hearing Officer Terry Spear convened a telephonic contested case hearing in this matter on October 19, 2005.¹ Sandoval appeared by telephone and represented himself. Roy appeared by telephone and represented himself, doing business as Dolphin Pacific. Wage and Hour Unit Documents 1-25 were admitted into evidence without objection. Additional Documents 26-29, another copy of the employment agreement, which also appears as Documents 5-8 and 18-21 (with a slightly different signature page at Document 21 than at Document 8 and Document 29) were admitted into evidence without objection.

Sandoval, Roy and Randy Carter, Chief of Survey Services for Dolphin Pacific, testified by telephone. Both parties agreed to proceeding by telephone. The parties gave closing arguments and submitted the case for decision. Based on the evidence

¹ At hearing, the Hearing Officer may have incorrectly identified the date as October 18. The hearing took place on Wednesday, October 19, 2005.

adduced at the hearing and the arguments presented in closings, the hearing officer makes the following findings of fact, conclusions of law and final order in this matter.

II. ISSUE

Are unpaid earned wages due Sandoval for his work for Dolphin Pacific from February 13, 2005, through March 11, 2005, and is a statutory penalty due?

III. FINDINGS OF FACT

1. On or about May 4, 2004, Michael Roy, doing business as Dolphin Pacific International, hired Jose P. Sandoval (also known as Ben Sandoval) as a regional account manager. Dolphin Pacific sold management services to businesses in many states, including Montana. The enterprise was regularly engaged in interstate business. The parties signed a written employment contract, in either Idaho or Indiana, that provided, in pertinent parts, for payment to Sandoval of a salary of \$250.00 per week, with additional compensation for “qualified sales,”² and payments based upon certain “expenses”—mileage reimbursement at 25 cents per mile for up to 125 miles per day and not more than 450 miles per week for work-related out of town travel and per diem of \$60.00 per day for work-related out of town travel with overnight stays. The contract included a mandatory binding arbitration clause, pursuant to the laws of the State of Nevada, for post employment dispute resolution. That clause required arbitration in Nevada unless the parties agreed to another location and required that each party pay half the costs and charges of arbitration (including the reasonable compensation the three arbitrators awarded themselves) unless the arbitrators determined that the party demanding arbitration did so unreasonably or frivolously. The contract was a “take it or leave it” package deal.

2. At the time Dolphin Pacific hired Sandoval, the enterprise was located in Nevada. During Sandoval’s employment, the enterprise relocated to Indiana.

3. Before going to work for Dolphin Pacific, Sandoval had worked for another multi-state enterprise, George S. May, selling the same kinds of management services, for more than 13 years. For Dolphin Pacific, as for May, Sandoval’s routine practice was to provide the employer with timely reports and reimbursement requests.

² The contract specified that a sale qualified if the purchasing company had over one million dollars in gross sales volume the preceding fiscal year and at least 12 full time employees. There was no evidence about Sandoval’s qualifying sales during his employment. He had no subordinate employees. The parties disagreed whether his “region” consisted of Montana or a multi-state area.

4. In mid-December 2004, Sandoval reported to Dolphin Pacific that he had been injured in an automobile accident and was unable to work. Dolphin Pacific began to pay Sandoval \$200.00 every 2 weeks. The parties now disagree about the nature of these payments. Dolphin Pacific asserted that these were salary advances and that Sandoval had not returned to work. Sandoval asserted that the employer had no workers' compensation insurance and these were payments in lieu of benefits. The payroll advice documents indicate that the payments were earnings, from which the employer took the normal payroll deductions. The employer made these payments through March 18, 2005, with the last check issued on March 23, 2005.

5. Sandoval submitted 2 "Field Service Payroll Vouchers" for per diem and mileage reimbursement for February 12 through March 11, 2005, with hotel receipts.³ Sandoval, in pursuing an unemployment insurance benefit claim in Montana, reported to the department that he had received no further pay for his work after March 18, 2005, from the employer and no satisfactory explanation for the lack of pay, so he left employment in April 2005.

6. Sandoval filed his wage and hour complaint on May 31, 2005, submitting with it copies of the February and March field service payroll vouchers and 2 of the pay advice sheets for 2005 documenting the \$200.00 biweekly payments. Dolphin Pacific did not timely respond. The department's Wage and Hour unit determined that Sandoval was due the amount he requested—\$2,102.75 for per diem and mileage reimbursement. Dolphin Pacific appealed that determination, and this case followed from that appeal.

7. On August 12, 2005, in accord with an order of the Hearing Officer, Dolphin Pacific made a written request for Sandoval to produce, among other items, his hotel receipts, call sheets, proof of auto insurance and a doctor's release to return to work, all covering the February-March 2005 period. Sandoval did not respond.⁴

8. According to his vouchers and his sworn testimony, Sandoval engaged in work-related travel in excess of 450 miles during 3 of the 4 weeks from February 12 through March 11, 2005. For the week of February 12-18, 2005, Sandoval reported

³ At hearing, Dolphin Pacific presented testimony that it had no record of ever receiving these vouchers prior to receipt of copies of Sandoval's wage and hour claim materials, mailed by the department to Dolphin Pacific on May 31, 2005.

⁴ At hearing, Sandoval testified that he had copies of the hotel receipts and could also have produced the doctor's release and the proof of insurance, but did not do so on the advice of his lawyer, because the requested documents were not relevant to the issues in this wage and hour case.

traveling 787 miles, which, when reduced to not more than 125 miles per day, amounted to 500 miles, for which he earned \$112.50 (25 cents per mile for 450 of those 787 miles). For the week of February 19-25, 2005, Sandoval reported traveling 448 miles, less than 125 miles on each day, for which he earned \$112.00 (25 cents a mile for the 448 miles). For the week of February 26-March 4, 2005, Sandoval reported traveling 1,380 miles, which, when reduced to not more than 125 miles per day, amounted to 690 miles, for which he earned \$112.50 (25 cents a mile for 450 of those 1,380 miles). For the week of March 5-11, 2005, Sandoval reported traveling 897 miles, which, when reduced to not more than 125 miles per day, amounted to 570 miles, for which he earned \$112.50 (25 cents a mile for 450 of those 570 miles). His work-related travel took him outside of Montana.

9. During those same 4 weeks, while the contract allowed \$60.00 per diem for travel with an overnight stay, Sandoval requested \$30.00 rather than \$60.00 per day for Sunday and Friday of each of the 4 weeks. The Hearing Officer therefore finds that Sandoval's reports indicate 5 overnight stays (Sunday through Thursday nights).

10. According to the contract, Sandoval earned \$1,200.00 in per diem reimbursements and \$449.50 in mileage reimbursements from February 13, 2005, through March 11, 2005.

IV. DISCUSSION⁵

A. *The Arbitration Clause of the Employment Contract Is Unconscionable*

After hearing the evidence, the Hearing Officer believes the previous ruling was correct. The arbitration clause is unconscionable and therefore unenforceable. It purports to apply the law of Nevada to a contract made in either Idaho or Indiana, performed in Montana (or in Montana and Idaho and other states surrounding Montana) and involving, at the conclusion of Sandoval's employment, an enterprise situated in Indiana and an employee residing and at least primarily working in Montana. It provides for assessment of the costs of the arbitration (and, most significantly, the "reasonable compensation" the 3 arbitrators award themselves) equally between the parties (unless one party has taken frivolous positions), thereby imposing an undue financial burden that far exceeds the burden Sandoval would face in pursuing judicial and administrative remedies. The arbitration provision was presented on a "take it or leave it basis," having been prepared by the employer. The

⁵Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

arbitration provision is, therefore, an unconscionable contract of adhesion that will not be enforced. *Kloss v. Edward D. Jones & Co.*, 2002 MT 129, 310 Mont. 123, 54 P.3d 1; *Iwen v. U.S. West Direct* (1999), 293 Mont. 512, 977 P.2d 989; *see also*, *Ticknor v. Choice Hotels Internat., Inc.* (9th Cir. 2001), 265 F.3d 931, 939-40, *cert. den.* 534 U.S. 1133 (2002).

B. Travel Reimbursement Is Not Recoverable as Unpaid Wages

Claims for expense reimbursement involve “indemnification” of necessary employee expenditures and are not recoverable under the wage and hour statutes. Mont. Code Ann. § 39-2-701(1); *Johnson v. K&T Mfg., Inc.* (1981), 191 Mont. 458, 625 P.2d 66. Although the statute does not on its face relate to travel reimbursement, but to indemnification, the *Johnson* decision is unequivocal. Even though the contract terms for Sandoval do not “indemnify” his expenditures, setting maximum payment amounts that would not entirely defray his actual reported expenses in 3 of the 4 weeks involved, the existing law precludes expense reimbursement recovery. The Hearing Officer is not free to disregard that law.

V. CONCLUSIONS OF LAW

1. Montana and the Commissioner, Department of Labor and Industry, have jurisdiction. Mont. Code Ann. § 39-3-201 et seq. *State v. Holman Aviation* (1978), 176 Mont. 31, 575 P.2d 925.

2. Mike Roy, d/b/a Dolphin Pacific International, does not owe unpaid wages to Jose P. Sandoval. Mont. Code Ann. §§ 39-2-701(1) and 39-3-204. As no wages are owed, no penalty arises.

VI. ORDER

The wage claim of Jose P. Sandoval dismissed.

DATED this 20th day of October, 2005.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ TERRY SPEAR
Terry Spear
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 service of the decision. See also Mont. Code Ann. § 2-4-702.

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