

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIMS) Case Nos. 1767-2006, 1782-2006
OF BRANDON L. DEAN, LESLIE ROY,) & 1783-2006
AND BRYAN J KANCILIA,)

)	
Claimants,)	FINDINGS OF FACT;
)	CONCLUSIONS OF LAW;
vs.)	AND ORDER
)	
T. W. TRICKLE DOWN TRUCKING, L. P.,)	
a Montana limited partnership,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

Respondent T.W. Trickle Down Trucking (Trickle Down) appeals from a determination of the Wage and Hour Unit that found it owed Claimants Brandon Dean, Leslie Roy, and Bryan Kancilia additional wages and statutorily prescribed penalty. Hearing Officer Gregory L. Hanchett held a hearing in each of these cases on November 10, 2006. By previous agreement of the parties, all parties were permitted to appear telephonically. Dean and Roy represented themselves. Brian Kohn, attorney at law, represented Kancilia. Matthew Erikson, attorney at law, represented Trickle Down. In the Dean case, Dean and Barb Tangwell, manager for Trickle Down Trucking, testified under oath. In addition, Documents 1 through 49 from the Employment Relations Division file in the Dean case were admitted into evidence by stipulation. In the Roy case, Roy and Tangwell testified under oath. Documents 1 through 25 from the Employment Relations Division file in the Roy case were admitted into evidence by stipulation. In the Kancilia case, Kancilia, Dean, Roy and Tangwell testified under oath. Documents 1 through 41 from the Employment Relations Division in the Kancilia case were admitted into evidence by stipulation.

Based on the evidence adduced at hearing, it is apparent that additional wages and statutory penalty are due to each of the claimants in the amounts set out below. The facts and rationale that support this determination is supported by the following findings of fact, conclusions of law, and final order in this matter.

II. ISSUE

Are Dean, Roy and Kancilia due additional wages and penalty as prescribed by law?

III. FINDINGS OF FACT

A. *Dean Case*

1. Don Tangwell and Barb Tangwell are the owners of Trickle Down located in Roundup, Montana. Trickle Down is a Montana based trucking company involved in the transportation of livestock.

2. In January, 2006, Tangwell hired Dean to drive a Trickle Down controlled truck for Trickle Down. Tangwell agreed to pay Dean a commission equal to 20% of the price paid by the shipper for transporting the livestock for each load Dean delivered.

3. Tangwell assigned Dean to deliver his first load on February 2, 2006. Dean delivered four loads of livestock, the last being a load from Wyoming to Texas. Based on the price to be paid for the shipment of the load, Dean was to be paid \$894.60.

4. Federal regulations governing the trucking industry required Dean to maintain daily driver's logs while he was driving for Trickle Down. Tangwell instructed Dean to write on the logs that the carrier was Quantum Logistics/Trickle Down Trucking. See, e.g., Document 39, Dean's Daily Driver log for February 2, 2006. Dean filled out the logs as Tangwell had instructed him.

5. The truck that Dean used to deliver the load from Wyoming to Texas, a 1992 Volvo, had previously been owned by Brian Kancilia. Trickle Down was in the process of buying the truck from Kancilia.

6. After Dean delivered the load and while he was still in Texas, Kancilia and Tangwell had a falling out about the purchase of the truck. Tangwell phoned Dean and told him to leave the truck in Texas and to fly back to Montana. Shortly thereafter, Kancilia called Dean and told him that he must return the truck to Kancilia in Montana. Dean also received a call from a Montana sheriff's office indicating that if he did not bring the truck back to Kancilia, he might be subjected to prosecution for theft.

7. Tangwell called Dean on February 13, 2006 and told him he was fired. Tangwell refused to pay Dean any commissions for any of the loads he had delivered.

8. Dean then returned the truck to Kancilia. Kancilia agreed to pay Dean for the miles he had driven the truck from Texas back to Montana. Kancilia would not pay him for delivering the load to Texas.

9. 55% penalty on \$894.60 equals \$492.03 ($\$894.60 \times .55 = \492.03).

B. *Roy Case*

1. In November, 2005, Tangwell hired Roy to do demolition and other work on buildings that Tangwell owned in Roundup, Montana. Tangwell agreed to pay Roy \$8.00 per hour between November 29, 2005 and January, 2006.

2. Roy worked approximately 50 hours for Tangwell during this time period. Tangwell did not pay Roy for his work.

3. In addition, as part of Roy's remuneration for his work, Tangwell agreed to pay for approximately 100 gallons of propane that Roy needed. Tangwell, however, did not pay for the propane as promised.

4. At \$8.00 per hour, Tangwell owes Roy \$400.00 in unpaid wages (50 hours x \$8.00 per hour = \$400.00). 55% penalty on \$400.00 equals \$220.00 (\$400.00 x .55=\$220.00).

C. Kancilia Case

1. Sometime in November, 2005, Tangwell hired Kancilia to drive for Trickle Down and to work as truck mechanic. Tangwell agreed to pay Kancilia \$40.00 per hour to complete repairs on Trickle Down trucks.

2. Between November, 2005 and February, 2006, Kancilia completed work for Trickle Down on the 1992 Volvo truck mentioned above, a 1982 Peterbilt, a 1971 Cabover International, a 1971 Cabover Ford, a 1991 Freightliner, and a Dodge pickup truck owned by the Tangwells and driven by Barb Tangwell. Kancilia completed 129½ hours of work on the 1982 Peterbilt and was due wages of \$5,180.00 (\$40.00 x 129½ hours = \$5,180.00) for working on that vehicle. He earned \$500.00 (worked approximately 12½ hours) in completing repairs on the 1991 Freightliner. He also earned \$605.00 for working on the 1971 International. Finally, he earned \$90.00 for working on the Dodge pickup truck. Tangwell did not pay Kancilia for any of this work.

3. One of Trickle Down's drivers brought a load to Roundup, Montana for Trickle Down and was to deliver the load to Las Vegas, Nevada for Trickle Down. The driver could not complete the trip. Kancilia took over the job of delivering the load to Las Vegas. Trickle Down consented to Kancilia delivering the load. This is evidenced by the fact that Kancilia contacted Barb Tangwell while he was in Nevada and asked Trickle Down to forward money for fuel and Trickle Down (through Barb Tangwell) agreed to do so. Trickle Down agreed to pay Kancilia \$.40 per mile as wages.

4. Trickle Down never paid Kancilia the mileage wage he earned by driving the load from Roundup to Las Vegas. Kancilia claims to be due a total of \$2,313.00 for mileage and per diem expenses for the trip. The actual mileage, however, between these two places does not support Kancilia's claim for the total amount. A reasonable estimate of the mileage between Roundup and Las Vegas is approximately 1,100 miles

each way, or a total of 2,200 miles.¹ At \$.40 per mile, Kancilia is due a total of \$880.00 for his driving (2,200 miles x \$.40 per mile=\$880.00).

5. Kancilia also had experience as a dispatcher with Quantum Logistics Trucking. Because of this experience, in January, 2006, Don Tangwell also asked Kancilia to take on the duties of dispatcher for Trickle Down. Tangwell agreed to pay Kancilia \$200.00 per week per truck for his dispatching work. Dispatching involves timed matching of loads with trucks to ensure that a truck has loads to haul (and thus produces income) both going out to deliver and coming back.

6. Between January and February 9, 2006, Kancilia dispatched loads for Trickle Down drivers Dean, Tangwell, and Jeremy Elder. Kancilia dispatched loads for Dean for the two weeks that Dean worked for Trickle Down. Kancilia dispatched loads for Elder for five weeks. Finally, Kancilia dispatched loads for Tangwell for a period of 8½ weeks. This equates to a total of 15½ weeks. At \$200.00 per week, this means that Tangwell owed Kancilia \$3,100.00 (\$200.00 x 15.5 weeks = \$3,100.00). Tangwell never paid Kancilia for any of his dispatching work.

7. The wages due to Kancilia for mechanic's work, driving and dispatching total \$10,355.00 (\$5,180.00 + \$500.00 + \$605.00 + \$90.00 + \$880.00 + \$3,100.00 = \$10,355.00). 55% penalty on this amount equals \$5,695.25 (\$10,355.00 x .55 = \$5,695.25).

IV. DISCUSSION²

A. *Trickle Down Owes Dean, Roy and Kancilia Additional Wages.*

Montana law requires employers to pay wages when due in conformity with the employment agreement and no later than 15 days following termination of employment. Mont. Code Ann. §§ 39-3-204 and 39-3-205. Except to set a minimum wage, the law does not set the amount of wages to be paid. That determination is left to the agreement between the parties.

An employee seeking unpaid wages has the initial burden of proving work performed without proper compensation. *Anderson v. Mt. Clemens Pottery Co.* (1946), 328 U.S. 680, *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

¹Information obtained through Mapquest (www.mapquest.com) shows that the distance between Roundup and Las Vegas is 1,031 miles. Kancilia did not break down for the hearing examiner which portion of his \$2,313.00 amount was due to unreimbursed per diem expenses (which are not recoverable in a wage and hour claim) and his actual mileage for the trip. It is not reasonable to assume that the total amount he claims to be due is attributable to mileage. Fixing the actual mileage of the trip at approximately 2,200 miles is reasonable under the facts adduced at the hearing.

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

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

Once an employee has shown as a matter of just and reasonable inference that he or she is owed wages, "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 to be drawn from the evidence of the employee. And if the employer fails to produce such evidence, it is the duty of the court to enter judgment for the employee, even though the amount be only a reasonable approximation.' * * *." *Garsjo*, 172 Mont. at 189, 562 P.2d at 477, quoting *Purcell, supra*, 359 Mich. at 576, 103 N.W. 2d at 497.

The testimony of Dean, Roy and Kancilia is credible and is sufficient to meet their respective burdens to show that each was not paid for the work they completed as set forth in the findings of fact. Their testimony is also found credible with respect to the amount of wages each is due as shown in the Findings of Fact.

Kancilia's claim with respect to amounts due for driving the load from Roundup to Las Vegas is only partially sustainable. Kancilia stated at hearing that a portion of the \$2,313.00 amount he seeks was due to Trickle Down's failure to reimburse him for his per diem expenses. Kancilia did not articulate what portion of the \$2,313.00 was attributable to per diem expenses and the hearing examiner has no power to award unreimbursed per diem expenses in a wage and hour proceeding. *Johnson v. K & T Manufacturing, Inc.* (1981), 191 Mont. 458, 652 P.2d 66. Neither can the entire sum he seeks be reasonably described as solely compensation for mileage. In order to be due \$2,313.00 for driving, Kancilia would have had to travel almost 5,782 miles, or over 2½ times the distance shown on the map between Roundup and Las Vegas. A reasonable figure for the amount of mileage due to Kancilia for this trip is one that reimburses him for a trip of approximately 2,200 miles round trip between Roundup and Las Vegas. Thus, as a matter of just and reasonable inference, the evidence in this case shows that Kancilia is due \$880.00 for driving the load from Roundup to Las Vegas .

Trickle Down presented no substantive testimony to refute the credible testimony presented by each of the claimants. The only witness to appear on behalf of Trickle Down, Barb Tangwell, had no real way to contradict the testimony of the claimants because she was not privy to the agreements that Don Tangwell made with each of the claimants nor was she present when the work was completed. On the contrary, many points of Barb Tangwell's testimony corroborated the claimant's testimony regarding wages they were due but were not paid. The reason for this is obvious: Don Tangwell did not pay his employees as he had promised he would. Accordingly, the hearing officer finds that Dean, Roy and Kancilia proved by a preponderance of the evidence that each is due the additional wages and penalty as stated in the Findings of Fact above.

B. *Trickle Down Owes Penalty on The Unpaid Wages*

Montana law assesses a penalty when an employer fails to pay wages when they are due. Mont. Code Ann. §39-3-206. For claims involving compensation other than minimum wage and overtime compensation, a penalty of 55% must be imposed in the absence of certain circumstances, none of which apply to this case. Applying this regulation, Trickle Down owes Dean \$492.03 in penalty on his unpaid wages. Trickle Down owes Roy \$220.00 in penalty on his unpaid wages. Trickle Down owes Kancilia \$5,695.25 in penalty on his unpaid wages.

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. Trickle Down owes Dean \$894.60 in unpaid regular wages and \$492.03 in penalty for a total due Dean of \$1,386.63.

3. Trickle Down owes Roy \$400.00 in unpaid regular wages and \$220.00 in penalty for a total due Roy of \$620.00.

4. Trickle Down owes Kancilia \$10,355.00 in unpaid regular wages and \$5,695.25 in penalty for a total due Kancilia of \$16,050.25.

VI. ORDER

T.W. Trickle Down Trucking is hereby ORDERED to tender the following cashier's checks or money orders in the following amounts (1) a cashier's check or money order in the amount of \$1,386.63 representing \$894.60 in wages and \$492.03 in penalty, made payable to Brandon Dean, (2) a cashier's check or money order in the amount of \$620.00, representing \$400.00 in wages and \$220.00 in penalty, made payable to Leslie Roy, and (3) a cashier's check or money order in the amount of \$16,050.25, representing \$10,355.00 in wages and \$5,695.25 in penalty, made payable to Bryan Kancilia. These checks and/or money orders must be mailed to the Employment Relations Division, P.O. Box 6518, Helena, Montana 59624-6518, no later than 30 days after service of this decision. Trickle Down may deduct applicable withholding from the wage portion but not the penalty portion of the amounts due.

DATED this 14th day of December, 2006.

DEPARTMENT OF LABOR AND INDUSTRY

By: /s/ GREORY L. HANCHETT
Gregory L. Hanchett, Hearing Officer

Hearings Bureau

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.

If there is no appeal filed and no payment is made pursuant to this Order, the Commissioner of the Department of Labor and Industry will apply to the District Court for a judgment to enforce this Order pursuant to Mont. Code Ann. § 39-3-212. Such an application is not a review of the validity of this Order.