

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM)	Case No. 1995-2006
OF RAYMOND E. JONES,)	
)
Claimant,)	FINDINGS OF FACT;
)
vs.)	CONCLUSIONS OF LAW;
)
	AND FINAL ORDER
)
DENNIS BAILEY D/B/A DENNIS BAILEY)	
TRUCKING,)	
)
Respondent.)	

* * * * *

I. INTRODUCTION

Claimant Raymond Jones filed this wage claim contending that he was owed \$2,868.85 in additional wages by Respondent Dennis Bailey Trucking. Jones alleged he was due this additional money because (1) Bailey failed to pay Jones an agreed upon wage of \$.31 per mile driven and (2) Bailey improperly withheld wages from Jones for cash advances taken by another employee.

Hearing Examiner Gregory L. Hanchett held a contested case hearing in this matter on September 7, 2006. Jones represented himself and testified under oath. Bailey represented himself and also testified under oath. The parties stipulated to the admission of Wage and Hour Documents 1 through 108. In addition, the parties stipulated to the admission of Respondent's Exhibits 1 through 111.

While this matter was still being investigated by the Wage and Hour Unit, Bailey paid over to the Employment relations Division \$1,233.94, less proper withholdings, agreeing that he had paid Jones a lower per mile rate than he should have. At the time of hearing, Jones conceded that he had incorrectly sought \$997.97 reimbursement from Bailey to which he was not entitled. Thus, the dispute at hearing centered only on \$636.94 in additional wages sought by Jones (\$2,868.85 less the \$1,233.94 already paid over by Bailey and the \$997.97 which Jones concedes

he is not owed). Based on the evidence and argument presented at the hearing, the following findings of fact, conclusions of law, and final order are made.

II. ISSUE

Is Jones due an additional \$636.94 in wages and penalty as prescribed by law?

III. FINDINGS OF FACT

1. Bailey hired Jones to drive a semitractor trailer rig hauling livestock. The parties' agreement required Bailey to pay Jones at a rate of \$.31 per mile. Jones worked for Bailey until February 10, 2006.

2. Between July 26, 2005 and August 8, 2005, Bailey erroneously paid Jones at the rate of \$.21 cents per mile for approximately 12,339 of the miles that Jones drove. This resulted in Bailey underpaying Jones by \$1,233.94 for those miles.

3. During this same time period, Bailey erroneously deducted utility payments from Jones' paycheck in the amounts \$58.77, \$72.88, and \$51.42 (a total of \$183.07). These were payments which Bailey made on behalf of a different employee. These advances should not have been deducted from Jones' paycheck.

4. Bailey also made deductions from Jones' August 4, 2005 paycheck for cash advances made at Caldwell, Idaho, Milltown, Montana, Evans, Colorado, and two additional cash advances taken at Brush, Colorado. A total of \$907.75 was deducted from Jones' paycheck for these advances.

5. During the time period covering the August 4, 2005 paycheck, Jones had another of Bailey's employees, Rob Harshman, riding with him in the rig. Jones credibly testified, and the hearing examiner finds, that one half of the \$907.75 deducted from Jones' paycheck were actually cash advances taken by Harshman, not Jones. By deducting the total amount of the cash advances from Jones' paycheck, Bailey underpaid Jones by \$453.87.

6. The trip tickets showing Harshman's cash advances (and which indicate that Harshman took less than one-half of the \$907.75 in cash advances) do not accurately reflect the full amount of cash advances provided to Harshman. As Jones testified (and the hearings examiner finds), Harshman filled out the information on some of those trip tickets and under-reported to Bailey the amount of the cash advances he took. The credible evidence in this case shows that Jones received only

\$453.87 in cash advances and that Bailey owes Jones the additional \$453.87 noted in Findings of Fact Paragraph 5 above.

7. Immediately upon becoming aware of Jones' complaint, and while this matter was still pending before the Wage and Hour Unit, Bailey paid over to the Wage and Hour Unit the \$1,233.94 in wages that he had erroneously withheld from Jones by miscalculating the per mile wage rate.

8. 55% penalty on the total of the improperly withheld amounts of \$183.07 and \$453.87 is \$350.32 ($[\$183.07 + \$453.87] \times .55 = \350.82).

IV. DISCUSSION¹

A. *Bailey Owes Jones Additional Regular Wages.*

Montana law requires employers to pay wages when due, and in no event later than 15 days following termination of employment. Mont. Code Ann. §§ 39-3-204 and 39-3-205. 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 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 v. Keegan*, *supra*, 359 Mich. at 576, 103 N.W. 2d at 497.

¹Statements 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.

The substantial testimony here shows that Bailey withheld \$183.07 for utility bills and \$453.87 in cash advances from Jones' paycheck when those expenses were properly attributable to Harshman. Jones' testimony to that effect is credible in light of the fact that it was Harshman and not Jones who filled out some of the information for the trip tickets, which included the under-reporting of Harshman's actual cash advances. The evidence presented by Bailey to counter this, the copies of the trip tickets' do not adequately refute Jones' point. Jones was in the best position to know of Harshman's actions and the amount of the cash advances Harshman actually took. Thus, the hearing examiner finds that Jones has proven by a preponderance of the evidence that he is owed the additional regular wages as stated in Finding of Fact Paragraphs 3 and 5. In addition, he is owed the \$1,233.94 in unpaid wages which was previously paid into the Wage and Hour Unit.

B. Bailey Owes Penalty on The Unpaid Wages.²

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% is prescribed. Admin. R. Mont. 24.16.7566. Where a payment is made either before or after an investigative letter has been sent, as occurred in this case, but the payment does not resolve the case, then penalty is due only on the portion of the balance determined to still be owed to the employee. Admin. R. Mont. 24.16.7551.

Here, it is evident that Bailey, immediately upon learning of Jones' complaint, paid over to the Wage and Hour Unit the \$1,233.94 due for the per mile wage owed to Jones. His conduct, while perhaps not within the letter of Admin. R. Mont. 24.16.7551, was certainly within the spirit of the rule since he paid this disputed amount as soon as he knew it was being claimed. Imposing a penalty on this amount would not serve the purposes of the rule but would only serve to penalize Bailey for that which he could not reasonably have been aware. Accordingly, no penalty should be imposed on the \$1,233.94 amount.

² Soon after the hearing concluded, Bailey called the Hearings Bureau and informed the hearings examiner's legal assistant that if the hearings examiner decided the case in Jones' favor, then Bailey wished to meet with the hearing examiner and Jones to try and settle this matter. The hearings examiner, however, has no power to do this. Moreover, if this was an attempt by Bailey to avoid paying penalty, the applicable administrative regulations do not provide for such a procedure. Once a contested case hearing has been undertaken on an amount in dispute, imposition of penalty in the amount prescribed by the regulations is required. *See generally*, Admin. R. Mont 24.16.7551 through Admin R. Mont. 24.16.7566.

With respect to the amount of wages that remained in dispute after the Wage and Hour Unit's investigation, Bailey must pay 55% penalty on that amount. That amount is the combination of the \$183.07 improperly withheld for the utility payment and the \$453.87 improperly withheld for cash advances. 55% of that total is \$350.32.

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. Bailey owes Jones \$1,233.94 (which has already been paid into the Wage and Hour Unit) for the unpaid mileage wages and \$636.94 in wages that were improperly withheld. In addition, Bailey owes Jones penalty of \$350.32.

VI. ORDER

Dennis Bailey d/b/a Dennis Bailey Trucking is hereby ORDERED to tender a cashier's check or money order in the amount of \$987.26, representing \$636.94 in wages and \$350.32 in penalty, made payable to Raymond Jones, and mailed to the Employment Relations Division, P.O. Box 6518, Helena, Montana 59624-6518, no later than 30 days after service of this decision. Bailey may deduct applicable withholding from the wage portion but not the penalty portion of the amount due.

In addition, after the time for appeal has expired in this matter, the Wage and Hour Unit is hereby ordered to release to Raymond Jones the money previously tendered by Bailey (\$1,233.94 less applicable withholdings) in settlement of the underpaid mileage wage.

DATED this 21st day of September, 2006.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ GREGORY L. HANCHETT
GREGORY L. HANCHETT

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.

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.

Jones FOF ghp