

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM)	Case No. 227-2012
OF CLINT PATTERSON,)	
)	
Claimant,)	
)	
vs.)	FINAL AGENCY DECISION
)	
T & R TRUCKING, INC., an Idaho)	
corporation not registered with the)	
Montana Secretary of State,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

T & R Trucking appeals from a Wage and Hour Unit determination that found it owed employee Clint Patterson unpaid wages and penalty.

Hearing Officer Gregory L. Hanchett convened a contested case hearing in this matter on November 17, 2011. Patterson and T & R Trucking owner Terry Foldvik both testified under oath. The parties stipulated to the admission of ERD Documents 1 through 75. Based on the testimony and exhibits admitted at the hearing, the hearing officer makes the following findings of fact, conclusions of law, and final order.

II. ISSUES

Is Patterson due additional overtime wages, additional incentive pay, and additional prevailing wages?

III. FINDINGS OF FACT

1. Patterson entered into an employment agreement with the respondent to drive a "belly dump" dump-truck. The parties agreed that Patterson would be paid \$19.00 per hour. The employment agreement also provided that Patterson would pay a \$500.00 cleaning fee if he left the truck which he was assigned in a dirty condition. Specifically, the agreement provided:

Company Policy

No smoking or animals allowed in truck.

If truck is not clean a charge of up to \$500.00 to clean and or deodorize the truck will be deducted from your wages.

Document 24. Patterson signed the agreement acknowledging the potential cleaning deduction.

2. The employer agreed to pay Patterson for driving trucks. The employer also agreed to pay Patterson for other types of work. For work that did not involve driving time, the employer stated:

Your AG Express invoice is your time card and you are paid according to these hours. Any additional time you need to be compensated for (such as truck repairs etc) must be recorded on a T & R trucking invoice.

Document 74.

3. Beginning in July 2011, the respondent secured trucking jobs that required Patterson to be based in and drive his truck out of Sidney, Montana. On all dates pertinent to his wage claim, Patterson was working for the employer out of Sidney. He would begin each work day leaving from Sidney and end each work day by returning to Sidney.

4. On July 11, 2011, Patterson left the Sidney yard at 6:30 a.m. and drove to a location to obtain rock material to be hauled in the truck back to Sidney. After the loader dropped the rock in the truck, a mechanical failure on the truck caused the gates for the center dump to open slightly and the gates would not close. In order to drive the truck safely, the gates had to be closed otherwise the rock material would spill out onto the road. Patterson pulled the truck over and attempted to fix the truck but was unable to do so. Patterson then enlisted the help of the loader to force the gates on the center dump closed. The loader was able to force the gates closed and Patterson began the return trip to Sidney.

5. About half way back to Sidney, the gates opened again. In order to drive the truck safely, Patterson had to slow down and drive the truck at about 15 miles per hour. About 5.5 hours of time elapsed from the time Patterson left Sidney until he returned with the load.

6. Once back at Sidney, Patterson had to make phone calls to the respondent in order to get permission to get the truck fixed. He also had to get the truck to the mechanic in order to get repairs completed. He also had to go back and retrieve the truck. This took an additional 2.5 hours.

7. Patterson worked a total of eight extra hours on July 11, 2011.

8. On July 13, 2011, Patterson was driving the truck for the employer when the oil filter on the truck began to leak oil. He had to have the truck repaired. He took the truck into a mechanic to get the oil leak fixed. When he arrived at the mechanics shop, he had to stay in the truck waiting for the mechanic to take the truck in for repair. Once the truck was in the shop, he had to transact some business for the employer which included getting supplies the employer wanted. The employer had Patterson running around trying to secure a part needed in order to fix the leak. Patterson spent four extra hours that day working for the employer.

9. On July 15, 2011, Patterson spent three extra hours tending the truck while a tire repair was completed on the dump trailer.

10. On July 16, 2011, Patterson had to drive the truck from Sidney to the Glendive materials pit in order to pick up material. He spent 1.5 hours doing this.

11. The work described in Paragraphs 3 through 10 above equates to 16.5 hours of work. At Patterson's regular hourly rate, this equates to \$313.50 in wages ($\$19.00 \times 16.5 \text{ hours} = \313.50). Documents 12, 13, 14, and 15.

12. Patterson invoiced the employer in accordance with his employment agreement for all of the work listed in Paragraphs 3 through 10 above. Documents 12, 13, 14, and 15.

13. On Saturday, July 16, 2011, Patterson parked the truck at the yard in Sidney after completing his work. He left Sidney to drive down to Glendive. That evening, he called to advise the employer he would not be able to work on the following Monday.

14. When Patterson returned to Sidney to resume work, the truck was no longer there. The employer had the truck moved over to North Dakota during Patterson's absence.

15. On July 19, 2011, the employer fired Patterson. The employer refused to pay Patterson for any of the additional 16.5 hours of work he completed. In addition, the employer withheld \$500.00 from Patterson's last paycheck as a cleaning

charge for the truck Patterson operated. T & R trucking failed to pay Patterson a total of \$813.50, representing unpaid wages for 16.5 hours of work, amounting to \$313.50, and \$500.00 in improperly withheld wages.

IV. DISCUSSION¹

A. *This Tribunal Has Jurisdiction Over Patterson's Wage Claim.*

While not making the argument at hearing, the employer argued in his notice of appeal (Document 7) that Montana has no jurisdiction over Patterson's wage claim because both parties reside in Idaho and the employment contract was entered into in Idaho. The employer does not dispute that the work for which Patterson seeks reimbursement, 16.5 hours of work in Sidney, Montana, was undertaken in Montana. Because the work for which wages are sought was carried out in Montana, this tribunal does have jurisdiction over this wage claim.

Mont. Code Ann. § 39-3-204 provides in pertinent part that "every employer of *labor in the state of Montana* shall pay to each employee the wages earned by the employee . . ." (Emphasis added). 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, Patterson has alleged that his employer failed to pay him for labor undertaken in Montana, specifically, Patterson's work related to effectuating the repairs of the employer's truck and driving the truck while Patterson was employed by the employer on trips that originated in Montana. Patterson has thus alleged facts to show that he was engaging in work for the employer within the state of Montana for which he alleges he was not paid. His allegations fall squarely within the subject matter jurisdiction described in Mont. Code Ann. § 39-3-204. Therefore, this tribunal has jurisdiction over Patterson's wage claim.

B. *The Employer Owes Patterson Wages.*

The employer essentially conceded at hearing that it now knows that the cleaning deduction taken from Patterson's final check was improper. The employer

¹ 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).

insists, however, that Patterson did not work the 16.5 hours of time he is claiming and, therefore, he is not owed any additional wages. Patterson contends that he worked those hours and that the employer agreed to pay him for that work.

The employment agreement between the parties contemplated that Patterson would be paid for work other than driving the truck if Patterson did such work and then properly invoiced the employer for such work. As the letter from the employer stated unequivocally, “AG Express invoice is your time card and you are paid according to these hours. Any additional time you need to be compensated for (such as truck repairs etc) must be recorded on a T & R trucking invoice.” Document 74. This language was broad enough to encompass the 16.5 hours of work that Patterson claims he is owed. Moreover, the work that Patterson engaged in was, in any event, work on behalf of the employer even if it was not specifically requested. Admin. R. Mont. 24.16.1005 specifically provides that “work not requested but suffered or permitted is work time.”

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*, *supra*, 359 Mich. at 576, 103 N.W. 2d at 497.

The respondent presented no substantive testimony to refute the credible testimony that Patterson presented regarding the 16.5 hours that he worked but for which he was not paid. Foldvik was not in a position to refute Patterson’s testimony as Foldvik was in Idaho during those four days in July 2011. Accordingly, the hearing officer finds that Patterson has proved by a preponderance of the evidence that he is

due the additional wages and penalty for the 16.5 hours that he worked but for which he was not paid. The amount of wages he is due is \$313.50.

The employer also unlawfully withheld \$500.00 from Patterson's final paycheck for a cleaning fee. As the wage and hour investigator correctly noted, the withholding of the \$500.00 cleaning deposit was improper. Attorney General Opinion No. 17 (1975). (An employer cannot withhold the wages due an employee and apply such wages for damages caused by employee negligence). Furthermore, agreements, such as the cleaning charge at issue in this case, which are in contravention of Montana law, are void. Mont. Code Ann. § 39-3-208. The withholding of the \$500.00 was improper under the Wage and Hour Act and Patterson is entitled to that compensation as well.

C. The Employer 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, the employer owes Patterson \$447.42 ($\$813.50 \times .55 = \447.42) in penalty on the unpaid wages.²

The requirement of paying a 55% penalty is mandatory under the above rule. The only exception is where the employer pays unconditionally to the Department the entire amount found to be due within the time period specified in the determination. Here, the determination specified that the employer, in order to receive a reduced penalty, had to pay in the wages due no later than September 12, 2011. The employer did not do this but instead appealed the determination and asked for a hearing. While the employer did eventually pay in a portion of the wages found to be due to Patterson, he did not pay in the full amount and he did not do so until September 29, 2011. Therefore, the full amount of penalty required by administrative rule, 55%, must be imposed on the unpaid wages.

² Prior to the hearing, the employer, in an effort to settle the instant matter during mediation, paid into the Department the sum of \$536.02, reflecting \$650.00 of the wages it owes to Patterson less withheld taxes, which amount was deposited into the Department of Labor and Industry's wage trust account. The parties could not come to agreement in mediation and the matter went forward to hearing. The amount which the employer has paid to the Department must be credited against the amount found to be due and owing in this decision.

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* 176 Mont. 31, 575 P.2d 925 (1978).

2. T & R Trucking failed to pay Patterson \$313.50 in wages owed to him. In addition, T & R Trucking failed to pay Patterson an additional \$500.00 in wages when it unlawfully withheld those wages as a cleaning deposit. T & R trucking thus owes Patterson \$813.50 in unpaid wages. T & R Trucking has paid in \$650.00 in wages, withholding taxes in the amount of \$113.98, and submitting a net sum of \$536.02 to the Department. That amount must be credited against the \$813.50 due to Patterson.

3. T & R Trucking also owes penalty on the unpaid wages in the amount of \$447.42.

VI. ORDER

Based upon the foregoing, T & R Trucking is hereby ORDERED to tender a cashier's check or money order in the amount of \$610.92, representing \$813.50 in unpaid wages plus \$447.42 in penalty, and reflecting a credit to the employer for the \$650.00 in wages already paid in to the Department (\$813.50 unpaid wages + \$447.42 penalty - \$650.00 already paid into the Department = \$610.92), made payable to Clint Patterson, and mailed to the Employment Relations Division, P.O. Box 201503, Helena, Montana 59620-1503, no later than 30 days after service of this decision. T & R Trucking may deduct applicable withholding from the additional wages it is paying in, \$163.50, but not the penalty portion, \$447.42, of the amount due.

DATED this 20th day of December, 2011.

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 the date of mailing of the hearing officer's 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.