

**EMPLOYMENT STANDARDS TRIBUNAL**  
In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act*

- by -

D D & D Drillers Ltd.  
operating Triple D Drillers  
("DDD")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Hans Suhr

**FILE NO.:** 96/340

**DATE OF DECISION:** May 4, 2001

**DECISION**

**OVERVIEW**

This is an appeal by D D & D Drillers Ltd. operating Triple D Drillers (“DDD”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against Determination No. CDET 002250 issued by the Director on May 13, 1996. In this appeal DDD claims that the Determination was not correct in that William S. Branton (“Branton”) did not have a Class 3 drivers license with air endorsement as he claimed, further that Branton lied about the dates he claims to have worked, further that Branton lied about the wage rate and finally that Branton was hired to drive truck not as a drillers assistant.

Consideration of this appeal falls under the transitional provisions of the *Act*. Section 128 (3) of the *Act* states:

If, before the repeal of the former Act, no decision was made by the director, an authorized representative of the director or an officer on a complaint, made under that Act, the complaint is to be treated for all purposes, including section 80 of this *Act*, as a complaint under this *Act*.

Written submissions were received from DDD and information was provided by the Director. Subsequently, an oral hearing was held in Prince George, British Columbia on July 12, 1996.

Persons in attendance at the hearing were:

For the Appellant “DDD”                      Darrell R. Netrefa  
Dale Netrefa

For the Complainant                              William S. Branton

For the Director                                      Ross Gould, Industrial Relations Officer

In addition to the above persons, evidence via speakerphone was provided by the following witnesses for the appellant:

Jay Gunnarson  
Randy Bennett

We were unable to establish contact during the hearing with another witness for the appellant by speakerphone and, at the request of the appellant, with the consent of the Director's delegate and the complainant, I was to put questions to the witness with respect to the complainant's claim to have worked in Quesnel, B.C. on October 15, 16, 1995. This witness was:

Lloyd Ingraham

## **FACTS**

Branton was employed by DDD in April and May 1995 at a rate of \$12.00 per hour and earned in total, as per T-4 issued, \$3,990.00 .

DDD also issued cheques to Branton as follows:

- dated August 5, 1995 in the amount of \$200.00 and marked as "advance";
- dated August 6, 1995 in the amount of \$250.00 and marked as "advance";
- dated August 20, 1995 in the amount of \$500.00 and marked as "advance wages".

DDD did not provide any record of the daily hours worked by Branton.

Branton filed a complaint with the Employment Standards Branch ("Branch") dated December 12, 1995 alleging that he was owed wages, overtime wages, annual vacation pay, statutory holiday pay and termination pay.

The delegate of the Director investigated the complaint and, subsequently, Determination CDET 002250 was issued in the amount of \$2,282.11.

The delegate of the Director issued a letter prior to the hearing indicating that an error had been made in calculating the interest owing and amending the total amount of the Determination to \$2,203.93.

## **ISSUE TO BE DECIDED**

The issue to be decided in this appeal is whether wages are owed to Branton by DDD.

## **EVIDENCE**

Darrell Netrefa testified that:

- Branton was only hired as “casual” labour;
- Branton claimed to have a class 3 license with air endorsement which, it turns out, had expired;
- Branton never challenged his payment while employed;
- his understanding of Branton’s wage rate was \$10.00 per hour for driving the truck;
- he believes that Branton is claiming wages for days that he did not work;
- he challenges the dates and hours claimed as worked by Branton as follows:
  - July 21- did not work as claimed;
  - July 24- did work 8 hours;
    - the invoice to this customer indicates that the work was done on July 24, 1995;
    - #0212 - dated July 24, 1995 - work performed for Gerald Berube only took 8 hours, not the 13.5 hours as claimed;
  - July 25, 26, 27 or 28- did not work in Burns Lake as claimed;
    - the invoice to this customer clearly indicates that the work was done prior to the dates that Branton claims to have been at the customers location;
    - Invoice #0195 - dated July 5, 1995 - work performed for Arlen Wium - Burns Lake;
  - \*July 29- did work 8 hours loading drill stem and bits for Whistler;
  - \*July 30- did work 12 hours driving to Whistler;
  - July 31- only worked 2 hours not 10 hours as claimed (worked from 10 a.m. to noon);
    - the invoice to this customer clearly indicate that the work was done on July 31, 1995;
  - \*August 1- did work 11 hours driving to Prince George;
  - August 2 - only worked 1 hour not 2 hours as claimed;
  - August 3 - only worked 4 hours, believe it was Quesnel, not the 6 hours at Mud River as claimed;
  - August 4 - worked 8 hours not 10 hours as claimed;
  - October 15 - did not work, was not in Quesnel for 12 hours as claimed;
  - October 16 - did not work, was not in Quesnel for 12 hours as claimed.

( \* indicates dates on which the hours claimed by Branton are the same as the hours which DDD agrees were worked.)

- he paid Branton by cash at the rate of \$100.00 per day for some of the work he performed, he also paid cash advances of \$40.00 and \$200.00;
- the cheque dated August 6, 1995 for \$500.00 was a loan and not wages;

- he would telephone his accountant with the hours of work for each employee so the accountant could then prepare the payroll;
- Branton was not on the payroll after May 1995 as he was only “casual” labour;
- he would have his accountant provide records to this panel via fax by the end of the day July 16, 1996 to show that Branton was not in Burns Lake in July as he claimed;
- Branton borrowed a van from him one evening and he believes while drunk, was involved in a “hit and run” accident which resulted in several thousands of dollars in damages to the van and the other vehicle;
- he did not fire Branton, he simple disappeared after the accident.

On cross examination Darrell Netrefa conceded that:

- he did not keep any records of the daily hours worked by Branton;
- he did not obtain any receipts for the cash payments made to Branton;
- overtime wages were not paid as there was an understanding that all hours were at straight time rates of pay;
- he always marks the cheques he issues as “advance” or “advance wages”.

Jay Gunnarson testified that:

- he is a superintendent at Ruskin Construction;
- Ruskin Construction utilizes the services of DDD as required;
- around the end of July 1995 there was a job at Whistler, B.C.
- he recalls that the DDD crew arrived late the night before the job was to start;
- he recalls that the job started at approximately 9:30 a.m. and was finished around noon;
- the rig was shutdown at 1:00 p.m. and he does not recall seeing any of the crew around at that time;
- he does not know where the crew was;

On cross examination he testified that:

- he does not recall having breakfast with the crew from DDD;
- not sure exactly what time the DDD crew showed up at the work site but that there was no need for them to be there early.

Randy Bennett testified that:

- he worked in October of 1995 for DDD;
- he is not sure when he started but he believes that it was in the 3rd week or so of October;

- he does not know Branton as he never met him;

On cross examination he testified that:

- his first job was out at Shelley (a small community near Prince George)
- Darrell had hired him to replace the regular helper Ted as he was going on vacation;
- he was hired to help pull equipment;
- not sure when the well at Shelley was drilled, could have been the previous week.

Lloyd Ingraham testified that:

- he recalls seeing Branton on only 2 separate occasions;
- he is not sure when it was that he saw Branton;
- the one time he saw Branton was out on West Fraser Road when DDD was drilling for a customer named McGregor(?);
- the second time he saw Branton was out on the Barkerville Highway and he also recalls that this was the time that DDD ran out of oxygen for the torch and had to borrow a tank from a friend of his, Greg Freeman;
- he recalls that when he saw Branton, he appeared to be suffering from a hangover.

The delegate of the Director provided an overview of the complaint and the steps he took for investigating this matter.

The delegate further states that there was little in the way of any records or documentation with respect to the work performed by Branton except for the cancelled cheques, pay slips for April and May 1995 and a copy of the 1995 T-4 slip.

The delegate further states that he was informed by DDD's accountant that:

- he was not aware that Branton worked beyond the end of April 1995;
- he was not aware of any cash payments made to Branton;

The delegate finally states that he received a fax from DDD's accountant which challenges the information that the Determination was based on. This fax was received on June 24, 1996, just prior to the oral hearing.

William Branton testified that:

- he wrote down his daily hours of work on the back of a cigarette package and at the time of filing the complaint, transcribed all of the information onto the page provided;
- he is not able to find the cigarette package with the original information;

- the days and hours he worked are as follows:
  - July 20 - did not put in any hours - Darrell called and asked him to go to Quesnel to pick up a truck as they could no longer tow it behind the other vehicle;
  - July 21 - 8 hours - worked at Shelley drilling a well, went to Dennis Roe's (?) place and loaded some casing, drill stem;
  - July 24 - 13.5 hours - drove to Telkwa to get casings from Pat Murray's place, had some problems and had to get the RCMP involved;
  - July 25 - 15.5 hours - went to Arlen Wium's place to see if we could clear up the water from the well drilled earlier, water was dirty and muddy;
  - July 26 - 11 hours - Arlen Wium's place again, drilled a second well across the road to try to get clean water;
  - July 27 - 11 hours - still at Arlen Wium's place, unable to get water, dropped liner into the original well to help clean it up;
  - July 28 - 14 hours - finished at Arlen Wium's, checked with other potential customer for work, not needed, traveled to Prince George;
  - July 29 - 8 hours - Dennis Roe's yard, unloaded casing, loaded up drill stem and bit for Whistler job;
  - July 30 - 12 hours - driving to Whistler;
  - July 31 - 10 hours - arrived at the job site approximately 7 a.m., blew out first piling which heaved up again - kept heaving up. sat at the rig all day waiting for permission to shut it down, approximately 2 p.m. cleaned up and set rig down, drove to Whistler, left equipment parked at arena and went to rooms to clean up;
  - August 1 - 11 hours - driving to Prince George
  - August 2 - 2 hours - unloaded trucks and prepared for next job;
  - August 3 - 6 hours - Mud River drilled well to 65 feet, got water, shutdown, loaded up and returned to Prince George;
  - August 3 - 10 hours - Mud River to Luigi's(?), to clean up well, finally drilled a new well on the side of the house, down to 125 feet and got water, got pipe truck stuck, Darrell had to pay \$100.00 on his Visa card to tow truck to pull pipe truck out;
  - October 15 - 12 hours - went to Quesnel, out on Barkerville Highway, got smacked with drill casing but continued to work;
  - October 16 - 12 hours - finished the job and then moved the truck to the far side of Dragon Lake (by Quesnel), went home to Prince George;
- he went to Terrace in August and did not return until early October when he returned to Prince George;
- he got a call from his ex-girl friend who was at the Northwood Pub and she said that Darrell was there and wanted to talk to me;

- he went to the pub and spoke to Darrell who said he wanted some help on the weekends as his regular helper did not want to work on the weekends;
- he recalls that while he and Darrell were in a pub at Whistler, Darrell promised to pay him 100 hours at \$15.00 per hour for all the work performed in July and starting August 1, he would earn \$15.00 per hour and be put back on the payroll.

On cross examination by Gould he testified that:

- the work performed from July 24 to 28 at Arlen Wium's place in Burns Lake was not the original well which had been done earlier in July, but they had to try to clean up the water and finally drilled another well, in fact 2 more wells were drilled before clean water was found;
- while at Burns Lake, they stayed at a Hotel which was paid for by Darrell on his credit card;

On cross examination by Netrefa he testified that:

- the regular helper Ted was not there when loading or unloading took place;
- when he worked for DDD in March 1995, he was paid \$100.00 per day cash;
- received \$40.00 cash on one occasion and on October 16 he received \$200.00 cash but this amount was for rental for the storage of Darrell's car for the winter in a friends garage;
- he only put down time that he was at work;
- he quit in May because he was not being paid properly;
- he never received any separation slip or Record of Employment from the accountant;
- the \$500.00 cheque dated August 6, 1995 was an advance on wages;
- he recalls that in October 16 while at Quesnel, they ran out of oxygen for the torch and had to borrow some from a friend of Lloyd Ingraham's.

## ANALYSIS

DDD argues that Branton was "not on the payroll" as he was simply "casual" labour and that an understanding was reached with him in respect to wages and overtime. I must turn to the provisions of the *Act* to consider the points raised by DDD.

The *Act* defines employee as:

**"employee"** includes

- (a) a person, including a deceased person, receiving or entitled to wages for work performed for another



- (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee
- (c) a person being trained by an employer for the employer's business,
- (d) a person on leave from an employer, and
- (e) a person who has a right of recall

There is no doubt based on the evidence and information provided by all parties at the hearing, that an employee - employer relationship existed between DDD and Branton after the end of May 1995.

The *Act* further contains several requirements for an employer to keep records with respect to employees. Sections 27 and 28 state:

### **Wage statements**

27. (1) On every payday, an employer must give each employee a written wage statement for the pay period stating
- (a) the employer's name and address
  - (b) the hours worked by the employee
  - (c) the employee's wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis,
  - (d) the employee's overtime wage rate,
  - (e) the hours worked by the employee at the overtime wage rate,
  - (f) any money, allowance or other payment the employee is entitled to,
  - (g) the amount of each deduction from the employee's wages and the purpose of each deduction,
  - (h) if the employee is paid other than by the hour or by salary, how the wages were calculated for the work the employee is paid for,
  - (i) the employee's gross and net wages, and
  - (j) how much money the employee has taken from the employee's time bank and how much remains.
- (2) If requested in writing by an employee or by a trade union representing an employee, a wage statement may be provided electronically to the employee.
- (3) To cancel a request made under subsection (2), an employee or trade union must notify the employer in writing.

- (4) If a wage statement would be the same as the wage statement given for the previous pay period, another wage statement need not be given until a change occurs.

### **Payroll records**

28. (1) For each employee, an employer must keep records of the following information:
- (a) the employee's name, date of birth, occupation, telephone number and residential address;
  - (b) the date employment began;
  - (c) the employee's wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis;
  - (d) the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis;
  - (e) the benefits paid to the employee by the employer;
  - (f) the employee's gross and net wages for each pay period;
  - (g) each deduction made from the employee's wages and the reason for it;
  - (h) the dates of the statutory holidays taken by the employee and the amounts paid by the employer;
  - (i) the dates of the annual vacation taken by the employee, the amounts paid by the employer and the days and amounts owing;
  - (j) how much money the employee has taken from the employee's time bank, how much remains, the amounts paid and dates taken.
- (2) Payroll records must
- (a) be in English,
  - (b) be kept at the employer's principal place of business in British Columbia, and
  - (c) be retained by the employer for 7 years after the employment terminates.

Section 4 of the *Act* is the provision which prohibits persons from agreeing to waive the requirements of the *Act*. Section 4 states:

### **Requirements of this Act cannot be waived**

4. The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.

There is agreement that except for the partial records for April and May 1995, DDD kept no records with respect to Branton's employment.

No further information was received by this panel from the accountant for DDD.

A central issue in deciding this appeal is the credibility of the evidence provided by all the parties. In assessing credibility, a number of factors are to be considered. These include:

- the demeanour of the witness
- opportunities for knowledge
- powers of observation
- judgment and memory
- ability to describe clearly what has been seen and heard
- the probability of the event happening in the manner suggested

Branton testified that he recalled being in Quesnel on October 16, 1995 and running out of oxygen for the torch. This was confirmed by the evidence provided by Ingraham, although he was not sure of what the date was.

The evidence of the invoice # 0214 for the work in Whistler clearly indicates that the rig was billed to the customer for "8 hr work". If this invoice is accurate, and there was no inference that it was not, this certainly indicates that more than the 2 hours stated by DDD were worked on this job.

The information provided to the Director by DDD's accountant which challenges the hours claimed by Branton was prepared on the basis of information provided to the accountant by DDD and is therefore considered as hearsay.

Based on the above and the other evidence provided, I conclude that the evidence provided by Branton with respect to the hours worked is preferable. This conclusion should not be construed as a finding that the appellant's witnesses were lying. Their evidence was, for the most part based on very vague recollection and lacking in any detail, while the evidence of Branton was forthright and contained specifics, which could have been but were not, rebutted by DDD.

I am however, unable to conclude that the calculation of wages owed to Branton on the basis of \$13.00 per hour wage rate is supported by the evidence. Similarly I am not

persuaded that the pub conversation in which \$15.00 per hour was discussed can be relied upon to establish the wage rate for the hours worked.

The payroll information provided indicates that the wage rate earned by Branton in April/May 1995 was \$12.00 per hour. I conclude therefore that it would be appropriate that the hours worked after May 1995 should also be calculated at \$12.00 per hour.

The revised calculations for wages earned by Branton are as follows:

Total Wages earned		\$6606.00
4 % vacation pay		<u>\$ 264.24</u>
Total earnings		<b>\$6870.24</b>
less wages paid by employer		
Wages as per T-4	\$3990.00	
Cheques (\$200.00 + \$250.00+\$500.00)	\$ 950.00	
Cash received	<u>\$ 40.00</u>	
Total wages received		<b><u>\$4980.00</u></b>
<b>Total wages owing</b>		<b><u>\$1890.24</u></b>

In addition to the wages I have determined to be owing, pursuant section 88 of the *Act*, interest is to be calculated by the Branch.

For all of the above reasons, the appeal is dismissed.

**ORDER**

Pursuant to Section 115 of *Act*, I order that Determination No. CDET 002250 be varied as outlined above.

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**Hans Suhr**  
**Adjudicator**  
**Employment Standards Tribunal**

May 4, 2001  
**Date**

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