LABOR COMMISSIONER, STATE OF CALIFORNIA **Department of Industrial Relations** **Division of Labor Standards Enforcement** **2031 Howe Avenue, Suite 100** **Sacramento, CA 95825** **Tel: (916) 263-2841 Fax: (916) 263-2853**	For Court Use Only:
Plaintiff: Ricardo Allen	Court Number
Defendant: HENDRICKSON TRUCKING, INC., a California corporation	
State Case Number **08 - 65718 1 JS**	**ORDER, DECISION OR AWARD OF THE LABOR COMMISSIONER**

1. The above-entitled matter came on for hearing before the Labor Commissioner of the State of California as follows:
DATE: October 22, 2012 ☐ **CONTINUED TO:**
CITY: 2031 Howe Avenue, Suite 100, Sacramento, CA 95825

2. IT IS ORDERED THAT: **Plaintiff recover from Defendant.**

$	116,466.90	for wages **(with lawful deductions)**
$	0.00	for liquidated damages pursuant to Labor Code Section 1194.2
$	0.00	Reimbursable business expenses
$	32,195.96	for interest pursuant to Labor Code Section(s) 98.1(c), 1194.2 and/or 2802(b),
$	0.00	for additional wages accrued pursuant to Labor Code Section 203 as a penalty *and that same shall not be subject to payroll or other deductions.*
$	0.00	for penalties pursuant to Labor Code Section 203.1 which *shall not be subject to payroll or other deductions.*
$	0.00	other (specify):
$	**148,662.86**	**TOTAL AMOUNT OF AWARD**

3. The herein Order, Decision or Award is based upon the Findings of Fact, Legal Analysis and Conclusions attached hereto and incorporated herein by reference.

4. The parties herein are notified and advised that this Order, Decision or Award of the Labor Commissioner shall become final and enforceable as a judgment in a court of law unless either or both parties exercise their right to appeal to the appropriate court* within ten (10) days of service of this document. Service of this document can be accomplished either by first class mail or by personal delivery and is effective upon mailing or at the time of personal delivery. If service on the parties is made by mail, the ten (10) day appeal period shall be extended by five (5) days. For parties served outside of California, the period of extension is longer (See Code of Civil Procedure Section 1013). In case of appeal, the necessary filing fee must be paid by the appellant and appellant must, immediately upon filing an appeal with the appropriate court, serve a copy of the appeal request upon the Labor Commissioner. If an appeal is filed by a corporation, a non-lawyer agent of the corporation may file the Notice of Appeal with the appropriate court, but the corporation must be represented in any subsequent trial by an attorney, licensed to practice in the State of California. Labor Code Section 98.2(c) provides that if the party seeking review by filing an appeal to the court is unsuccessful in such appeal, the court shall determine the costs and reasonable attorney's fees incurred by the other party to the appeal and assess such amount as a cost upon the party filing the appeal. An employee is successful if the court awards an amount greater than zero.

PLEASE TAKE NOTICE: Labor Code Section 98.2(b) requires that as a condition to filing an appeal of an Order, Decision or Award of the Labor Commissioner, the employer shall first post a bond or undertaking with the court in the amount of the ODA; and the employer shall provide written notice to the other parties and the Labor Commissioner of the posting of the undertaking. Labor Code Section 98.2(b) also requires the undertaking contain other specific conditions for distribution under the bond. While this claim is before the Labor Commissioner, you are required to notify the Labor Commissioner *in writing* of any changes in your business or personal address within 10 days after any change occurs.

LABOR COMMISSIONER, STATE OF CALIFORNIA

BY: _____
Arleen Elberg HEARING OFFICER

* Appropriate Court:
Sacramento County Superior Court
720 Ninth Street
Sacramento, CA 95814

DATED: June 6, 2014

BEFORE THE LABOR COMMISSIONER

OF THE STATE OF CALIFORNIA

RICARDO ALLEN, Plaintiff v. HENDRICKSON TRUCKING, A California corporation, Defendant	CASE NO. 08-65718-1 JS ORDER, DECISION OR AWARD OF THE LABOR COMMISSIONER

BACKGROUND

Plaintiff filed an initial claim with the Labor Commissioner's Office on March 23, 2011. The Complaint raises the following allegations:

1. Wages for 181,726 miles at the rate of $.95 per mile earned from November 5, 2009 to August 3, 2011, claiming $172,639.70; less $55,215.80 received. Balance Claimed Due: $117,423.90;

3. Waiting time penalties pursuant to Labor Code § 203 at a daily rate of $396.15

Hearing was conducted in Sacramento, California, on October 22, 2012, before the undersigned Hearing Officer designated by the Labor Commissioner to hear this matter. Appearances for Plaintiff: Ricardo Allen; Brian D. Hefelfinger, Attorney at Law. Appearances for Defendant: Ward Hendrickson, CEO; James A. Whited, Witness; Jose R. Miller, Witness; Douglas A. MacDonald, Esq.

Due consideration having been given to the testimony, documentary evidence and arguments presented, the Labor Commissioner hereby adopts the following Order, Decision or Award.

FINDINGS OF FACT

Plaintiff was employed by Defendant, a trucking company, to perform personal services as a Truck Driver for the period of November 5, 2009, through September 1, 2011, in Sacramento County, California, under the terms of a written agreement at the promised rate of $.95 per dispatched mile plus 100 percent fuel surcharges.

Plaintiff and Defendant entered into an *Independent Contractor Operating Agreement* and an *Equipment Lease Agreement with Purchase Option* (hereinafter "Agreements") on November 5, 2009, with no term of completion. The Agreements, drafted by Defendant, called for $.95 per mile and a fuel surcharge[1] with authorized deductions to cover expenses involved with driving the leased truck. Plaintiff claimed the relationship was actually an employee-employer relationship and not an Independent Contractor relationship. Accordingly, Plaintiff claimed 181,726 miles at the rate of $.95 per mile earned during the period of November 5, 2009, through August 3, 2011, for a total of $172,639.70, less $55,215.80 received for a balance claimed due of $117,423.90. In addition, Plaintiff claimed interest and waiting time penalties.

Plaintiff testified he signed the Agreements during a required orientation because he needed work. The Agreement required Plaintiff to pay all operating expenses which included in part: truck lease payments ($840.00 every two weeks), cost of fuel, fuel taxes, base plates and licenses, equipment maintenance and repairs, road taxes, bobtail insurance, physical damage insurance, workers' compensation insurance, and mileage taxes. Plaintiff transported freight exclusively for Defendant in eleven western states, and he received a Contractor Settlement every

---

[1] additional charge to customers for fuel usage based on an average price supplied by Department of Energy.

two weeks. The Contractor Settlement included miles driven, mileage rate, fuel surcharge, and deductions for expenses.

Plaintiff alleged Defendant retained direct control over the manner and means Plaintiff accomplished his job. Plaintiff transported freight for Defendant's customers under Defendant's "authority" – United States Department of Transportation (USDOT number), and Defendant's name was on the sides of the truck. Plaintiff was assigned a DOT number when he was hired; however, the number was never activated. Plaintiff testified he was not allowed to transport freight for other carriers because Alban Lang, Defendant's Manager, refused to give Plaintiff Title information required to carry for another company. The truck Plaintiff leased was registered to Defendant as Operator and Lessee, and Plaintiff was not allowed to make any alterations or modifications[2] without Defendant's approval. Plaintiff testified he was required to check in with Dispatch at 10:00 a.m. every morning, and he was assigned loads from Defendant's dispatchers on Defendant's satellite communication system. Plaintiff was instructed where and when to deliver or pick up a load, and he was paid for a predetermined route. In addition, a memorandum was issued to all owner and lease Operators on September 6, 2010, which stated in part, "...please note that delivery times are determined by dispatch, not necessarily the time indicated on the Bill of Lading." Plaintiff testified he was required to participate in Defendant's maintenance program at the rate of $.10 per mile; however, there was no cash management of the monies. Further, Plaintiff was required to bring the truck to Defendant's maintenance yard for the following services: "oil and filter changes; tire repairs, tire and brake replacement, based on normal wear and tear; minor truck repairs (less than $500.00 including parts and labor); all routine and federally mandated

[2] Per Agreement: Alterations and modifications stated in part, No wheel changes may be made. Tire size and wheel types must stay the same. No electrical modifications may be made to the tractor without specific approval. No lights on the bumper, quarter fenders or mud flaps. Panel lights clusters on the bracket strip only may be installed under the sleeper or cab. No singular lights allowed.

repairs required on the road or in Hendrickson Trucking Inc. shop under $500.00 will be paid in full by Hendrickson Trucking, Inc.; Agrees to notify Hendrickson Trucking, Inc. maintenance department of all potential issues with the truck immediately after identifying an issue; agrees to give Hendrickson Trucking, Inc. complete control of any repairs covered by this AGREEMENT up to and including determining the status of the tractor; any repairs undertaken by LESSEE without prior Hendrickson Trucking, Inc. approval will be at the LESSEE's expense and can be considered as a failure to make the tractor available for dispatch; any repairs to bring the tractor to Hendrickson Trucking, Inc. standards at the termination of lease to be at the LESSEE'S expense." Defendant's maintenance agreement did not cover major repairs. In addition, Plaintiff was required to purchase all insurances through Defendant's approved insurance companies, and Plaintiff testified he was only allowed to fuel at Defendant's approved fuel stations.[3]

Plaintiff testified Defendant did not provide him with any documentation that verified the operating expenses that were deducted from Plaintiff's compensation. Furthermore, Plaintiff received fuel surcharges; however, there was no documentation to verify the amounts Defendant received.

On March 31, 2010, Plaintiff received a letter from Defendant's Log Supervisor stating, "...in auditing your daily logs, we found the following violations. This is not a request for corrected logs. Please return a signed copy of this notice, and explain why you were in violation. If you do not understand why you were in violation, or if you feel you have been cited in error, please schedule a review with the Safety Department."

Plaintiff's compensation was reported on a 1099, and Plaintiff deducted the operating expenses when he filed his taxes. Plaintiff testified he stopped receiving loads from Defendant

---

[3] Plaintiff was charged $.02 per gallon to use a fuel card that was issued during orientation.

the first week of September 2011, and he received his final compensation on September 3, 2011. Plaintiff's final settlement was paid as a company driver (employee) at a total rate of $.35 per mile with deductions for taxes.

It is Defendant's position that Plaintiff was properly classified as an Independent Contractor citing the required factors that were met for Plaintiff's classification. In addition, by allowing Plaintiff to operate under the Lease Agreement with Purchase Option, it gave Plaintiff the opportunity to eventually own a truck. Ward Hendrickson, CEO, testified that both parties entered into the Agreements with the intention Plaintiff would be an Independent Contractor. Plaintiff possessed a special skill of driving a truck which he learned in truck driving school, and he possessed a Commercial Driver's license which was required to drive Defendant's truck. Hendrickson testified that although the customer dictated when loads were to be moved, Plaintiff had control over routes, and Plaintiff had control over his work load by deciding to accept or refuse loads. Plaintiff refused loads so he could take time off. Furthermore, Plaintiff was able to move loads for another carrier[4]. Plaintiff could choose to use Defendant's fuel card at stations where Defendant had an account or Plaintiff could choose to fuel wherever he wanted if he used his own cash. Defendant testified if Plaintiff used the fuel card, the fuel was purchased at a discounted rate. Hendrickson testified they offer the maintenance program as a convenience factor and cost saver to fulfill required DOT inspections and to address ordinary wear and tear issues.

Defendant relied on court decisions *Cristler v. Express Messenger Service, Inc.*, and *State Compensation Ins. Fund v. Brown* which decided drivers were correctly classified as independent contractors.

---

[4] To move loads for another carrier, the Agreement called for additional charge of $30.00 per day plus $.15 per mile. Further, Plaintiff was required to operate under his own DOT number with a separate insurance.

Defendant compared Defendant's Employee Truck Drivers to their Independent Contractors stating employees received $.34 per mile plus benefits, are not permitted to drive for other companies, and they are required to take all jobs. Further, employee truck drivers are subject to firing. In comparison, Defendant's Independent Contractors entered into an Agreement to allow drivers to own a truck and receive $.95 per mile so they can pay operating expenses. While Independent Contractors lease their trucks, the doors on the trucks state, "Leased to Hendrickson Trucking, Inc." Further, Independent Contractors are allowed to haul for other companies, and they can refuse loads.

Defendant claimed entitlement to an offset in the amount of $160,000 against any award to Plaintiff for damage to a truck and failure of timely return. Defendant claimed Plaintiff hid a truck from Defendant in October 2011. Defendant alleged the truck was recovered in April 2012; however, Defendant paid $950.00 in towing fees and $13,560.87 in repairs. Further, Defendant claimed loss of revenue for a total amount of $160,000. Further, Plaintiff received $957.00 from Defendant as a result from a U.S. Department of Labor audit for back wages.

Defendant's witness, James Whited, testified he began to work for Defendant as a Company Driver (employee of Defendant) in February 2009; however, he decided he wanted to purchase a truck and signed on as an Independent Contractor. Whited testified to the differences he experienced when his status changed: 1) Whited was responsible for his taxes and took operating expenses as a deduction; 2) Whited was able to refuse a load – although it was rare; and 3) Whited had choice in routes. Whited testified the job itself did not change.

Defendant's witness, Jose Miller, testified he had been an Independent Contractor for Defendant for two years, and he only hauled loads for Defendant. Miller testified he participated

in Defendant's fuel card and maintenance program. He received his load instructions from Dispatch, and he was paid for a predetermined route.

LEGAL ANALYSIS

Defendant's business is subject to the provisions of Industrial Welfare Commission Order No. 9-2001 (Order), which regulates wages, hours and working conditions in the Transportation Industry. Section 2 (E) of the Order defines "employ" as to "engage, suffer, or permit to work." Section 2 (G) of the Order defines "employer" as "any person as defined in Section 18 of the Labor Code, who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person." Section 2 (H) defines "hours worked" as the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so."

It is Defendant's position that Plaintiff was an independent contractor. In determining whether an individual providing service to another is an independent contractor or an employee, there is no single determinative factor. It is necessary to focus on the facts of each service relationship and apply the "multi-factor" or "economic realities" test adopted by the California Supreme Court in *S.G. Borello & sons, Inc., v. Department of Industrial Relations* (1989) 48 Cal. 3d 341 at pp. 349, 354). Previously, the principle test was whether the person to whom the service was rendered had the right to control the manner and means of accomplishing the result desired.

In determining whether a person is an employee or an independent contractor, the *Borello* court identified the following factors that must be considered:

- The right to control the manner and means of accomplishing the results desired;
- The degree of permanence of the working relationship;

- Whether the person performing the service is engaged in a business or occupation distinct from that of the principal, or whether the services rendered are part of the regular business of the principal;
- The investment of the person performing services in the equipment of materials required by this or her task;
- Whether the service requires special training and skills characteristic of independently owned businesses;
- Whether the principal or the person performing the service supplies the instrumentalities, tools and the place of work;
- The kind of occupation , with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;
- The length of time for which the person is to perform the services;
- The method of payment , whether by the time, a piece rate or the job;
- Whether the person providing the service has an opportunity for profit or loss based on his or her managerial skill;
- Whether or not the parties believe they are creating an employer-employee relationship.

Plaintiff's services were an integral part of Defendant's business, which is a trucking company. Plaintiff's services were not distinct from Defendant's business, and Plaintiff did not have his own customers. Plaintiff's services were the exact services that Defendant's Employee Drivers performed. The existence of a written agreement purporting to establish an independent contractor relationship is not determinative, and the Labor Commissioner must look behind any such agreement in order to examine the facts that characterize the parties' actual relationship. Further, the party seeking to avoid liability has the burden of proving that persons whose services he has retained are independent contractors rather than employees. In other words, there is a presumption of employment. Plaintiff's work did not entail any managerial skills which could affect profit or loss; Plaintiff received his work assignments from Defendant's Dispatchers. Plaintiff did not have the ability, or the resources to enter into agreements with other companies to provide services. The sole investment was Plaintiff's lease payments towards the purchase of a truck; however, Plaintiff was required to accept the lease agreement in order to work for

Defendant. Defendant created the Agreements and required Plaintiff to sign them. Further, it was difficult for Plaintiff to operate independently from Defendant because it would have been prohibitively expensive. In reality, none of the Drivers carried for other companies. Defendant exercised direction and control over the Plaintiff with regards to hours and days of work via Defendant's Dispatchers. Plaintiff did not receive any accounting of the fuel surcharges, and there or money paid into the maintenance fund.

Defendant relied on court decisions *Cristler v. Express Messenger Service, Inc.*, and *State Compensation Ins. Fund v. Brown* which decided drivers were correctly classified as independent contractors. In the *Cristler* case, Plaintiff had an obligation to prove Employee status and Defendant had the obligation to prove Independent Contractor status. *Cristler* did not apply the *Borello* factors. *Cristler* is inapposite because it does not help to determine how to apply *Borello* factors to the case. In the *Brown* case, Independent Drivers had complete control over their working conditions and the manner in which a load was transported (including whether or not to hire assistants), and they were free to accept or reject assignments without reprisal. It was established at this hearing, Plaintiff did not have complete control over his working conditions and the manner in which a load was transported. Plaintiff was required to check in with Defendant's Dispatchers, and was paid for a predetermined route established by Defendant's Dispatchers. Further, Plaintiff was not allowed to carry for other companies. In addition, there was no information given to Plaintiff in regards to fuel charges or maintenance fund.

Based upon a review of all of the above factors and the evidence, Plaintiff is found to be an employee and subject to the laws of the California Labor Code.

Defendant argued that any determination of wages earned by Plaintiff should be based on its Employee Driver rates and not the rates for owner/operator. However, the settlement

documents clearly show the rates Defendant paid to Plaintiff for the services he performed as a truck driver. There is no basis for the Labor Commissioner to establish a wage rate for Plaintiff that is different from the rates actually paid.

Labor Code § 450 (a) provides "No employer, or agent or officer thereof, or other person, may compel or coerce any employee, or applicant for employment, to patronize his or her employer, or any other person, in the purchase of any thing of value. (b) for purposes of this section, to compel or coerce the purchase of any thing of value includes, but is not limited to, instances where an employer requires the payment of a fee or consideration of any type from an applicant for employment for any of the following purposes: (1) For an individual to apply for employment orally or in writing. (2) For an individual to receive, obtain, complete, or submit an application for employment. (3) For an employer to provide, accept, or process an application for employment.

Labor Code § 2802 requires an employer to indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties. Labor Code § 224 prohibits an employer from withholding or diverting any portion of an employee's wages unless the employer is required or empowered so to do by state or federal law or when a deduction is expressly authorized in writing by the employee to cover insurance premiums, hospital or medical dues, or other deductions not amounting to a rebate or deduction from the standard wage arrived at by collective bargaining or pursuant to wage agreement or statute, or when a deduction to cover health and welfare or pension plan contributions is expressly authorized by a collective bargaining or wage agreement.

Deductions are impermissible for items which in any way benefit the employer either directly or indirectly. A deduction from an employee's earnings, not specifically allowed by law

or by a voluntarily executed written authorization from the employee for a specific amount, constitutes a pre-judgment attachment of the employee's wages and is an abridgment of due process of law.

Fees totaling $117,423.90 were deducted from Plaintiff's wages. These fees were standard operating expenses which Defendant routinely paid on trucks operated by its Employee Drivers. Defendant benefited directly from Independent Drivers paying all operating expenses. The deductions were impermissible under Labor Code § 224 as they represented standard operating expenses that should have been paid by Defendant as required by Labor Code § 2802. As such, Plaintiff is awarded $117,423.90, minus $957.00 Plaintiff received as a result of an audit by the Department of Labor, for a total award of $116,466.90.

Defendant's request for an offset in the amount of $160,000 against any award to Plaintiff for damage, tow, and loss of revenue is denied. An employer may not take deductions from an employee's wages - except for gross negligence, willful misconduct or dishonesty - other than deductions required by law as stated above. There is no evidence to establish that Plaintiff acted with gross negligence, willful misconduct or dishonesty. Defendant is free to pursue the matter in the proper court of jurisdiction.

A good faith dispute that any wages are due will preclude imposition of waiting time penalties under Labor Code Section 203. The Defendant's error is a good faith dispute and the fact that Defendant's argument was ultimately unsuccessful does not preclude a finding that a good faith dispute did exist. Therefore, the claim herein for penalties under Labor Code Section 203 is dismissed.

Labor Code § 98.1(c) states as follows: All awards granted pursuant to a hearing under this chapter shall accrue interest on all due and unpaid wages at the same rate as prescribed by

subdivision (b) of Section 3289 of the Civil Code. The interest shall accrue until the wages are paid from the date that the wages were due and payable as provided in Part 1 (commencing with Section 200) of Division 2.

CONCLUSIONS

FOR ALL OF THE REASONS SET FORTH ABOVE, it is hereby ordered that:

1. Plaintiff takes $116,466.90 as wages.
2. Plaintiff takes $32,195.96 as interest pursuant to Labor Code § 98.1(c).

Total Amount of Award $148,662.86

Dated: June 6, 2014

Arleen Elberg, Hearing Officer

/////

LABOR COMMISSIONER, STATE OF CALIFORNIA
Department of Industrial Relations
Division of Labor Standards Enforcement
2031 Howe Avenue, Suite 100
Sacramento, CA 95825
Tel: (916) 263-2841 Fax: (916) 263-2853

Plaintiff: Ricardo Allen

Defendant: HENDRICKSON TRUCKING, INC.,
a California corporation

State Case Number
08 - 65718 1 JS

NOTICE OF PAYMENT DUE

You have been served a copy of the Labor Commissioner's Order, Decision or Award.

If the full amount of the sums set forth in the Order, Decision or Award is received by this office within ten (10) days of the date the Order, Decision or Award was served upon you, no judgment will be entered in this matter.

Payment must be made by certified check, cashier's check or money order (no other tender will be accepted) made payable to the Plaintiff named in the Order, Decision or Award, and addressed to the Office of the Labor Commissioner at the address shown above.

DATED: June 6, 2014

Julia Sidhu

Julia Sidhu 916-263-2843 Deputy Labor Commissioner

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT

CERTIFICATION OF SERVICE BY MAIL
(C.C.P. 1013A) OR CERTIFIED MAIL

I, Angela Brown, do hereby certify that I am a resident of or employed in the County of Sacramento, over 18 years of age, not a party to the within action, and that I am employed at and my business address is:

LABOR COMMISSIONER, STATE OF CALIFORNIA
2031 Howe Avenue, Suite 100
Sacramento, CA 95825
Tel: (916) 263-2841 Fax: (916) 263-2853

I am readily familiar with the business practice of my place of business for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

On June 24, 2014 at my place of business, a copy of the following document(s):

Order, Decision or Award

was(were) placed for deposit in the United States Postal Service in a sealed envelope, by first class mail, with postage fully prepaid, addressed to:

NOTICE TO: Palay Law Firm
121 North Fir St., Suite F
Ventura, CA 93001
Attn: Brian Hefelfinger

and that envelope was placed for collection and mailing on that date following ordinary business practices.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on: June 24, 2014 at Sacramento, California

STATE CASE NUMBER: 08-65718 1 JS

Angela Brown
Angela Brown