

**STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU**

IN THE MATTER OF THE WAGE CLAIM)	Case No. 1583-2003
OF ROBERT J. KIMMERLE,)	
Claimant,)	
)	
vs.)	FINAL AGENCY DECISION
)	
NATIONWIDE AUTO TRANSPORT INC.,)	
a Nevada Corporation,)	
Respondent.)	

I. INTRODUCTION

On March 7, 2003, Robert J. Kimmerle filed a claim with the Department of Labor and Industry contending that Nationwide Auto Transport Inc. had failed to pay him \$4,779.39 wages due to him from a damage fund maintained by the employer during his employment. On April 23, 2003, the Wage and Hour Unit determined that Nationwide owed Kimmerle \$5,000.00, and a statutory penalty. Nationwide appealed this determination on May 12, 2003. On August 5, 2003, the case was transferred to the Department's Hearings Bureau for hearing.

The hearing was conducted by telephone on November 4, 2003. Kimmerle was present and testified. Peter T. Stanley, attorney at law, represented Nationwide Auto Transport Inc. Scott Kimmerle, Teri Spiker, Louis Kuchera, and Susan Kuchera also testified in the case. Documents from the investigative file compiled by the Wage and Hour Unit numbered 1, 6-8, 9- 11, 12-13, 31, 41, 43, 45, 46, 50, 51, 51a, 52-56, 57-73, 75-76, and 81-82 were admitted into evidence without objection, except that respondent's failure to object to 9-11, the determination issued by the Employment Relations Division, and 75-76, the wage claim filed by Kimmerle, were conditioned on them being admitted for administrative purposes rather than evidentiary purposes.

II. ISSUE

The issue in this case is whether Nationwide Auto Transport, Inc., a Nevada corporation, owes wages for work performed, as alleged in the complaint filed by Robert J. Kimmerle, and owes a penalty, as provided by law. A full statement of issues is contained in the order governing hearing proceedings issued on October 28, 2003.

Based upon the testimony and exhibits in the case, the Hearing Officer makes the following:

III. FINDINGS OF FACT

1. Nationwide Auto Transport, Inc. (Nationwide) is a business established by Louis and Susan Kuchera to transport cars to their related automobile reconditioning and sales business. Louis Kuchera is the president of Nationwide and Susan Kuchera is the treasurer and secretary.

2. Kimmerle was an employee of Nationwide Auto Transport Inc. He worked as a truck driver to transport cars. He started his employment on or about August 17, 2000.

3. Prior to beginning employment, Kimmerle met with Louis Kuchera to discuss the terms of employment. After reaching agreement, the terms of Kimmerle's employment were put in writing. Louis Kuchera had the agreement typed up and Kimmerle signed it. It contained the following provisions:

Salary: To be as follows:

\$0.36 per mile by driver. The driver will receive \$5.00 for each car loaded with no damage and \$5.00 for each car unloaded with no damage for a maximum of \$10.00 per vehicle. This money will be held in a damage fund to the sum of \$5000.00. Once this amount has been reached [sic], driver can draw \$10.00 per car as pay.

Damages:

Driver is responsible for all transport damage. Large losses will be turned in to carriers [sic] insurance and smaller losses will be paid from driver's damage fund or paycheck. (\$2500 or less is considered a smaller loss.) The insurance deductible will be withheld from driver's damage fund or paycheck.

4. The written agreement contained no provision for the disposition of the damage fund on termination of employment. However, Louis Kuchera told Kimmerle that the funds in the damage fund would be distributed to him on termination of employment.

5. Kimmerle quit working for Nationwide on February 28, 2003. During his approximately 2½ years of employment, he transported 1,567 cars without damage. Prior to January 2003, Nationwide deducted \$10,891.61 from his damage fund account for damage to vehicles.

6. After he resigned, Kimmerle requested the balance remaining in the damage fund, which he calculated as \$4,779.39. Nationwide declined to pay it. It charged the fund with additional charges of \$293.60 to a 1998 Chevrolet Malibu and \$4,660.19 to Kimmerle's truck resulting from a collision with a deer, leaving a negative balance in the account of -\$174.40.

7. Nationwide deducted \$42.00 from Kimmerle's paycheck of February 18, 2003 for his share of the February insurance premium.

IV. DISCUSSION AND ANALYSIS⁽¹⁾

Montana law requires that employers pay employees wages when due in accordance with the employment agreement, and in any event not more than 15 days following the separation from 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. "Wages" include any money due from an employer to an employee, including bonuses and commissions. Mont. Code Ann. § 39-3-201(6); *Delaware v. K-Decorators, Inc.*, 1999 MT 13, 293 Mont. 97, 104-105, 973 P.2d 818.

Kimmerle contends that Nationwide owes him \$4,779.39, which was the balance of the damage fund provided for in his employment agreement at the end of his employment. Nationwide contends it never agreed to pay Kimmerle the amount in the damage fund, that even if it did, he never became entitled to it because it did not reach the \$5,000.00 level, and that the damages attributable to Kimmerle at the end of his employment offset any remaining balance.

Based on the employment agreement, the damage fund established by Nationwide was compensation to be paid to Kimmerle. Despite the testimony of the Kucheras to the contrary, the written agreement prepared by Louis Kuchera and signed by Kimmerle states that Kimmerle "**will receive** \$5.00 for each car loaded with no damage and \$5.00 for each car unloaded with no damage for a maximum of \$10.00 per vehicle" (emphasis added). The use of the phrase "will receive" means that it is to be paid to Kimmerle, and is therefore wages. Although Kuchera testified that the fund was intended to establish an incentive for employees to minimize damage to vehicles and was never intended to be compensation to the driver, this characterization is not consistent with the plain language of the employment agreement.

The fact that the amount in the fund never reached \$5,000.00 is not relevant to the question of whether Kimmerle was entitled to the balance of the fund on termination of employment. The employment agreement provided that once the amount in the fund reached \$5,000.00, the driver could draw \$10.00 per car as pay. Although the language is not a model of clarity, it appears to contemplate a bonus of \$10.00 per car on a current basis rather than making further deposits to the damage fund. It does not provide that the driver will never be entitled to the amount in the fund.

Further, if the terms of the agreement could be construed to divest Kimmerle of wages he had earned because he never reached the \$5,000.00 level, such a condition would be a condition subsequent to Kimmerle's entitlement to previously earned wages. The Montana Supreme Court has held such a condition subsequent to illegally divest employees of earned vacation leave, and the requirement to reach a balance of \$5,000.00 has the same effect in this case. *In re the Wage Claim of Sharon Langager v. Crazy Creek Products, Inc.*, 1998 MT 44, 287 Mont. 445, 455-56, 954 P.2d 1169. Nationwide cannot divest Kimmerle of his earned wage by placing such a condition on it.

The agreement is ambiguous as to the disposition of amounts in the damage fund on termination of employment. The intent of the parties must therefore be determined from their testimony. Kimmerle credibly testified that Louis Kuchera told him that the balance in the fund

would be his at the termination of employment. Although this testimony was disputed, Kimmerle's version was consistent and reasonable. Further, for reasons discussed below, Nationwide's practice of deducting damages from the earnings of its drivers is illegal. Despite this fact, Kimmerle did not seek to recover amounts deducted from his earning which he believed to be consistent with his employment agreement. For these reasons, I credit Kimmerle's testimony that Louis Kuchera told him the balance in the fund would be his, rather than Kuchera's testimony to the contrary. Therefore, Kimmerle was entitled to the balance of the fund on termination of employment.

Further, Nationwide cannot deduct the damages to the 1998 Chevrolet and to the truck from the damage fund. Kimmerle contended that the employment agreement contemplated only deductions for damage to the vehicles being transported, as opposed to other damage. It is unnecessary to reach the question of the meaning of this aspect of the employment agreement, however, because Nationwide's practice of deducting damages from Kimmerle's earnings violates Montana's wage payment laws.

Mont. Code Ann. § 39-3-204(1) provides:

[E]very employer of labor in the state of Montana shall pay to each employee the wages earned by the employee in lawful money of the United States or checks on banks convertible into cash on demand at the full face value of the checks, and a person for whom labor has been performed may not withhold from any employee any wages earned or unpaid for a longer period than 10 business days after the wages are due and payable. However, reasonable deductions may be made for board, room, and other incidentals supplied by the employer, whenever the deductions are a part of the conditions of employment, or other deductions provided for by law.

This statute prohibits an employer from withholding an employee's wages and applying them toward damages caused by employee negligence, notwithstanding the fact that the employee contractually agreed to the deduction. 36 Mont. A.G. Op. 17 (1975); *see also Christiansen v. Taylor Brothers, Inc.* (1987), 225 Mont. 318, 732 P.2d 841. An agreement which violates Mont. Code Ann. § 39-3-204(1) is void. Mont. Code Ann. § 39-3-208. Having agreed to pay Kimmerle \$10.00 for each car he transported without damage, Nationwide could not deduct any damage amounts from those wages. Therefore, Nationwide owed Kimmerle the balance that remained in the fund without reduction for any damage.⁽²⁾

Louis Kuchera testified it is necessary for businesses involved in automobile transport to have a wage arrangement that encourages safe transport of vehicles. The problem with this justification is that it is not consistent with Montana law. The incentive arrangement that an employer establishes cannot deduct damages from employee earnings. Having framed the arrangement as one in which the driver "will receive" \$10.00 for each vehicle loaded without damage, the employer cannot deduct other damages from those earnings.⁽³⁾

The balance in the fund at the conclusion of Kimmerle's employment, not including the damages to 1998 Chevrolet and the Freightliner, was \$4,778.39. This sum is based on the ledger

sheets maintained by Nationwide. The ledger sheets showed that Kimmerle transported a total of 1,567 cars without damage. From the \$15,670.00 in earnings resulting from multiplying 1,567 by \$10.00 per car, the employer deducted \$10,891.61 for damages which Kimmerle did not seek to recover in this proceeding. Subtracting \$10,891.61 from \$15,670.00 results in \$4,778.39 remaining and owing to Kimmerle.

Montana law provides for a penalty to be assessed against an employer and paid to the employee in an amount not to exceed 110% of the wages due and unpaid. Mont. Code Ann. § 39-3-206(1). The rules of the department provide that for violations which do not involve minimum wage or overtime issues, the penalty should be 55%, unless certain special circumstances are present. Admin. R. Mont. 24.16.7566. There is no evidence that any of the special circumstances apply in this case. Therefore, Kimmerle is entitled to a penalty of 55% of \$4,778.39 or \$2,628.11 in addition to his unpaid wages.

Kimmerle also contended that Nationwide had improperly deducted \$42.00 from his pay for health insurance which was terminated at the end of his employment. Based on the evidence in the record, it appears the \$42.00 was for February's premium and that the deduction was proper.

Nationwide also contended that Kimmerle owed \$195.45 for telephone bills at the conclusion of his employment, which he has not paid at this point. Although Kimmerle seemed to concur at hearing that he still owed Nationwide for the phone bills, offsets of wages are not contemplated under the wage payment laws. Nationwide should seek Kimmerle's agreement to any reduction of his award for these charges.

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. Nationwide Auto Transport Inc. violated Mont. Code Ann. § 39-3-204(1) by failing to pay Robert J. Kimmerle wages when due and improperly withholding Kimmerle's wages for damages.

3. Nationwide Auto Transport Inc. owes Kimmerle \$4,778.39 in improperly withheld wages. It also owes Kimmerle a penalty of \$2,628.11 based on Mont. Code Ann. § 39-3-206(1).

VI. ORDER

Nationwide Auto Transport Inc., a Nevada corporation, IS HEREBY ORDERED to tender a cashier's check or money order in the amount of \$7,406.50, representing \$4,778.39 in unpaid wages and \$2,628.11 as a penalty, payable to the claimant, Robert J. Kimmerle, and delivered to the Employment Relations Division, P.O. Box 6518, Helena, Montana 59604-6518 no later than February 20, 2004.

DATED this 22nd day of January, 2004.

DEPARTMENT OF LABOR AND INDUSTRY

By: /s/ ANNE L. MACINTYRE

Anne L. MacIntyre, Chief
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, MCA. Such an application is not a review of the validity of this Order.

1. Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.
2. Based upon the law and the employment agreement, Kimmerle would have been entitled to \$15,670.00, \$10.00 for each car he transported without damage. He made it clear in prehearing proceedings and at hearing that he sought to recover only the portion remaining in the damage fund at the end of his employment. Therefore, this decision awards only the wages claimed, plus statutory penalties.
3. Louis Kuchera also testified that a representative of the Montana Department of Revenue conducted an audit of Nationwide and told the employer that the damage fund arrangement was legal. The Department of Revenue has no involvement with enforcement of wage payment laws, and its representatives have no expertise in this area.