

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

<b>IN THE MATTER OF THE WAGE CLAIM</b>	)	<b>Case No. 931-2001</b>
<b>DOUG ELVBAKKEN</b>	)	
<b>Claimant,</b>	)	
	)	<b>FINDINGS OF FACT;</b>
<b>vs.</b>	)	<b>CONCLUSIONS OF LAW;</b>
	)	<b>AND ORDER</b>
<b>J &amp; S TRANSPORT, LLC,</b>	)	
<b>Respondent.</b>	)	

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**I. INTRODUCTION**

On November 28, 2000, Claimant Doug J. Elvbakken filed a wage claim with the Wage and Hour Unit of the Montana Department of Labor and Industry. The Claimant alleged the Respondent, J & S Transport, LLC, owed him a bonus in the amount of \$3,250.00. The Claimant stipulated that he withdrew his claim for \$75.95 for an overpayment, as that amount was correctly calculated by his employer.

The Respondent appealed the determination of the Wage and Hour Unit that it owed the Claimant \$1,812.11 in wages and penalty. On July 24, 2001, Hearing Officer Gordon D. Bruce held a telephone hearing. The Claimant was present and represented himself. The Respondent was represented by Peter T. Stanley, Attorney at Law. Exhibits A through J were admitted without objections. Exhibits 1 through 8 and 13 through 25 were admitted without objections. Claimant's Exhibit C-1 and Exhibits 9 through 12 were not admitted. The Claimant and Scott Chesarek, an owner and manager of J & S Transport, gave sworn testimony.

**II. ISSUE**

1. Whether the Respondent owes the Claimant wages in bonus pursuant to § 39-3-201, MCA.

**III. FINDINGS OF FACT**

1. J & S Transport, LLC, hired Doug Elvbakken as a truck driver on June 20, 2000, and he worked until October 20, 2000, when he quit his job. Elvbakken's duties involved transporting vehicles to and from certain destinations where he loaded and unloaded them as required. (Testimony of Elvbakken and Scott Chesarek)

2. Scott Chesarek on behalf of J & S offered Elvbakken employment under an oral agreement that his total wages for transporting, loading and unloading vehicles would be 20% of the gross value of the load being transported. (Testimony of Chesarek and Exhibits 29, 30, and 31)
3. Elvbakken agreed to the wage of 20% gross, but requested a fee for loading and unloading the vehicles. Chesarek refused to pay wages other than the 20% of gross, but agreed to place 1% of gross into a pool ("damaged vehicle pool"). (Testimony of Chesarek)
4. J & S informed Elvbakken that the damaged vehicle pool was an amount set aside to cover damages to vehicles that could result from loading and unloading vehicles. However, J & S would pay Elvbakken any surplus (pool money less damages to vehicles) in the pool at year's-end or upon termination of his services. Elvbakken was aware of the conditions of his employment contract, and accepted the job based on the terms set by Chesarek. (Testimony of Chesarek and payment records Exhibits A, B, C, D, E, F, H and I)
5. Beginning with the pay period of August 2, 2000, J & S agreed to change the damaged vehicle pool after Elvbakken persuaded the company to revert to a per car arrangement. The new agreement did not change the original 20% of gross as the entire salary for transporting, loading and unloading vehicles, but set the pool at \$10.00 per vehicle with the same procedure as under the 1% gross pool. (Testimony of Chesarek and Exhibit 30)
6. Following Elvbakken's return to work from a vacation on September 25, 2000, J & S changed the damaged vehicle pool and placed \$5.00 per vehicle into a non-damaged pool for cars undamaged in transit, and paid that directly to Elvbakken with regular wages. In addition, J & S changed the damaged vehicle pool to place \$5.00 in the pool to compensate for total damages. (Testimony of Chesarek and Exhibits A and 31)
7. While Elvbakken was employed, each damaged vehicle pool was set up as an incentive for Elvbakken to not damage vehicles he was transporting. J & S paid Elvbakken the entire amount of his agreed to wages (20% of gross) without any deduction for damages. However, J & S never agreed to pay Elvbakken any part of the damaged vehicle pool unless there was a surplus where the pool exceeded the damages on vehicles. (Testimony of Chesarek and payroll records)
8. At the end of his employment, the amount of money credited to Elvbakken in the undamaged vehicle pool amounted to \$760.40. J & S paid Elvbakken that amount. J & S correctly paid Elvbakken his gross wages and damaged vehicle pool money pursuant to the employment contract. (Testimony of Chesarek and Exhibit 31)

#### **IV. DISCUSSION**

Montana law requires employers to pay employees wages when due and in no event more than 15 days following termination of employment. §§ 39-3-204 and 39-3-205, MCA. Except to set a minimum wage, the law does not establish the amount of wages. The wages due are based on the employment agreement between the parties. Based on the overall record in this matter, J & S paid Elvbakken in full for all wages and bonus earned as computed by J & S. Elvbakken was fully aware at all times during his employment the terms of his wages and bonus under the

employment contract. Indeed, through Elvbakken's urging, J & S changed the plan to accommodate his request for more money.

Here, J & S paid Elvbakken his total wages due at 20% gross for transportation, loading and unloading. The bonus plan under the damaged vehicle pool was not in any way a deduction from Elvbakken's agreed to wages. The bonus was established as an incentive to Elvbakken to avoid damages to vehicles he was transporting. However, Elvbakken was not entitled to any further bonus after the termination of his employment.

An employer cannot withhold wages or any portion thereof due and owing to an employee as wages earned, and apply such wages for damages caused by an employee's negligence during his employment. Attorney General Opinion No. 17, Volume 36 (1975). However, in this matter, J & S never deducted damages from the wages it agreed to pay Elvbakken, which was 20% of gross for transporting, loading and unloading vehicles. Regardless of Elvbakken's contention that J & S withheld bonus money from him in the form of wages, a bonus is binding upon an employer only after requirements of a bonus policy have been fulfilled by the employee. *Compton v. Shopko Stores, Inc.*, 93 Wisc.2d 613, 287 NW2d 720, 726 (1985).

The record reflects that J & S correctly paid Elvbakken for all wages and bonuses he had earned.

## **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 § 39-3-201 et seq. MCA. *State v. Holman Aviation*, 176 Mont. 31, 575 P.2d 925 (1978).

2. Doug Elvbakken has been paid in full pursuant to his employment contract and has failed to show that he is entitled to any additional bonus money under the conditions of hire.

## **VI. ORDER**

Doug Elvbakken's wage claim is hereby dismissed with prejudice.

DATED this 17th day of September, 2001.

DEPARTMENT OF LABOR & INDUSTRY  
HEARINGS BUREAU

By: /s/ GORDON D. BRUCE  
GORDON D. BRUCE  
Hearing Officer

NOTICE: You are entitled to judicial review of this final agency decision in accordance with § 39-3-216(4), MCA, by filing a petition for judicial review in an appropriate district court within 30 days of service of the decision. See also § 2-4-702, MCA.