

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

IN THE MATTER OF THE WAGE CLAIM) Case Nos. 814-2004 & 1724-2004
OF DAVID W. GAGEBY,)
Claimant,) FINDINGS OF FACT;
) CONCLUSIONS OF LAW;
vs.) AND FINAL AGENCY DECISION
)
G & G AUTO BROKERS, INC., a Montana)
corporation,)
Respondent.)

I. INTRODUCTION

Claimant David Gageby (David) appeals a determination of the Wage and Hour Unit which found that his former employer, G & G Auto Brokers (G & G) did not owe him any additional commissions. In case number 814-2004, David contends that (G & G) owes him \$11,418.00 in commissions for sales completed between April 2002 and October 31, 2002. In case number 1724-2004, David asserts G & G owes him \$2,330.00 in commissions for sales completed during June, July, and August, 2003.

Hearing Examiner Gregory L. Hanchett convened a contested case hearing in this matter on September 21 and September 30, 2004. David Gageby represented himself. Wayne Gageby appeared on behalf of G & G Auto Brokers. David and Wayne both testified under oath. In addition, Craig McCarthy, Todd Costa, Charles Dishner, Charles Horten, Dale Holmes, Joyce Kramer, Eric Hyatt, Dorothy Gageby, Carla Gageby, Terry Hocking, Stephen Gageby, Rick Scarbourough, and Dan Waldman appeared and testified under oath.

The parties stipulated to the admission of Documents 1 through 319 (all of the documents contained in the Wage and Hour Unit file). Respondent offered into evidence Exhibits 1 through 26. The hearing examiner admitted Respondent's documents 2, 3, 4, 13, 14, 15, 16, 16B, 17, 23, 24 and 26. Respondent's remaining exhibits were excluded. In addition, the photocopies of checks received by First Bank of Montana showing the

commission and expense reimbursement checks which G & G Auto paid to David Gageby were admitted into evidence by stipulation of the parties. Based on the evidence presented and the arguments made at the hearing, the hearing examiner makes the following findings of fact, conclusions of law, and final order in this matter.

II. ISSUE

Does G & G Auto Brokers owe David Gageby additional commissions as claimed in his complaint and penalty as required by law?

III. FINDINGS OF FACT

1. David worked for G & G Auto Brokers selling automobiles from April, 2002 until August 7, 2003. G & G fired Gageby on August 7, 2003. Wayne Gageby, Jr., (David's father) was at all times relevant to this proceeding the president of G & G Auto.

2. David worked for G & G pursuant to a "Work for Hire Agreement" signed by both David and Wayne sometime prior to February 1, 2002. " Respondent's Exhibit 3. The agreement provided that David would receive \$150.00 commission for each car bought on a "Buy Here/ Pay Here" basis. For every cash sale, he would receive \$150.00 if the selling gross payable on the particular sale was less than \$1,000.00. If the selling gross payable exceeded \$1,000.00, he would receive 25% of the gross payable.

In addition, under the agreement David was to receive \$75.00 for each repossession of a vehicle that occurred in the Butte area. He was also to be compensated \$125.00 for each car repossession outside the Butte area plus 30 cents per mile in mileage reimbursement.

3. At some point in time, David proposed a different pay plan to Wayne. Document 155. Wayne, however, rejected David's proposed pay plan.

4. G & G Auto Brokers paid all commissions due to David for sales made between November, 2002 and May, 2003.

5. Between April, 2002 and October 31, 2002, G & G Auto paid David a total of \$22,210.89 through the following checks:

Check #	Date	Amount
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1096	4/07/02	\$ 590.00
1098	4/07/02	378.95
1099	4/07/02	342.25
1100	4/07/02	400.00
1135	4/13/02	877.89
1168	4/22/02	1,000.00
1180	4/27/02	1,904.17
1254	5/16/02	500.00
1315	6/06/02	2,000.00
1334	6/16/02	1,092.56
1358	6/23/02	2,000.00
1394	7/04/02	657.34
1399	7/06/02	275.00
1412	7/11/02	1,000.00
1425	7/19/02	730.00
1484	8/12/02	1,000.00
1498	8/19/02	538.42
1516	8/23/02	1,000.00
1550	9/06/02	524.31
1560	9/10/02	1,500.00
1590	9/18/02	1,500.00
1635	10/04/02	1,500.00
1671	10/18/02	250.00

1689	10/26/02	150.00
1694	10/31/02	<u>500.00</u>
Total:		\$22,210.89

6. The above checks represented both payment for commissions and some expense reimbursement.

7. During June, July, and August, 2003, G & G paid David a total of \$3,427.50 as follows:

Check #	Date	Amount
2142	6/04/03	\$ 200.00
2145	6/09/03	260.00
2149	6/11/03	200.00
2183	6/25/03	1,000.00
2199	7/11/03	488.50
2200	7/12/03	100.00
2206	7/14/03	429.00
2219	7/22/03	400.00
2226	7/28/03	200.00
2237	7/31/03	<u>150.00</u>
Total:		\$ 3,427.50

8. G & G's sales journal (Documents 147, 148, and 149) reflects the individual car sales made by G & G during the time period of April through October, 2002. In addition, the journal reflects the amount of commission due for each sale. In this case, the monthly commissions due during those months were as follows:

<u>Month/year</u>	Amount Due
April, 2002	\$ 2,763.00

May, 2002	2,640.00
June, 2002	3,045.00
July, 2002	2,675.00
August, 2002	2,905.00
September, 2002	2,350.00
October, 2002	<u>2,300.00</u>
Total:	\$18,678.00

9. During the months of April, 2002 through October, 2002, David received \$22,210.89 in commission and reimbursement. During that same period, he earned \$18,678.00 in commissions.

10. The G & G Sales journal shows that David earned commissions of \$1,430.25 for sales made during June, 2003 and \$675.00 for sales made during July, 2003. During this same period David was paid a total of \$3,427.50.

IV. OPINION (1)

Montana law requires that employers pay wages when due, in conformity with the employment agreement. Mont. Code Ann. § 39-3-204. 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" are money the employer owes an employee, including 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.

David bears the burden of proof in this matter to show by a preponderance of the evidence that he was entitled to the commissions he claims he is due. *Berry v. KRTV Communications* (1993), 262 Mont. 415, 426, 865 P.2d 1104, 1112. *See also, Marias Health Care Services 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 the plaintiff failed to meet her burden of proof to show that she was not compensated in accordance with her employment contract).

David's sole contention in this matter is that he has been shorted commissions for car sales that he is due. He does not

contend that he was improperly reimbursed for expenses and repossession work.

David has failed to meet his burden of proof in this case. David asserts that he is due substantial sums of additional commissions, but he has produced no substantial evidence to support that claim. Moreover, it stretches credulity to argue, as David does, that for a period of six months G & G failed to pay him his commissions and then suddenly, for seven months straight (November, 2002 through May, 2003), G & G never missed any commission payments.

The substantial evidence in this matter (testimony of Wayne Gageby, Dorothy Gageby, Terry Hocking, the sales journals from G & G Auto, and the copies of the negotiated checks that G & G paid to David) shows that David received all payment for commissions due to him during the time periods in question. This is consistent with the testimony of the former and present employees and independent contractors who uniformly stated that they were properly paid by G & G for their work. Indeed, the journals show that for April through October, 2002, David was paid \$22,210.89 in commissions and expense reimbursement. That amount far exceeds the \$18,678.00 amount due to him on commissions. And, while it is clear that not all of the \$22,219.60 is commission payment, there is no substantial evidence to suggest that David was shorted on the commissions due him. The journals also show that David received \$3,427.50 in payments for his sales in June and July, 2003. During this time, his commissions totaled just over \$2,100.00. There is simply no evidence in this case to suggest that David did not receive all commissions he was due.

V. CONCLUSIONS OF LAW

1. The State of Montana and the Commissioner of the Department of Labor and Industry have jurisdiction over this complaint. Mont. Code Ann. § 39-3-201 *et seq.* *State v. Holman Aviation* (1978), 176 Mont. 31, 575 P.2d 925.

2. David has failed to prove by a preponderance of the evidence that G & G Auto owes him additional commissions as alleged in his complaints.

VI. ORDER

Based on the foregoing, David Gageby's complaints in case numbers 814-2004 and 1724-2004 are dismissed.

DATED this 16th day of December, 2004.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: 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 service of the decision. See also Mont. Code Ann. § 2-4-702.

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