STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM OF MICHAEL R. LEE,	)	Case No. 411-2009
Claimant,	)	**FINDINGS OF FACT; CONCLUSIONS OF LAW; AND ORDER**
vs.	)	
GENESIS, INC., a Montana Corporation,	)	
Respondent.	)	

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I. INTRODUCTION

Claimant Michael Lee appeals from a Wage and Hour Unit Determination which dismissed his wage claim against Respondent Genesis Troy Mine. The Wage and Hour Unit found that Lee was not due a safety bonus as the bonus was entirely discretionary with the employer and Lee had not met the terms of earning the bonus.

Hearing Officer Gregory L. Hanchett held a contested case hearing in this matter on June 2, 2009. The parties stipulated to holding the hearing by telephone. Lee, Vic White, Steve Lloyd, Ben Schnetter, Joe Lee, Bob Burnhart, and Lloyd Donney all testified under oath. Documents 1 through 89 were admitted into evidence by stipulation. Based on the arguments and evidence adduced at hearing, the Hearing Officer makes the following findings of fact, conclusions of law, and recommended decision.

II. ISSUES

Is Lee due additional wages as alleged in his wage complaint and penalty as provided by law?

II. FINDINGS OF FACT

1. The employer operates a mine in Troy, Montana. The employer, being engaged in Interstate Commerce as defined in the Montana Wage and Hour Act, is subject to the provisions of the Fair Labor Standards Act (FLSA).

2. Lee began working for the employer on January 23, 2007. He was fired from his position on August 3, 2008.

3. The employer had a policy of providing employees with a safety bonus known as a "no lost time accident" bonus. In essence, for every six months of operation with no "lost time"

industrial accidents, each employee would receive a bonus of $500.00. For every 12 consecutive months no "lost time" industrial accidents, the employees would receive a bonus of $1,000.00. The bonus in question in this case is the bonus that would be due to the employees between August 1, 2007 and July 31, 2008.

4. The plant was "no stop" accident free between August 1, 2007 and February 2008. At a meeting held on February 18, 2008, in conformity with the policy, Lee and his fellow employees received a $500.00 bonus. At the meeting, the employees were told that if they maintained their record of no lost time accidents, they would get another bonus at the end of the next six months.

5. Until April 2008, the employer had only an oral agreement with the employees regarding the criteria for an employee to be able to receive the bonus. The agreement did not contain any proviso that it was entirely discretionary and could be withdrawn at any time or that it would be paid out only to employees who were employed on the date that the bonus checks were paid out.

6. In April 2008, the employer created a written policy regarding the "no lost time accident" bonus. The written policy states:

> The purpose of this safety incentive is to reward employees for the entire operation for completing 12 months without a loss time accident. This incentive is entirely at the discretion of the company and may be changed, cancelled, or modified at any time.
>
> Employees that have worked the full year will get the incentive.
>
> Employees that have been employed less than a year will get a fraction of the months worked. In calculating the bonus, if the employee was employed on, or prior to the 15th of the month, they will be given credit for the month.
>
> Employee must be employed on the check date.

* * *

Document 63.

7. The written policy contains two additional requirements which are material to the dispute in this case that were not present under the oral agreement for the no lost time bonus. First, the written requirement indicated that it was essentially completely discretionary with the employer. Secondly, the written policy purported to add a requirement that the employee be employed by the company on the date that the bonus check was disbursed to the employees.

8. When Steve Lloyd, Lee's direct supervisor, spoke to his charges about the incentive, he did not mention the particulars of the written policy such as the need to be employed on the

date that the check was written nor did he mention that the bonus could be withdrawn at any time as is indicated in the written policy.

9. The plant was "no lost time" accident free between March 2008 and July 31, 2008. As a result, the employees, including Michael Lee, became eligible to receive the no lost time accident bonus.

10. On August 20, 2008, all employees except Lee (who had been discharged on August 3, 2008) received a $1,000.00 bonus for no stop time accidents for the time period of August 1, 2007 through July 31, 2008.

11. Because Lee was not employed on the date that the bonus checks were disbursed, the employer did not pay Lee his bonus even though he worked through July 31, 2008 with no lost time accidents.

12. Penalty on the unpaid amount is $550.00 ($1,000.00 x .55=$550.00).

IV. DISCUSSION[1]

A. *Lee is Due the $1,000.00 Bonus.*

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 bonuses if the payment of such bonuses are required by the employment agreement. Mont. Code Ann. § 39-3-201(6).

Lee bears the burden of proof in this matter to show by a preponderance of the evidence that he is entitled to the additional wages he claims. *Berry v. KRTV Comm.* (1993), 262 Mont. 415, 426, 865 P.2d 1104, 1112. *See also, Marias Health Care Services v. Turenne*, ¶¶13, 14, 2001 MT 127, 305 Mont. 419, 28 P.3d 494 (holding that the 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).

Where a bonus is only payable in the sole discretion of the employer, it is in the nature of a gratuity, not recoverable in a wage claim under the Montana Wage and Hour Act. *Talon Plumbing and Heating v. Bears*, ¶31, 2008 MT 376, 346 Mont. 499, 198 P.3d 213. To be recoverable under wage payment laws, a bonus must have the character of compensation for work performed. *See, e.g., Pyle v. National Wine and Spirits Corp.*, 637 N.E. 2d 1298, 1300 (Ind. App, 1994) (a bonus can be considered a wage under the wage and hour laws if "it is compensation for time worked and is not linked to a contingency such as the financial success of the company"); *State ex rel. Nilsen v. the Oregon State Motor Association* (1967), 248 Ore. 133,

[1]Statements of fact in this discussion are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

432 P.2d 512. Moreover, the conditions for earning the bonus must be fulfilled or such bonus will not be recoverable under the wage and hour act. *See, e.g., Berry v. KRTV* (1993), 262 Mont. 415, 426-27, 865 P.2d 1105, 1101-02 (finding that while the employment agreement required the employer to pay the claimant a bonus if the employer's television ratings were higher than those of its competitors, the claimant failed to prove that the employer's ratings were in fact higher than those of its competitors and therefore the bonus was not due to the claimant).

Lee contends in his complaint that he was due the no "stop work" bonus paid to other employees because the plant had no "stop work" accidents during the period of August 1, 2007 through July 31, 2008 and he worked through that entire period. The respondent counters Lee's argument by pointing out that Lee did not comport with all criteria for receiving the bonus because he was not employed on the date that the bonus was paid out. In reply, Lee argues and in fact presented substantial evidence that the only conditions precedent to receiving the bonus was working through the time period with no "stop work" accidents. He asserts that there was no requirement that the employee be employed on the date of the disbursement of the bonus nor was there any discretion retained by the employer as to whether or not to pay out the bonus. Lee further argues that the written terms of the bonus contained in Document 63 were contrived by the employer after the fact to justify denying him the $1,000.00 bonus that it paid out to the other employees.

At the investigative level, the parties focused on the requirements of the Fair Labor Standards Act which pertain to whether or not a bonus must be included in determining the regular rate of pay under 29 CFR 778.21. The question raised in Lee's complaint, however, was whether or not the bonus was compensation he was due, not whether the bonus must be included in determining his regular rate of pay for purposes of determining overtime pay. As such, the terms of the FLSA do not apply to the determination of this case. Rather, the determination must be made by looking to the Montana Wage and Hour Act. *See, for its persuasive value only, Hall v. Wheelsmith Fabrications, Inc.*, 2001 ML 374, 2001 Mont. Dist. LEXIS 2712 (1st Judicial District Court, 2001) (holding that the FLSA "is not the law on whether a bonus must be paid. Rather, the [FLSA] governs how a bonus is to be treated when determining an employee's regular rate of pay for purposes of overtime compensation.")

The Montana Wage and Hour rules which pertain to calculating regular rates, while not directly applicable to this case, do provide some insight into the types of bonuses that are considered to be wages under the Montana Wage and Hour Act. Promised bonuses are not excluded from determining the regular rate of pay. As the rules indicate, "Bonuses which are announced to employees to induce them to work more steadily or more rapidly or more efficiently or to remain with the firm are regarded as part of the regular rate of pay." Admin. R. Mont. 24.16.2517(4)(c). Indeed, under the Montana rules, in order to be considered as a discretionary bonus, and therefore not includable in determining the regular rate of pay, the employer must retain discretion "both as to the fact of payment and as to the amount until a time quite close to the end of the period for which the bonus is paid." Admin. R. Mont. 24.16.2517(4)(b).

The real issue here is whether the employment agreement made the bonus in the nature of compensation for Lee's work and whether Lee met the terms of the agreement thus entitling him to the bonus as part of his employment compensation. To make this determination, the fact finder must first ascertain the terms of the agreement and then determine whether Lee met those terms.

It is apparent from the credible testimony of Michael Lee, Joe Lee, and Ben Schnetter that there were only two criteria for obtaining the no lost time accident bonus: (1) having no lost time accidents and (2) being employed through the end of the no lost time accident period, July 31, 2008. The testimony of these three witnesses convinces the hearing officer that there was no requirement that the employee be employed on the date that the checks were disbursed. Likewise, the company had no discretion in the paying of the bonus provided that the one year period was completed with no lost time accidents. The bonus was not discretionary with the employer provided the criteria were met. The bonus was closely related to the wages and was in the nature of compensation for maintaining an accident free workplace between August 1, 2007 and July 31, 2008.

There was no written criteria respecting the bonus until April 2008, when the criteria were set forth in Document 63. By that time, however, the employees had kept a perfect safety record in substantial reliance upon the fact that only two criteria existed for obtaining the bonus (remaining employed through the end of the period and having no lost time accidents). As the employees had performed their end of the agreement in substantial reliance upon the only requisite criteria of no lost time accidents through July 31, 2008, the employer could not unilaterally change the terms of the agreement by adding in the additional requirement contained in Document 63 that the employee must be employed at the time the bonus check was disbursed. *Cf, Langager v. Crazy Creek Products, Inc.*, 1998 MT 44, 287 Mont. 445, 455-56, 954 P.2d 1169 (holding that an employer could not add a condition subsequent to the employment agreement to divest the employee of vacation benefits which had already accrued). The safety bonus was promised to the mine employees at least by the time of the February 2008 meeting and payment was not discretionary provided that no lost time accidents occurred and the employee stayed employed through the end of July 31, 2008.

There is no dispute that Lee met the two criteria of obtaining the bonus. He was employed beyond the end of the July 31, 2008 period and there were no lost time accidents during that period. Accordingly, Lee has demonstrated preponderantly that he is due the $1,000.00 bonus for no lost time accidents.

B. *Lee Is Due Penalty.*

Montana's Administrative Rules applicable to wage and hour cases require imposition of a penalty when wages are found to be due and unpaid. Where wages other than minimum or overtime wages are found to be due, the applicable administrative rules require the imposition of a 55% penalty. Admin. R. Mont. 24.16.7566. Here, Genesis owes Lee a 55% penalty as noted in the Findings of Fact.

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. Genesis owes Lee $1,000.00 in unpaid wages and penalty of $550.00 on the unpaid regular wages.

VI. ORDER

Genesis is hereby ORDERED to tender a cashier's check or money order in the amount of $1,550.00, representing $1,000.00 in unpaid wages and $550.00 in penalty, made payable to Michael Lee, and mailed to the Employment Relations Division, P.O. Box 201503, Helena, Montana 59620-1503, no later than 30 days after service of this decision. Genesis may deduct applicable withholding from the wage portion but not the penalty portion of the amount due.

DATED this 22nd day of July, 2009.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ 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.

The notice of appeal shall consist of a written appeal of the decision of the hearing officer. It must set forth the specific errors of the hearing officer and the issues to be raised on appeal. Notice of appeal shall be mailed to:

Board of Personnel Appeals
Department of Labor and Industry
P.O. Box 201503
Helena, MT 59620-1503

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. Such an application is not a review of the validity of this Order.