STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM OF OLIVER W. ARLINGTON,	)	Case No. 788-2010
Claimant,	)	**FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER AND NOTICE OF JUDICIAL REVIEW RIGHTS**
vs.	)	
MILLER'S TRUCKING, INC., a Montana Corporation,	)	
Respondent.	)	

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I. INTRODUCTION

Claimant Oliver W. Arlington appealed from a Wage and Hour Unit determination and redetermination that found Miller's Trucking, Inc. did not owe him any unpaid wages during his employment with Miller's.

Hearing Officer Terry Spear convened a contested case hearing in this matter in Helena, Montana, on November 18, 2010. Arlington appeared and acted on his own behalf. Brian J. Smith, Garlington, Lohn & Robinson, PLLP, represented Miller's, which appeared through Susan Miller, its designated representative. Bryan Arlington, Oliver Arlington, Bill Huttinga, Mike Ihly, Susan Miller, Tony Miller, Cody Reich, Darrell Ward (by telephone), and Scott Wozny testified under oath. Exhibits 9-10, 20-49, 51, 78, 103, 106, 111, 118-158, 168-69, 178-79, 194 and 425-523 were admitted into evidence. Based on the evidence, exhibits, authorities, and arguments presented, the Hearing Officer now issues the following findings, conclusions, and final order.

II. ISSUE

The determinative issue in this case is whether Arlington is due unpaid wages as alleged in his complaint. A full statement of the issues appears in the Pre-Hearing Order of November 8, 2010, herein.

III. FINDINGS OF FACT

1. Oliver W. Arlington worked for Miller's Trucking, Inc., a Montana corporation, as a log truck driver and loader operator from September 2008 until

mid-August 2009, for which he earned 25% of the "load rate" as calculated by Miller's. The terms of his employment agreement were discussed and agreed upon, but were never reduced to writing. There is no substantial and credible evidence that Miller's either made any binding representations about the monthly or annual wage that Arlington could reasonably expect to earn, or guaranteed any minimum monthly or annual wage that Arlington would earn.

2. Miller's had a United States Department of Transportation permit and number to operate. Miller's trucks were registered as apportioned for interstate travel in Idaho, Montana, Washington, and Wyoming.

3. Arlington drove and performed routine maintenance and safety checks on a truck owned by Miller's. He picked up logs from points of origin in Montana (primarily if not exclusively in the Roundup, Montana, area) and delivered them to a destination (a railroad station in Laurel) also within Montana, by routes entirely within Montana, with most if not all of his driving upon public roads in Montana.

4. Arlington's operation and maintenance of one or more of Miller's trucks, with which Miller's engaged in interstate as well as intrastate transportation of goods, was activity that directly affected the safety of operations of motor vehicles on public highways.

5. From the railroad station, the logs were transported within Montana to Smurfit-Stone, in Frenchtown, Montana. Smurfit-Stone removed the bark from the logs and shipped the bark out of Montana. It made the logs into fiber paper and shipped the fiber paper out of Montana.

6. On November 3, 2009, Arlington filed the wage claim involved in this case with the Commissioner of Labor and Industry, alleging that he was owed $25,568.32 in regular wages and $46,101.81 in overtime wages by Miller's.

IV. DISCUSSION

The state, acting through the Department of Labor and Industry, has the power to adjudicate claims for unpaid wages. Mont. Code Ann. § 39-3-201 ***et seq***.; *State v. Holman Aviation*, 176 Mont. 31, 575 P.2d 925, 925-26 (1978).

Arlington did not prove that Miller's entered into an agreement with him that he would earn any specific or specific guaranteed monthly or annual wage. His testimony to the contrary was simply not credible.

An oral contract defining compensation for the employee's work is entirely acceptable for purposes of a wage and hour claim. The question becomes what the agreement regarding compensation was. Obviously, the proof of the terms of the agreement will be based upon testimony and other evidence about what the parties

agreed to and what the performance of that agreement looked like. It will ultimately be a decision of fact about who credibly proved their contentions with substantial evidence. *Talon Plumbing & Heating, Inc. v. D.L.I.*, 2008 MT 376, 346 Mont. 499, 198 P.3d 213; *Ramsey v. Yellowstone Neurosurgical Assocs., P.C.*, 2005 MT 317, 329 Mont. 489, 125 P.3d 1091.

In the present case, it is a matter of credibility. Arlington testified that his employer, through Tony Miller, gave him an oral guarantee, at the time of hiring, of earnings of $60,000.00 to $70,000.00 per year driving for Miller's. Tony Miller adamantly denied making any guarantee. This Hearing Officer finds it incredible that this employer, through one of its owners and operators, would give such a guarantee to a new hire. The evidence in this case established that such a guarantee would have exposed Miller's to substantial liability above and beyond the wages that at least some of its employees could actually earn. Without corroborative evidence, Arlington's testimony is insufficient to establish the oral guarantee. Arlington has not proved that, based upon an alleged binding oral guarantee at the time of hiring, he earned regular wages above and beyond the wages already paid him by Miller's.

For Arlington's overtime claim, overtime requirements under Montana law and the Fair Labor Standards Act ("FLSA") are inapplicable to employees over whom the Secretary of Transportation establishes qualifications and maximum hours of service. 49 U.S.C. 31502; Mont. Code Ann. § 39-3-406(2)(a); 29 U.S.C. 213(b)(1). This overtime exemption applies to employees who (1) work for motor carriers whose transportation of property by motor vehicles is subject to the Secretary's jurisdiction and (2) engage in activities of a character directly affecting the safety of operation of motor vehicles transporting passengers or property in interstate commerce within the meaning of the Motor Carrier Act ("MCA"). 29 C.F.R. 782.2(a). The MCA exemption is to be construed narrowly against employers and applies only to those falling "plainly and unmistakably within [the] terms and spirit" of the exemption. *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 396 (1960). Miller's has the burden of proving the MCA exemption applies. *Arnold* ***at*** 394 n.11; *Donovan v. Nekton, Inc.*, 703 F.2d 1148, 1151 (9th Cir. 1983).

Miller's proved that it was subject to the jurisdiction of the Secretary by establishing it held a valid permit from the Department of Transportation to transport interstate in Idaho, Montana, Washington, and Wyoming. Miller's cited authority stating this proposition. In *Baez v. Wells Fargo Armored Serv. Corp.*, 938 F.2d 180, 182 (11th Cir., 1991), the court held:

> . . . . Wells Fargo, which holds a permit from the Interstate Commerce Commission, is a "contract carrier." As such, Wells Fargo is subject to the Secretary's jurisdiction under

> the Motor Carrier Act. . . . . In fact, the permit issued by the ICC indicates that jurisdiction has already been exercised. . . . . Thus, it is clear that Wells Fargo is a motor carrier subject to the Secretary's jurisdiction. [***Citations omitted.***]

The same reasoning applies in the present case. Miller's has proved it is subject to the jurisdiction of the Secretary.

29 C.F.R. 782.2(b)(2) defines the second requirement for the overtime exemption:

> The exemption is applicable, under decisions of the U.S. Supreme Court, to those employees and those only whose work involves engagement in activities consisting wholly or in part of a class of work which is defined: (i) As that of a driver, driver's helper, loader, or mechanic, and (ii) as directly affecting the safety of operation of motor vehicles on the public highways in transportation in interstate or foreign commerce within the meaning of the Motor Carrier Act. . . . . In determining whether an employee falls within such an exempt category, neither the name given to his position nor that given to the work that he does is controlling . . . ; what is controlling is the character of the activities involved in the performance of his job. [***Citations omitted.***]

When working for Miller's, Arlington did not drive outside of Montana. However, Miller's is still entitled to the benefit of the MCA exemption from overtime wage laws, if it proved that at least some of Arlington's activities were "involved in interstate commerce" as that phrase is defined by law.

Arlington's driving, transporting the logs within Montana, could be enough to bring him within the overtime exemption if the goods he carried actually moved in interstate commerce, at some time either before or after his transport of them within Montana. ***E.g.***, 29 C.F.R. § 782.7(b)(1) (interstate commerce requirement satisfied when the goods transported within one state had before or would thereafter move in interstate commerce); *Bilyou v. Dutchess Beer Distributors, Inc.*, 300 F.3d 217, 223 (2nd Cir. 2002) (even if a carrier transports goods within one state, the interstate commerce requirement for exemption is satisfied if that intrastate transport is one leg of a "practical continuity of movement in the flow of interstate commerce"); *Reich v. A.D.S., Inc.*, 33 F.3d 1153, 1155, n. 3 (9th Cir. 1994) (wholly intrastate transport that is part of "continuing transportation" that includes interstate transport meets the overtime exemption requirements); *UTU Local 759 v. O.N.E.B., Inc.*, 111 F. Supp. 2d 514 (D.N.J. 2000) (bus company employees subject to exemption

based on company's participation in through-ticketing arrangements where passengers who purchased bus passes for intrastate transportation could also use same pass for transportation interstate and were entitled to reduced rates for certain interstate travel).

After Arlington delivered the logs to Laurel, Montana, and the railroad took the logs from there to Frenchtown, Montana, Smurfit-Stone processed the logs into bark stripped off of them and fiber paper made out of them after the bark was stripped. Those two results of the processing were then shipped interstate.

Arlington argued that these facts, which on their face brought him within the overtime exemption, actually precluded the exemption, under example number three in 29 C.F.R. 782.7(c):

> The wage and hours provisions of the Fair Labor Standards Act [as opposed to provisions of the Motor Carrier Act] are applicable not only to employees engaged in commerce, as defined in the act, but also to employees engaged in the production of goods for commerce. Employees engaged in the "production" of goods are defined by the act as including those engaged in "transporting, or in any other manner working on such goods . . . or in closely related process or occupation directly essential to the production thereof, in any State." (Fair Labor Standards Act, sec. 3(j), 29 U.S.C., sec. 203(j), as amended by the Fair Labor Standards Amendments of 1949, 63 Stat. 910. See also the Division's Interpretative Bulletin, part 776 of this chapter on general coverage of the wage and hours provisions of the act.) Where transportation of . . . property by motor vehicle between places within a State falls within this definition, and is not transportation in interstate or foreign commerce within the meaning of the Motor Carrier Act because movement from points out of the State has ended or because movement to points out of the State has not yet begun, the employees engaged in connection with such transportation (this applies to employees of common, contract, and private carriers) are covered by the wage and hours provisions of the Fair Labor Standards Act and are not subject to the jurisdiction of the Secretary of Transportation. Examples are: . . . . (3) drivers who transport goods from a producer's plant to the plant of a processor, who, in turn, sells goods in interstate commerce, the first producer's goods being a part or ingredient of the second producer's goods . . . .

On the face of the regulation, although it is a close case, that example describes a distinguishable process from that in this case. The goods Arlington transported within Montana were logs. After his transport, the railroad transported those logs, still within Montana. Smurfit-Stone then processed those logs into bark and fiber paper. The bark and fiber paper was then shipped interstate. The logs were not a part or ingredient in a product assembled or produced by Smurfit-Stone and then sold in interstate commerce. "Production" of new saleable goods had not yet occurred. Instead, pieces of the logs were shipped interstate for production of new saleable products after arrival. Even if example number three in 29 C.F.R. 782.7(c) applied to Arlington, his routine maintenance and safety checks on a truck licensed for interstate commence, owned and operated by an employer regulated by the Secretary of Transportation, and done for use of the truck on public highways in Montana, would still constitute activities in interstate commerce.

Miller's established that Arlington's driving, routine maintenance and safety checks, all involving a truck or trucks licensed for interstate commerce and owned and operated by an employer regulated by the Secretary of Transportation, constituted activities in interstate commerce. The overtime exemption applies.

V. CONCLUSIONS OF LAW

1. The State of Montana and the Commissioner of the Department of Labor and Industry have jurisdiction over Arlington's wage claim.

2. Arlington did not prove that Miller's entered into an agreement with him that in his driving job he would earn at least $60,000.00 to $70,000.00.

3. Miller's provided that Arlington's employment was within the overtime exemption of the Motor Carrier Act because its transportation of property by motor vehicles was subject to the Secretary's jurisdiction, and Arlington engaged in activities of a character directly affecting the safety of operation of motor vehicles transporting passengers or property in interstate commerce. He is not entitled to overtime wages.

VI. ORDER

Oliver W. Arlington's claim against Miller's Trucking, Inc. is dismissed.

DATED this 9th day of March, 2011.

DEPARTMENT OF LABOR AND INDUSTRY

By: /s/ TERRY SPEAR
Terry Spear, Hearing Officer
Hearings Bureau

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NOTICE OF JUDICIAL REVIEW RIGHTS: 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.