

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

IN THE MATTER OF THE WAGE CLAIM)	Case No. 849-2017
OF RIANA J. HATTEM,)	
)	
Claimant,)	
)	
vs.)	FINAL AGENCY DECISION
)	
HIGH ALTITUDE ENTERPRISES, INC.,)	
a Montana Corporation d/b/a THE TRAP)	
LINE CAFÉ AND GRILL,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

1. On December 5, 2016, Claimant Riana J. Hattem (Hattem) filed a claim with the Wage and Hour Unit of the Montana Department of Labor and Industry (Wage and Hour Unit) alleging Respondent High Altitude Enterprises, Inc. (High Altitude) failed to pay her wages of \$324.28 from October 9 through 22, 2016.

2. High Altitude, through its representative, Matt Kinsella, responded to the Wage and Hour Unit’s request for information, stating that the wages sought by Hattem had been withheld as restitution for alleged theft.

3. On July 24, 2017, the Wage and Hour Unit issued a Determination finding High Altitude owed Hattem \$324.28 in wages. A 15% penalty of \$48.64 was assessed if High Altitude paid by August 8, 2017. If no payment was made by High Altitude within that timeframe, the penalty increased to 55%, or \$178.35.

4. High Altitude made no payments in accordance with the July 24, 2017, Determination.

5. On August 5, 2017, High Altitude timely appealed the Wage and Hour Unit’s Determination and requested a hearing with the Office of Administrative Hearings (OAH).

6. On November 8, 2017, OAH issued a Notice of Hearing and Telephone Conference informing the parties that a telephone scheduling conference would be held on November 16, 2017. The Notice stated the issue was “. . . whether High Altitude Enterprises, Inc., a Montana corporation d/b/a The Trap Line Café & Grill, owes wages for work performed, as alleged in the complaint filed by Riana J. Hattem, and owes penalties or liquidated damages, as provided by law.”

7. The November 8, 2017, Notice also stated as follows:

5. **RIGHT TO LEGAL COUNSEL.** Each party has the right to be represented by an attorney. Individuals are not required to be represented by an attorney. Corporations, partnerships, limited liability companies (LLCs), and similar entities are required to be represented by an attorney pursuant to Admin. R. Mont. 1.3.231(2). Any party that is represented by an attorney must hire and pay for that counsel.

(Emphasis in original.)

8. Due to a scheduling conflict on the part of the Hearing Officer, on November 20, 2017, an Order Resetting Telephone Conference was sent to the parties, advising them that the scheduling conference had been moved from November 16, 2017, to November 29, 2017.

9. On November 29, 2017, Hattem participated in the scheduling conference on her own behalf, and Matt Kinsella (Kinsella) participated in the scheduling conference as High Altitude’s representative. Kinsella was advised that, as a corporation, High Altitude would need to be represented by counsel pursuant to Montana law. Kinsella acknowledged his awareness of the need to hire counsel in court proceedings, but indicated he was unaware he needed to do so for proceedings with OAH. In order to give Kinsella an opportunity to hire counsel and to economize resources such that whatever schedule the parties agreed to would also work with new counsel’s schedule, the Hearing Officer delayed proceeding with the scheduling conference at that time.

10. Having received no notice of appearance from counsel for High Altitude, on December 6, 2017, another Order Setting Scheduling Conference was sent to the parties, setting a new scheduling conference for December 18, 2017.

11. On December 18, 2017, Hattem participated in the scheduling conference on her own behalf, and Kinsella participated in the scheduling conference as High

Altitude's representative. Upon inquiry from the Hearing Officer and an admonition that High Altitude would not be able to participate in the proceedings without counsel, Kinsella advised that High Altitude had not yet retained counsel but that he was working on it.

12. On December 20, 2017, OAH issued a Scheduling Order. Contained in that Scheduling Order was the following statement: "The respondent was advised that as a corporation it must be represented by an attorney licensed to practice law in the State of Montana. The attorney must submit a Notice of Appearance to the Office of Administrative Hearings." The Scheduling Order also stated that if the appellant, High Altitude, failed to appear at the hearing, OAH would issue an order affirming the Wage and Hour Unit's Determination.

13. Based upon representations made to OAH by Kinsella that he wished to settle Hattem's claim but was unable to communicate with her, on March 5, 2018, a status conference was held. Attempts were made to contact Kinsella at both his cell phone and work numbers and a message was left on his cell phone, but he was unavailable. Kinsella contacted OAH later that day and was informed by staff that the case would proceed as scheduled.

14. No final contentions, exhibit or witness lists, or any other related documents were filed by High Altitude as required by the Scheduling Order.

15. The final pre-hearing conference was held as scheduled on March 16, 2018. Hattem participated on her own behalf, but after attempts were made to contact Kinsella at both his cell phone and work numbers, he was unavailable. The Hearing Officer left Kinsella a voicemail reminding him of the conference, but no response was received.

16. Based on High Altitude's failure to obtain counsel, Kinsella's unavailability, Hattem's agreement, and the need to economize resources, the Hearing Officer determined at the final pre-hearing conference that the hearing in the matter would be held telephonically, rather than in person. Kinsella was advised of the Hearing Officer's intent to conduct a telephonic hearing in the voicemail left for him.

17. On March 19, 2018, an Amended Scheduling Order was sent to the parties advising them that the hearing in the matter would be held telephonically at the same date and time previously scheduled on March 23, 2018, at 9:00 a.m. MDT. The Amended Scheduling Order included the following statement:

Although attempts were made to contact Respondent High Altitude Enterprises, Inc., via its representative, Matt Kinsella, Kinsella was unavailable. At the conference, the Hearing Officer determined that, for the sake of judicial economy and because High Altitude Enterprises had not yet obtained counsel, the scheduled in-person hearing would instead be conducted telephonically. Hattem did not object. Kinsella was informed of the Hearing Officer's intent to hold the hearing telephonically in a message left on his phone during the attempt to contact him for the conference.

18. Neither the mailed nor e-mailed copies of the March 19, 2018, Amended Scheduling Order was returned to OAH or otherwise marked as undeliverable.

19. On March 23, 2018, Hattem was available for and participated in the hearing, but Kinsella—who had not yet obtained counsel on behalf of High Altitude—was unavailable. As before, attempts were made to contact Kinsella at both his cell phone and work numbers, and the Hearing Officer left a voicemail advising Kinsella that the hearing would proceed, that High Altitude could be found in default without either his presence or counsel, and leaving him OAH's contact information.

20. At the start of the hearing, the Hearing Officer informed Hattem that, absent her objection, because High Altitude was the appellant in the case and was not present at the hearing, and based on the record, he intended to find High Altitude in default and affirm the Determination of the Wage and Hour Unit. Hattem did not object, and elected to proceed accordingly without offering further evidence.

II. ISSUE

Whether Respondent owes Claimant wages for work performed, as alleged in the complaint filed by Claimant, and owes penalties, as provided by law.

III. FINDINGS OF FACT

1. On November 8, 2017, OAH issued a Notice of Hearing and Telephone Conference informing the parties that, among other things, corporations, partnerships, limited liability companies, and similar entities are required to be represented by an attorney pursuant to Admin. R. Mont. 1.3.231(2).

2. On December 20, 2017, a Scheduling Order was sent to the parties which informed them about (1) the date and time of the hearing, (2) the method for

conducting the hearing, (3) the consequence of not participating in the hearing, and (4) the requirement of setting aside four hours to be available for the hearing. The Order also once again advised High Altitude that, as a corporation, it would need to obtain counsel, and stated that if High Altitude, as the appellant, failed to appear at the hearing, OAH would issue an order affirming the Wage and Hour Unit's Determination.

3. On March 19, 2018, an Amended Scheduling Order was sent to the parties advising them that the hearing in the matter would be held telephonically at the same date and time previously scheduled.

4. Respondent never obtained counsel as required by Montana law and did not participate in either the final pre-hearing conference or the hearing herein.

5. None of the documents sent to the parties were returned as undeliverable.

6. On March 23, 2018, Hattem was available for and participated in the hearing, but High Altitude was unavailable and did not respond to voicemail.

7. High Altitude owes Hattem \$324.28 in wages.

8. High Altitude also owes a 55% penalty of \$178.35, for a total amount owed of \$502.63.

IV. DISCUSSION AND ANALYSIS

This is a contested case proceeding subject to the Montana Administrative Procedures Act (MAPA) pursuant to Mont. Code Ann. § 2-4-601 et. seq and § 39-3-302. MAPA specifically provides that informal disposition may be made of any contested case by, among other things, a default unless such disposition is precluded by law. Mont. Code Ann. § 2-4-603(1)(a). Nothing in Title 39 or Title 2 prohibits imposition of a default where a party fails to comport with any facet of a scheduling order, fails to respond to a tribunal's direct order, or fails to appear for a scheduled hearing.

The Department has adopted the Attorney General's model rules, which provide in pertinent part, "[I]n a contested case, if a party does not appear to contest an intended agency action, the agency may enter a default order. If a default is entered, pursuant to Mont. Code. Ann. § 2-4-623, the order must be in writing and include findings of fact and conclusions of law" (emphasis added). Admin. R.

Mont. 1-3-213(1) and 24-2-101(1). Furthermore, the model rules state that, “A corporation appearing before an agency is considered a separate legal entity and may not appear on its own behalf through an agent other than an attorney.” Admin. R. Mont. 1.3.231(2).

High Altitude, the appellant, is in default because the employer failed to participate in the scheduled hearing. Even if High Altitude had been present via a representative, it had not obtained counsel and therefore still could not have participated. Because “a party is responsible for developing legal analysis that supports its position. . .” (*Wohl v. City of Missoula*, 2013 MT 46, ¶ 48, 369 Mont. 108, 300 P.3d 1119), the Hearing Officer will not undertake that effort for the respondent/appellant. High Altitude failed to participate in a scheduled hearing and failed to follow orders issued by the Hearing Officer. Therefore, High Altitude is in default in this case.

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. High Altitude failed to obtain counsel and failed to participate at the scheduled final pre-hearing conference and the scheduled hearing. As a result, High Altitude failed to meet its burden of proof and is in default.

3. High Altitude, the appellant, has shown no basis to set aside the Wage and Hour Unit’s July 24, 2017, Determination. Hattem is due a total of \$502.63 in unpaid wages and penalties.

VI. ORDER

It is ORDERED that Respondent’s appeal is DISMISSED. The Department’s July 24, 2017, Determination is affirmed and is therefore final. High Altitude owes Hattem \$502.63 in unpaid wages and penalties. High Altitude is ORDERED to tender a cashier’s check or money order in the amount of \$502.63 made payable to Riana J. Hattem and mailed to the Employment Relations Division, P.O. Box 201503, Helena, MT 59620-1503, no later than 30 days after service of this

decision. The employer may deduct applicable withholding from the wage portion of \$324.28, but not from the penalty portion of \$178.35.

DATED this 27th day of March, 2018.

DEPARTMENT OF LABOR & INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ CHAD R. VANISKO
CHAD R. VANISKO
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 the date of mailing of the hearing officer's decision. See also Mont. Code Ann. § 2-4-702. Please send a copy of your filing with the district court to:

Department of Labor & Industry
Wage & Hour Unit
P.O. Box 201503
Helena, MT 59624-1503

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.