

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

IN THE MATTER OF THE WAGE CLAIM) Case No. 1068-2017
OF SHAWN CONRAD,)

Claimant,)

vs.)

J AND S CUSTOM BUILDERS, LLC,)
a Montana limited liability company,)

FINAL AGENCY DECISION

and)

SHANE SOUTHWICK, individually and)
d/b/a J AND S CUSTOM BUILDERS, LLC,)
a Montana limited liability company)
involuntarily dissolved on December 1, 2016,)

Respondent.)

* * * * *

I. INTRODUCTION AND FINDINGS OF FACT

1. On January 20, 2017, Shawn Conrad filed a claim with the Wage and Hour Unit of the Montana Department of Labor and Industry (Wage and Hour Unit) alleging the Respondents J & S Custom Builders and Shane Southwick, individually owed him \$1,825.00 in unpaid wages.

2. On February 14, 2017, the Wage and Hour Unit, after hearing no response from the Respondents, issued a Determination finding Conrad was owed the wages he sought plus a 110% penalty amounting to \$2,007.50 for a total owing of \$3,832.50.

3. The Determination informed the Respondents that they had until March 1, 2017 to file an appeal. On March 6, 2017, the Wage and Hour unit received an appeal from the Respondents that had a postmark date of March 3, 2017.

4. On March 7, 2017, the Wage and Hour Unit sent a letter confirming receipt of the appeal but noted that it was untimely and that the timeliness of the appeal would be the only issue for hearing.

5. On May 12, 2017, the Wage and Hour Unit transferred the case to the Office of Administrative Hearings (OAH) after attempts at mediation were unsuccessful. On May 31, 2017, Hearing Officer David A. Scrimm held a scheduling conference during which the Respondents did not appear. A June 8, 2017 hearing was scheduled on the timeliness issue. The Scheduling Order sent to J and S Builders, 2111 Wyoming, was returned by the Postal Service as undeliverable. The Scheduling Order sent to Southwick at P.O. Box 18162 was not returned. Southwick did not provide any other mailing addresses.

6. On June 8, 2017, the Hearing Officer attempted to conduct a hearing on the issue. Southwick did not answer the Hearing Officer's call and did not respond to the message that was left asking him to call as soon as possible. No testimony was taken. In order to resolve the timeliness issue, Documents 1 through 33 were admitted into the record. The Hearing Officer also reviewed the envelope which contained the appeal letter (Doc. 14.), which was included in the administrative record but not included in Documents 1 through 33.

7. The Department's Determination provided the following notice to the Respondents concerning the implications of its decision:

The Respondent or the Claimant may request either a redetermination or an appeal to a contested case hearing before the Office of Administrative Hearings. **The request must be postmarked by, or received, or filed no later than 3-1-2017** in accordance with Administrative Rules of Montana (ARM), 24-16-7534 & ARM, 24.16.7517.

...

If an appeal or a request for redetermination is not filed, the Dismissal will be final to the Wage and Hour Unit.

Id., p. 3.

8. Respondents' request for appeal was due to the Department no later than March 1, 2017.

9. On February 22, 2017, Southwick called Windy Knutson of the Wage and Hour Unit to discuss the Department's Determination and his belief that Conrad was

an independent contractor. Knutson reminded Southwick that any appeal needed to be postmarked by March 1, 2017. Doc. 16.

10. Respondents filed their request for appeal on March 6, 2017. Doc. 14.

11. Respondents' request for appeal was postmarked March 3, 2017. It had a return address of P.O. Box 18162, Missoula, MT 59808. Southwick never provided any other mailing address.

12. The Wage and Hour Unit's Determination became final on March 2, 2017.

II. DISCUSSION¹

A. Respondents' request for appeal is untimely.

"[A]n item sent to the department is timely if it is either postmarked or received by the department by not later than the last day of the time period."

Admin. R. Mont. 24.16.7514(2).

Respondents' appeal letter was postmarked March 3, 2017 and was stamped "Received" by the Department on March 6, 2017, five days after the 15-day appeal period had expired. Respondents' appeal request would, under the rule, be considered received on March 3, 2017 based on the postmark.

Requests for hearings must be filed within 15 days of the date of the determination. Admin. R. Mont. 24.16.7537. The plain language of this rule contains no good cause exception. It is undisputed that Respondents filed their request for redetermination on March 3, 2017, three days after the time for appeal had passed. Moreover, the Department's decision identified the specific date a request for hearing was due. The Department's February 14, 2017 Determination and the applicable administrative rules are clear and unambiguous—a request for hearing must be filed within 15 days and Respondents allowed that deadline to pass.

The consistent application of procedural time limits serves important policy considerations. *BNSF Ry. Co. v. Cringle*, 2010 MT 290, ¶ 18, 359 Mont. 20,

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

247 P.3d 707; *Weidow v. Uninsured Employers' Fund*, 2010 MT 292, ¶ 28, 359 Mont. 77, 246 P.3d 704. It is true that these policy considerations should be weighed against equitable principles. *Id.* Here, however, the Respondents failed to respond to Conrad's claim and then waited until the last day to try to appeal the Wage and Hour Unit's Determination. Respondents also failed to participate in any of these proceedings and failed to update addresses or phone numbers.

In light of Respondents' failure to respond and the absence of other pertinent facts in the record, the Hearing Officer finds no basis to apply equitable principles to address a "garden variety claim of excusable neglect." *Weidow v. Uninsured Employers' Fund*, 2010 MT 292, ¶ 28; citing *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 96, 111 S.Ct. 453, 458, 112 L.Ed. 2d 435 (1990).

B. Respondents are in Default.

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 and then further fails to respond to a tribunal's direct order.

The Department has adopted the model rules proposed by the Montana Attorney General, 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).

Respondents' appeal is untimely. Respondents are also in default for failing to participate in these proceedings.

III. 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. Respondents' appeal is untimely. Admin. R. Mont. 24.16.7534.

3. The Respondents failed to pursue their appeal, to comply with the orders of this tribunal, or to appear at the hearing in this matter. Therefore, the Respondents are found in Default.

4. This is the final agency decision in this matter.

IV. ORDER

IT IS THEREFORE ORDERED THAT:

1. Respondents' appeal is DISMISSED.
2. The Wage and Hour Unit's February 14, 2017 Determination is final.

DATED this 13th day of June, 2017.

DEPARTMENT OF LABOR & INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ DAVID A. SCRIMM
DAVID A. SCRIMM
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.