

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

IN THE MATTER OF THE WAGE CLAIM	)	Case No. 1108-2016
OF KYLE J. GRACE.	)	
	)	
Claimant,	)	
	)	
vs.	)	<b>FINAL AGENCY DECISION</b>
	)	
BANDON DESIGNS, LLC, a Montana	)	
limited liability company d/b/a ADAMS	)	
GENERAL CONTRACTING,	)	
	)	
Respondent.	)	

\* \* \* \* \*

**I. INTRODUCTION**

1. On December 17, 2015, Kyle J. Grace filed a claim with the Wage and Hour Unit of the Montana Department of Labor and Industry (Wage and Hour Unit) alleging the respondent, Bandon Designs, LLC, d/b/a Adams General Contracting, owed him \$1,327.50 in unpaid wages for work performed October 3 through 19, 2015.

2. Adams General Contracting asserted Grace had been an independent contractor, not an employee. The issue of whether Grace was an employee or independent contractor was referred to the Independent Contractor Central Unit (ICCU) to make a decision on this issue.

3. On September 14, 2016, ICCU mailed a written decision to the parties that held Grace performed services for Adams General Contracting as an employee from October 3 through 19, 2015.

4. On October 4, 2016, the Wage and Hour Unit issued a determination finding Adams General Contracting owed Grace \$1,530.00 in regular and overtime wages. The determination imposed liquidated damages of 55% on the regular wages and a 110% penalty on the overtime wages if Grace's wages were not paid by October 19, 2016. The determination stated a redetermination had to be filed by October 19, 2016.

5. On October 24, 2016, an Amended Certificate of Service was mailed to the parties because ICCU had not included the appeal rights on the previous Certificate of Service. The Amended Certificate of Service informed the parties that either party could request a redetermination or an appeal, but the request had to be received on or before November 9, 2016.

6. In an October 24, 2016 letter, the Wage and Hour Unit informed Zachary Adams, the registered agent for Adams General Contracting, that it appeared he intended to appeal ICCU's decision. The letter informed Adams that if he wanted to appeal the ICCU decision, he had to forward his appeal to Dallas Cox with ICCU.

7. On October 31, 2016, a compliance specialist of the Wage and Hour Unit informed Adams that Dallas Cox, the supervisor of the Independent Contract Central Unit, had accepted Adams' previously submitted information as an appeal. Adams also received information that he would receive information from the Wage and Hour Unit's mediator.

8. On January 9, 2017, following unsuccessful mediation efforts, the Wage and Hour Unit transferred the issue of whether Adams owed Grace for wages and penalties to OAH. No appeal was filed with the Workers' Compensation Court on the issue of whether Grace was an employee or independent contractor.

9. On January 11, 2017, OAH issued a Notice of Hearing and Telephone Conference informing the parties that a scheduling conference would be held on January 25, 2017. The Notice stated the issue was "Whether Bandon Designs, LLC, a Montana limited liability company d/b/a Adams General Contracting owes wages for work performed, as alleged in the complaint filed by Grace, and owes penalties or liquidated damages, as provided by law."

10. On January 25, 2017, Grace participated at the scheduling conference. The January 26, 2017 Scheduling Order was mailed to Adams at a new address of record in Oregon. The January 26 Scheduling Order that was mailed to Oregon was not returned.

11. The final pre-hearing conference call was held on April 21, 2017. Grace participated in the conference call. The employer could not be called because the employer did not provide a phone number to contact anyone on the employer's behalf.

12. On April 28, 2017, Grace participated at the hearing. No one on the employer's behalf participated.

## II. ISSUE

Whether Bandon Designs, LLC, d/b/a Adams General Contracting owes wages for work performed, as alleged in the complaint filed by Kyle Grace, and owes penalties or liquidated damages, as provided by law.

## III. FINDINGS OF FACT

1. On January 11, 2017, the Office of Administrative Hearings (OAH) issued a Notice of Hearing and Telephone Conference. The notice informed the parties, Kyle Grace and Adams General Contracting, that a failure to appear for any conference or hearing could result in default or dismissal of the appeal.

2. The Scheduling Order dated January 26, 2017 informed the parties that if the appellant, Adams General Contracting, failed to appear at the hearing, OAH would issue an order affirming the Wage and Hour Unit's redetermination.

3. On April 28, 2017, only Grace participated at the scheduled hearing. Even though the January 26, 2017 Scheduling Order was mailed to Adams General Contracting's most recent address, the employer did not provide a phone number with which to contact Adams General Contracting's attorney.

4. Adams General Contracting failed to present a prima facie case showing the employer is entitled to any relief. There is nothing in the administrative record or the Wage and Hour redetermination that shows any error of fact or law affecting the propriety of the Wage and Hour Unit's redetermination.

5. Adams General Contracting owes Grace \$1,440.00 in wages for 96 hours of work and \$90.00 for four hours of overtime work, for a total of \$1,530.00 in wages.

6. Adams General Contracting also owes 55% penalty of \$792.00 on the regular wages and a 110% penalty of \$99.00 on the overtime wages--for a total amount owed of \$2,421.00.

## IV. DISCUSSION AND ANALYSIS

*Adams General Contracting, the appellant, is in default because the employer failed to participate in the scheduled hearing.*

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).

Adams General Contracting, the appealing party, received a Scheduling Order with notification 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. On April 28, 2017, Adams General Contracting received multiple opportunities to participate in the April 28 scheduled hearing. 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. Adams General Contracting failed to participate in a scheduled hearing and failed to follow orders issued by the Hearing Officer. Therefore, Adams General Contracting 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. Adams General Contracting failed to follow the Scheduling Order and failed to participate in the hearing scheduled on April 28, 2017. As a result, Adams General Contracting is in default and has failed to meet its burden of proof.

3. Adams General Contracting, the appellant, has shown no basis to set aside the Wage and Hour Unit's determination. Kyle Grace is due a total of \$2,421.00 in unpaid wages and liquidated damages.

## VI. ORDER

It is ORDERED that the respondent's appeal is DISMISSED. The Department's redetermination is final. Bandon Designs, LLC, d/b/a Adams General Contracting, owes Kyle Grace \$2,421.00 in unpaid minimum wages and overtime

and liquidated damages. Bandon Designs, LLC, d/b/a Adams General Contracting is ORDERED to tender a cashier's check or money order in the amount of \$2,421.00 made payable to Kyle Grace 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, but not the penalty portion.

DATED this 6th day of June, 2017.

DEPARTMENT OF LABOR & INDUSTRY  
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ DEBRA L. WISE  
DEBRA L. WISE  
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.