

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

IN THE MATTER OF THE WAGE CLAIM	)	Case No. 167-2017
OF WILLIAM R. ADLER.	)	
	)	
Claimant,	)	
	)	
vs.	)	<b>FINAL AGENCY DECISION</b>
	)	
HOMESTEAD RESTAURANT AND	)	
CASINO, INC., a Montana Corporation,	)	
	)	
	)	
Respondent.	)	

\* \* \* \* \*

**I. INTRODUCTION**

1. On July 27, 2016, William R. Adler filed a claim with the Wage and Hour Unit of the Montana Department of Labor and Industry (Wage and Hour Unit) alleging the respondent, Homestead Restaurant and Casino, Inc., a Montana corporation, owed him \$1,482.00 for 114 hours in unpaid wages for work he performed June 14 through July 16, 2016; \$195.00 for 10 hours of overtime; and \$898.94 in overdraft fees.

2. Adler asserted Homestead Restaurant and Casino agreed to pay him \$13.00 an hour.

3. Homestead Restaurant and Casino did not dispute that the employer owed Adler \$1,000.00 for 80 hours of work he performed June 14 through 27, 2016, and \$164.58 for 13.17 hours he worked June 28 through July 1, 2017. Homestead Restaurant and Casino paid Adler a total of \$1,164.58 at the rate of \$12.50 per hour.

4. On January 4, 2017, the Wage and Hour Unit issued a determination that held the overdraft fees claimed by Adler were not wages. Therefore, the Wage and Hour Unit had no authority to collect these fees from Homestead Restaurant and Casino.

5. Based on information presented by Adler and Homestead Restaurant and Casino, the January 4, 2017 determination held Adler's hourly rate was \$12.50, not \$13.00 an hour.

6. The January 4, 2017 determination concluded Adler worked 3.4 hours of overtime. While the employer had paid him \$12.50 an hour, the employer had not paid the overtime premium of \$6.25 an hour. As a result, Homestead Restaurant and Casino owed Adler an additional \$21.25 in overtime wages.

7. The Wage and Hour Unit also concluded the special circumstances defined by Admin. R. Mont. 24.16.7551(1)(d) did not apply in this case. Therefore, the maximum penalty was not imposed on Homestead Restaurant and Casino.

8. Before the January 4, 2017 determination was issued, Homestead Restaurant and Casino had paid Adler \$1,164.58 in wages. The Wage and Hour Unit determined Homestead Restaurant and Casino owed Adler an additional \$56.67 for regular and overtime hours. The January 4, 2017 determination stated that if Homestead Restaurant and Casino paid Adler \$35.42 for regular wages by January 19, 2017, the employer would be assessed a penalty of 15% totaling \$5.31. Also, if Homestead Restaurant and Casino paid Adler overtime wages of \$21.25 by January 19, 2017, the employer would be assessed a penalty of 55% totaling \$11.69.

9. On January 9, 2017, the employer issued a check totaling \$73.67 to Adler.

10. Adler timely appealed the January 4, 2017 determination on January 17, 2017.

11. On February 22, 2017, following unsuccessful mediation efforts, the Wage and Hour Unit transferred the issue of whether Homestead Restaurant and Casino owed Adler for wages and penalties to the Office of Administrative Hearings (OAH).

12. On February 24, 2017, OAH issued a Notice of Hearing and Telephone Conference informing the parties a scheduling conference would be held on March 9, 2017. The notice stated the issue was "Whether Homestead Restaurant and Casino, Inc., a Montana corporation owes wages for work performed, as alleged in the complaint filed by Adler, and owes penalties or liquidated damages, as provided by law."

13. On March 3, the telephone conference was rescheduled to March 17, 2017, at 3:00 p.m.

14. On March 17, 2017, Adler and Cynthia Hendrick, the owner of Homestead Restaurant and Casino, participated in the scheduling conference. During this conference, Hendrick learned the employer had to be represented by a licensed attorney. The Scheduling Order was mailed to the parties on March 23, 2017.

15. On March 21, 2017, Stephanie Breck notified Adler and OAH that she represented the Homestead Restaurant and Casino.

16. On April 10, Breck requested a new hearing date because of a conflict with a jury trial scheduled on June 19, 2017. On April 24, 2017, Adler and Breck participated in a telephone conference and agreed the pre-hearing conference would be held on June 28, 2017 at 8:30 a.m. and the hearing would be rescheduled to July 6, 2017 at 8:30 a.m.

17. The pre-hearing conference was held on June 28, 2017. Adler and Breck participated in the conference call.

18. On July 6, 2017, Breck and the employer's witnesses were available for the hearing. Adler was called at the scheduled hearing time. He was not available and a message was left asking him to contact OAH immediately, if he wanted to participate at the hearing. After waiting approximately ten minutes, Adler was called a second time. Again he was not available for the hearing.

## **II. ISSUE**

Whether Homestead Restaurant and Casino owes wages for work performed, as alleged in the complaint filed by William Adler, and owes penalties or liquidated damages, as provided by law.

## **III. FINDINGS OF FACT**

1. On February 24, 2017, the Office of Administrative Hearings (OAH) issued a Notice of Hearing and Telephone Conference. The notice informed the parties, William Adler and Homestead Restaurant and Casino, that a failure to appear for any conference or hearing could result in default or dismissal of the appeal.

2. The Scheduling Order dated March 23, 2017 informed the parties that if the appellant, William Adler, failed to appear at the hearing, OAH would issue an order affirming the Wage and Hour Unit's January 4, 2017 determination.

3. On July 6, 2017, Stephanie Breck, the attorney for Homestead Restaurant and Casino, and the employer's witnesses were available for the hearing. Even though Adler appeared at the June 28 pre-hearing conference, he was not available for the July 6 hearing. As of the date of this decision, Adler has not contacted OAH.

4. William Adler failed to present a prima facie case showing he is entitled to any further relief. There is nothing in the administrative record or the Wage and

Hour determination that shows any error of fact or law affecting the propriety of the Wage and Hour Unit's January 4, 2017 determination.

#### IV. DISCUSSION AND ANALYSIS

*William Adler, the appellant, is in default because he 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 the party fails to comply 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).

Adler, 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 July 6, 2017, Adler received multiple opportunities to participate in the scheduled hearing, but did not. 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 appellant. William Adler failed to participate in the July 6, 2017 scheduled hearing. Therefore, William Adler is in default.

#### 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. William Adler failed to follow the Scheduling Order and failed to participate in the hearing scheduled on July 6, 2017. As a result, a default is entered in this case pursuant to Mont. R. Civ. P. 55.

3. William Adler, the appellant, has shown no basis to set aside the Wage and Hour Unit's January 4, 2017 determination. Homestead Restaurant and Casino owes William Adler no additional wages or penalties.

## VI. ORDER

It is ORDERED that William Adler's appeal is DISMISSED. The Department's January 4, 2017 determination is final. Since Homestead Restaurant and Casino paid an additional \$73.67 before January 19, 2017, Homestead Restaurant and Casino does not owe William Adler any additional wages or penalties.

DATED this 20th day of July, 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