

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

IN THE MATTER OF THE WAGE CLAIM OF JUAN JAIME-SOTO.)	Case No. 206-2016
)	
)	
Claimant,)	
)	
vs.)	FINAL AGENCY DECISION
)	
MANUEL VARGAS, individually d/b/a M & B WOODWORK,)	
)	
)	
Respondent.)	

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I. INTRODUCTION

1. On July 31, 2015, Juan Jaime-Soto filed a claim with the Wage and Hour Unit of the Montana Department of Labor and Industry (Wage and Hour Unit) alleging the respondent, Manuel Vargas, d/b/a M & B Woodwork, owed him \$15,200.00 in unpaid wages for work performed May 15, 2015 through July 28, 2015.

2. Vargas did not initially respond when he was sent notice of the claim. As a result, on September 14, 2015, the Wage and Hour Unit issued a determination that he owed Jaime-Soto wages and penalties. Vargas made a timely request for a redetermination on September 22, 2015.

3. On June 28, 2016, the Wage and Hour Unit issued a redetermination finding Vargas owed Jaime-Soto \$6,695.05 in minimum and overtime wages. The redetermination imposed liquidated damages of 100% of the wages owed, for a total amount owed of \$13,390.10. The redetermination stated an appeal of the redetermination had to be filed by July 13, 2016.

4. The redetermination incorporated a decision by the Independent Contractor Central Unit (ICCU) that concluded Jaime-Soto performed services for Vargas as an employee not as an independent contractor. The redetermination stated the decision of the ICCU would be final unless a mediation request on the employment status decision was received by July 13, 2016. According to the redetermination, that mediation request had to be filed with Dallas Cox, Department of Labor & Industry, ICCU, P.O. Box 8011, Helena, Montana 59604-8011. Finally,

the redetermination stated that if the employment status dispute was not resolved in mediation, either party could file a petition with the Workers' Compensation Court within 30 days of the mailing of the mediator's report.

5. On July 12, 2016, Vargas appealed the redetermination concluding he owed Jaime-Soto \$13,390.10.

6. On July 20, 2016, the supervisor of the Wage and Hour Unit sent a letter to Vargas. It stated that both (1) the issue of whether Vargas owed Jaime-Soto for wages and penalties and (2) the issue of whether Jaime-Soto was an employee or independent contractor would be referred to a mediator. The letter stated if the issue regarding whether Vargas owed Jaime-Soto for wages and penalties was not resolved, the issue would go to hearing before the Office of Administrative Hearings (OAH). Finally, the letter stated that if the issue of Jaime-Soto's employment status was not resolved, the issue would proceed to the Workers' Compensation Court, "assuming an appeal is filed with the Court."

7. On August 2, 2016, following unsuccessful mediation efforts, the Wage and Hour Unit transferred the issue of whether Vargas owed Jaime-Soto for wages and penalties to OAH. No appeal was filed with the Workers' Compensation Court on the issue of whether Jaime-Soto was an employee or independent contractor.

8. On August 5, 2016, OAH issued a Notice of Hearing and Telephone Conference informing the parties that a scheduling conference would be held on August 19, 2016. The Notice stated the issue was "Whether Manuel Vargas, individually, d/b/a M & B Woodwork owes wages for work performed, as alleged in the complaint filed by Juan A. Jaime-Soto, and owes penalties or liquidated damages, as provided by law."

9. On August 19, 2016, Jaime-Soto and Vargas participated in a telephone scheduling conference with Hearing Officer Steven A. Wise. Jaime-Soto was assisted by a Spanish interpreter. The parties agreed to a November 14, 2016 final pre-hearing conference and a November 21, 2016 in-person hearing. A Scheduling Order was issued on August 22, 2016 to the parties confirming these dates.

10. On October 18, 2016, Vargas requested the hearing be postponed due to the need to finish a job he was working on. A telephone conference on the request was held with Jaime-Soto and Vargas on November 7, 2016, with a Spanish interpreter for Jaime-Soto. The parties agreed to a January 3, 2017 final pre-hearing conference and a January 9, 2017 in-person hearing.

11. On December 19, 2016, OAH received a request from Jaime-Soto to participate in the hearing by telephone because he was working and could not travel to Montana.

12. The final pre-hearing conference call was held on January 3, 2017. Manuel Vargas participated in the conference call at the scheduled time and requested the hearing be rescheduled because he had projects he was working on and needed to make travel arrangements to Montana. He was informed that the hearing on January 9, 2017 could be conducted by telephone so that he would not have to travel to Montana. At that point, Vargas agreed to a telephone hearing. Jaime-Soto called in after the conference call and also agreed to a telephone hearing.

13. On January 4, 2017, OAH issued an Order For Telephone Hearing by mail and e-mail scheduling the matter for a telephone hearing to be conducted on January 9, 2017, at 9:00 a.m., MST. After the Order was issued, Vargas contacted OAH to state that he intended to appear in person for the hearing.

14. On January 9, 2017, Vargas did not appear in person for the hearing. As a result, both parties were called for the hearing at 9:00 a.m., MST. Both Jaime-Soto and Vargas were on the call to begin the hearing. Spanish interpreter Elena Frederick provided language assistance to Jaime-Soto.

II. ISSUE

Whether Manuel Vargas, individually, d/b/a M & B Woodwork owes wages for work performed, as alleged in the complaint filed by Juan A. Jaime-Soto, and owes penalties or liquidated damages, as provided by law.

III. FINDINGS OF FACT

1. On August 5, 2016, the Office of Administrative Hearings (OAH) issued a Notice of Hearing and Telephone Conference. The notice informed the parties, Juan Jaime-Soto and Manuel Vargas, that a failure to appear for any conference or hearing could result in default or dismissal of the appeal.

2. The Scheduling Orders dated August 22, 2016 and November 9, 2016 and the Order For Telephone Hearing dated January 4, 2017 informed the parties that if the appellant failed to appear at the hearing, OAH would issue an order affirming the Wage and Hour Unit's redetermination. The Order For Telephone Hearing informed the parties that they were expected to be available for the hearing for a minimum of four hours to make sure there was sufficient time to conduct the hearing.

3. When Vargas was called about the hearing on January 9, 2017, he stated he was in Great Falls, Montana, because he had business there. He was asked why he had not appeared in person for the hearing as he said he would. He replied that he was confused by the Order For Telephone Hearing he had received.

4. At that point, Vargas was given the option to proceed by telephone or the hearing could be continued until later in the day for him to travel to Helena to appear in person. Vargas then stated that the matter was a waste of his time, he did not owe Jaime-Soto any wages, and the case should be dismissed. The Hearing Officer informed Vargas that he had the option of withdrawing his appeal to resolve the matter but to obtain the relief he was requesting, he would have to participate in the hearing. Vargas then stated he would participate in the hearing by telephone.

5. The parties were advised of the hearing procedure, and both Jaime-Soto and Vargas were administered the oath. The hearing began with Jaime Soto's testimony. After five minutes of testimony, Vargas interrupted and asked for everyone to wait while he took another phone call. The Hearing Officer informed Vargas that he was not allowed to take the call at that time. Vargas insisted that it was an important business call. When the Hearing Officer reminded Vargas that he was to set aside at least four hours for the hearing, he responded that he did not have four hours and had jobs going on. He asked to reset the case for a different time because he had to answer his phone calls. He stated again that the hearing was a waste of time and he was going to sue Jaime-Soto back. The Hearing Officer informed Vargas that the hearing would not be reset, and if he did not wish to continue with the hearing and dropped off the call, he would not be called back.

6. Vargas responded that he would do as much as he could but would not lose his business over the matter. Vargas then stated that the hearing should not be about whether he owed Jaime-Soto wages but instead be about whether Jaime-Soto was an independent contractor or an employee. The Hearing Officer stated that issue involved a separate determination that he had to appeal to the Workers' Compensation Court. Vargas then objected to the contractor versus employee issue not being handled in the hearing. The Hearing Officer overruled the objection and informed Vargas that if he wanted to make an argument at the end of the hearing, he could do so, but the hearing was at the stage where facts were being taken from each side.

7. Vargas then asked why the case could not be taken to attorneys or a court for an opinion. The Hearing Officer reminded Vargas that he had been notified of his right to retain an attorney for the hearing. He was informed that he also could appeal the decision issued in the case to court if he disagreed with it, but that did not eliminate the need for a hearing. When the Hearing Officer asked Vargas if he could proceed with taking Jaime-Soto's testimony, Vargas repeated that the case was a

waste of time and he thought the case was about whether Jaime-Soto was an independent contractor. Vargas insisted “we’re in the wrong hearing.”

8. At that point, the Hearing Officer explained that there were two determinations made—one about whether Vargas owed wages to Jaime-Soto and one about whether Jaime Soto was an independent contractor. The Hearing Officer further explained that the appeal filed and the scheduled hearing were regarding the issue of whether Vargas owed wages to Jaime-Soto.

9. Vargas then said that he was confused. He stated he wanted to take the matter to where it could be determined that Jaime-Soto was an independent contractor and that was the decision he needed to appeal. The Hearing Officer explained that the determination of the ICCU was in the administrative file sent to Vargas and included the instructions for appealing if he wished to pursue that.

10. Vargas then argued that the hearing should not go forward until after he appealed the employment status determination. The Hearing Officer told Vargas that he needed to decide if he was going to pursue his appeal or not on the issue of whether he owed Jaime-Soto wages. When the Hearing Officer informed Vargas that he was prepared to take evidence from both sides and make a decision, Vargas responded that he (Vargas) could not do that because he needed to appeal the independent contractor issue.

11. The Hearing Officer informed Vargas that he intended to proceed with the hearing on the issue before him and Vargas needed to decide if he was going to continue with the hearing. Vargas replied “no” that he was going to appeal the independent contractor issue because if he continued with the hearing, he would be admitting Jaime-Soto was an employee. The Hearing Officer informed Vargas that if he was indicating that he did not wish to proceed with the case, it could be treated as a withdrawal of his appeal. Vargas stated that he did not know how to put it in a legal manner but he was not withdrawing but he was going to resubmit the paperwork to determine that Jaime-Soto was a contractor. The Hearing Officer again asked Vargas if he intended to participate in the hearing or not and stated that since Vargas said he was not withdrawing the appeal, the Hearing Officer would take testimony from both sides and make a decision on the matter before him.

12. Vargas then said that he did not want a decision made in the case and requested another month to file the paperwork on the employment status issue. The Hearing Officer informed Vargas that he was not postponing the hearing. Vargas then asked to withdraw the matter because he was going to sue Jaime-Soto back. The Hearing Officer informed him that was a separate matter that he would have to pursue. Vargas then said that is what he was going to do and thanked the Hearing Officer.

13. When the Hearing Officer asked Vargas if he was saying that he was pursuing another claim and withdrawing his appeal, Vargas responded that was correct but he was not using those words. He said he would file his paperwork with the court. The Hearing Officer advised Vargas that if he withdrew his appeal, a decision would be issued affirming the Wage and Hour Unit's redetermination. Vargas replied that was fine, he would appeal the other determination. When asked if he no longer wished to proceed with the hearing, he said he would not put it in those words.

14. The Hearing Officer again said that if Vargas was not withdrawing the appeal, he would start taking testimony again. Vargas was advised that if he did not wish to participate in the hearing, he could hang up the phone. Vargas then said he would not participate because if he did, he would be admitting that Jaime-Soto was an employee. The Hearing Officer informed Vargas that he could take the position that Jaime-Soto was not an employee and still argue that he did not owe him wages, but Vargas replied that he did not owe Jaime-Soto wages because he wasn't an employee. When the Hearing Officer informed Vargas that the issue of Jaime-Soto's employment status could not be decided in the case, Vargas said "I'm done," and hung up the phone. The Hearing Officer asked Vargas several times whether he was on the line to make sure he had hung up and received no response.

15. The Hearing Officer waited 15 minutes to see if Vargas would call back, but Vargas never called. The Hearing Officer informed Jaime-Soto that since Vargas, the appellant, had hung up the phone and was not participating in the hearing, an order affirming the Wage and Hour Unit's determination would be issued.

16. Vargas failed to present a prima facie case showing he 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.

17. Vargas owes Jaime-Soto \$6,695.05 in unpaid minimum and overtime wages.

18. Vargas also owes liquidated damages of 100% of the wages owed—\$6,695.05—for a total amount owed of \$13,390.10.

IV. DISCUSSION AND ANALYSIS

Manuel Vargas, 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 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).

Vargas, the appealing party, received two Scheduling Orders and an Order For Telephone Hearing 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 January 9, 2017, Vargas was given multiple opportunities to participate in the hearing. In the end, when informed that the hearing would not be on the employment status issue and the Hearing Officer would be proceeding on the issue before him, Vargas announced that he was done and hung up the phone. This constitutes a failure to participate in a scheduled hearing and failure to follow orders issued by the Hearing Officer. Therefore, Vargas is 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. Manuel Vargas failed to follow the Scheduling Orders and Order For Telephone Hearing and failed to participate in the hearing scheduled on January 9, 2017, by expressing that he was done and hanging up the phone. As a result, he is in default and has failed to meet his burden of proof.

3. Vargas, the appellant, has shown no basis to set aside the Wage and Hour Unit's determination. Juan Jaime-Soto is due a total of \$13,390.10 in unpaid wages and liquidated damages.

VI. ORDER

It is ORDERED that the respondent's appeal is DISMISSED. The Department's redetermination is final. Manuel Vargas, d/b/a M & B Woodwork, owes Juan Jaime-Soto \$6,695.05 in unpaid minimum wages and overtime and liquidated damages of \$6,695.05. Manuel Vargas is ORDERED to tender a cashier's check or money order in the amount of \$13,390.10 made payable to Juan Jaime-Soto 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. Vargas may deduct applicable withholding from the wage portion, but not the penalty portion.

DATED this 24th day of January, 2017.

DEPARTMENT OF LABOR & INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ STEVEN A. WISE
STEVEN A. 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.