

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

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| IN THE MATTER OF THE WAGE CLAIM |) | Case No. 287-2017 |
| OF ROBERT QUIROZ, |) | |
| |) | |
| Claimant, |) | |
| |) | |
| vs. |) | FINAL AGENCY DECISION |
| |) | |
| LA COCINA FELIZ, LLC, a Montana limited |) | |
| liability company, |) | |
| |) | |
| Respondent. |) | |

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I. INTRODUCTION

On September 26, 2016, La Cocina Feliz, LLC (employer) appealed a September 7, 2016 determination issued by the Wage and Hour Unit of the Department of Labor and Industry (Wage and Hour). The September 7 determination concluded the employer had not paid Robert Quiroz \$559.00 in wages. The determination also assessed the employer a penalty of \$614.90.

On November 15, 2016, Wage and Hour transferred this matter to the Office of Administrative Hearings for a contested case hearing. On December 5, 2016, a telephone scheduling conference was held. Quiroz was called, but did not participate at the scheduling conference. Chris McWhirter appeared on the employer's behalf. McWhirter indicated his attorney would participate at the hearing. McWhirter agreed a telephone hearing could be held on January 12, 2017 at 9:00 a.m.

On January 12, 2017, Hearing Officer Debra Wise held a contested case hearing in this matter. Quiroz was called twice for the hearing, but he was not available either time. John Wagner, attorney at law, represented the employer. The employer agreed to proceed by telephone. On the employer's behalf, Chris McWhirter presented sworn testimony.

The administrative record compiled at Wage and Hour (Documents 1 - 34) was admitted into the record without objection. Based on the evidence and argument presented at hearing, the hearing officer makes the following findings of fact, conclusions of law, and final agency decision.

II. ISSUE

Whether La Cocina Feliz, LLC, a Montana limited liability company, timely appealed a September 7, 2016 Wage and Hour determination or had good cause to file a late appeal.

III. FINDINGS OF FACT

1. On August 15, 2016, Wage and Hour received Robert Quiroz's claim that the employer had not paid him \$559.00 in wages (Documents 30 - 34).

2. Wage and Hour sent the employer a letter on August 18, 2016 informing the employer that Quiroz had filed a wage claim. The August 18 letter asked the employer to send a copy of Quiroz's time cards for July 13 through 17, 2016, his wage agreement, and a copy of the payroll ledger showing the gross amount Quiroz earned (Document 22).

3. On August 31, 2016, McWhirter called Wage and Hour after he received Quiroz's wage claim. McWhirter informed Theresa Sroczyk that the employer had initially mailed Quiroz's final paycheck, but it was returned. He further explained that Quiroz's final paycheck cleared the bank on August 25, 2016. After the check cleared the bank, McWhirter initially understood Quiroz's wage and hour claim was resolved. Sroczyk asked McWhirter to submit time cards and a copy of the cancelled check to Wage and Hour (Documents 5, 28, 33).

4. McWhirter and his office manager had a communication breakdown. McWhirter understood his office manager sent the requested time cards and cancelled check to Wage and Hour and she assumed he had. Neither McWhirter nor his office manager sent Wage and Hour the requested information by September 7, 2016.¹

5. Based on Quiroz's submitted information, on September 7, 2016, Wage and Hour issued a determination that held the employer owed Robert Quiroz \$559.00 in wages and assessed the employer a \$614.90 penalty. The September 7 determination was mailed to the employer's address of record. The September 7 determination informed the employer that a redetermination or an appeal must be postmarked by, received, or filed no later than September 22, 2016 (Documents 25, 26).

¹ If La Cocina Feliz had provided timely proof of the payment to Wage and Hour, any remaining amount would be based on the balance still due.

6. Between September 7 and 26, 2016, McWhirter was in and out of his office. Even though his office manager was at work and received the September 7 determination, he did not personally read the September 7 determination until September 26. McWhirter then immediately contacted Wage and Hour. The Wage and Hour representative told McWhirter that Wage and Hour could not extend the time to appeal (Document 24).

7. During a second conversation on September 26, McWhirter understood there remained a dispute concerning Quiroz's rate of pay so there was still an issue in dispute (Document 23).

8. On September 26, Wage and Hour received the employer's response to Quiroz's wage claim (Documents 15, 16). Even though McWhirter had signed the response on August 31, Wage and Hour did not receive the response until September 26, 2016.

9. On September 27, 2016, the employer faxed a copy of Quiroz's last paycheck that cleared on August 25, 2016. The employer paid Quiroz a gross payment of \$416.17 for 37.50 hours at an hourly rate of \$11.00. The employer's records indicate Quiroz worked 37.83 hours from July 13 to 16, 2016 (Documents 4 - 7).²

10. McWhirter on behalf of La Cocina Feliz appealed the September 7 determination on September 26, 2016 (Documents 18, 19).

11. Since September 26, the employer established a new procedure for wage and hour claims. McWhirter, now, is solely responsible for responding to wage and hour complaints with the assistance of his attorney.

12. When Quiroz did not make himself available to participate in a mediation, this matter was transferred to the Office of Administrative Hearings on November 15, 2016 (Documents 1, 2).

IV. DISCUSSION

A party who has received an adverse decision from a compliance specialist must request a formal hearing within 15 days of the date that the final determination or redetermination was mailed to the party. Admin. R. Mont. 24.16.7537. The department, by rule, shall provide relief for a person who does not receive the

² Quiroz asserted he worked 40 hours that the employer had not paid him, but the employer's records indicate he worked 37.83 hours. The employer paid him for 37.5 hours (Documents 5, 6).

redetermination by mail. Mont. Code Ann. § 39-3-216(3). Admin. R. Mont. 24.16.7544(1) provides:

A party which alleges that it did not receive timely notice by mail of the claim, determination or hearing process provided by these rules has the burden of proof of showing that the party ought to be granted relief. The party seeking relief must present clear and convincing evidence to rebut the statutory presumption contained in 26-1-602, MCA, that a letter duly directed and mailed was received in the regular course of the mail.

The Montana Supreme Court has addressed the situation where a party disputes the receipt of mail. Montana law presumes that a letter mailed in the ordinary course of business has been received. Mont. Code Ann. § 26-1-602(20)(24). In this case, the employer does not dispute that the employer did not receive the September 7 determination before September 22, 2016. The employer's bookkeeper was in the office, but McWhirter did not see or read the September 7 determination until September 26 because he had been in and out of the office the previous two weeks.

McWhirter testified that he incorrectly assumed his bookkeeper had provided all necessary documents and responses to Wage and Hour and the bookkeeper incorrectly assumed that he had. As a result of incorrect assumptions and miscommunication, the requested information concerning Quiroz's wage claim was not provided to Wage and Hour until September 26 and 27, 2016. McWhirter explained that his business is new and he is still learning and developing procedures.

The evidence establishes the employer did not file a timely appeal. Even though the employer is a new business and is learning to develop procedures concerning wage and hour claims, the employer did not establish good cause for filing a late appeal. Mont. Code. Ann. § 39-3-216(3).

V. 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. The employer failed to file a timely appeal as required under Mont. Code Ann. § 39-3-216(3).

3. The employer did not establish good cause for filing a late appeal.

4. The employer's September 26, 2016 appeal is dismissed. The September 7, 2016 determination became final on September 22, 2016.

VI. ORDER

La Cocina Feliz, LLC, a Montana limited liability company's appeal is dismissed.³

DATED this 27th day of January, 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

³ The hearing officer recognizes the employer's records show the employer paid Quiroz 37.5 hours instead of the 40 hours Quiroz initially claimed he had not been paid. As a result, the amount of wages at issue after August 25, 2016 is less than \$100.00. Also, after Quiroz received his final paycheck, he has not participated in any legal proceeding.