



was in Kalispell. The department noted that none of the notices previously sent to him were returned as undeliverable.

The department sent the matter to mediation that proved unsuccessful (the hearing officer is unaware of whether the parties actually participated in the mediation or whether they simply failed to respond).

On January 11, 2006 the Wage & Hour Unit transferred the case to the Hearings Bureau for further proceedings. On January 13, 2006, the Hearings Bureau issued a Notice of Hearing which appointed the undersigned as Hearing Officer and set a telephone scheduling conference for January 26, 2006.

Hearing Officer David Scrimm convened a telephone scheduling conference in this matter on January 26, 2006. At that conference both parties agreed to a schedule for the proceedings that included an April 28, 2006 date for submission of contentions, lists of exhibits and witnesses and stipulated facts; a prehearing conference to be held on May 9, 2006 at 9:00 a.m.; and a telephonic hearing at 9:00 a.m. on May 11, 2006.

Neither party submitted the required contentions or witness and exhibit lists. Neither party was available when the hearing officer attempted to contact them for the May 9, 2006 prehearing conference. Mr. Schwindt's phone appeared to be disconnected and a message to contact the hearing officer was left on Mr. Post's voice mail. The Hearing Officer and Hearings Bureau staff attempted without success to find other telephone numbers for the parties. By the time of the May 11, 2006 hearing, Mr. Post had not contacted the hearing officer in response to the May 9 message.

At the time set for the hearing, the hearing officer contacted Mr. Post who alleged that his cell phone connection was breaking up. He also alleged that he had no notice of the hearing. Mr. Post participated in the scheduling conference that established the date for the hearing and was mailed a copy of the scheduling order. It is the hearing officer's assessment that Mr. Post was not credible about either the phone connection or his allegation that he had not received notice. This assessment was bolstered when immediately upon ending the first call, he again tried to contact Mr. Post and got no answer. The hearing officer left another message at that time for Mr. Post to contact him that day or risk having his appeal dismissed. As of the date of this Order, Mr. Post has not responded.

Post has failed to meet his burden to show that the default order was issued in error and that the department's determination of wages and penalties is incorrect.

The January 13, 2006 Notice of Hearing informed Post that should he fail to appear at the hearing, the Hearings Bureau would issue an order affirming the Wage & Hour Unit's determination. As of the date of this Order, Mr. Post has done nothing to dispute the factual basis for the claim or to support his basis for appeal. He has also failed to appear at either the prehearing conference or the hearing scheduled in this matter.

### Conclusions of Law

1. The State of Montana and the Commissioner of the Department of Labor and Industry have jurisdiction over Schwindt's claim for unpaid wages under § 39-3-201 et seq. MCA. State v. Holman Aviation, 176 Mont. 31, 575 P.2d 925 (1978).

2. The default order issued in this matter was properly issued because Post failed to respond to the determination or to appear at the hearing in this matter. Admin. R. Mont. 24.16.7541

### THEREFORE, IT IS HEREBY ORDERED:

**Respondent's request for administrative relief IS DISMISSED.** The department's Order on Default is final. The determinations of the Wage and Hour Unit which found that the claimant was due \$885.00 in unpaid wages and a penalty in the amount of \$937.50 are affirmed. This dismissal is a final agency decision.

DATED this 17th day of May, 2006.

DEPARTMENT OF LABOR AND INDUSTRY

By: /s/ DAVID A. SCRIMM  
David A. Scrimm, Chief  
Hearings Bureau

NOTICE: You are entitled to judicial review of this final agency decision in accordance with § 39-3-216(4), MCA, by filing a petition for judicial review in an appropriate district court within 30 days of service of the decision. See also § 2-4-702, MCA.

Schwindt Order Affirming Agency Determination