

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

IN THE MATTER OF THE WAGE CLAIM)	Case No. 1414-2020
OF DELAIN DAVIS,)	
)	
Claimant,)	
)	
vs.)	FINAL AGENCY DECISION
)	
MELISSA DEMERS, individually, AND)	
d/b/a MD GO GREEN CONSTRUCTION,)	
)	
Respondent.)	

* * * * *

I. PROCEDURAL BACKGROUND

1. On December 3, 2019, Delain Davis filed a claim with the Wage and Hour Unit of the Montana Department of Labor and Industry alleging Melissa Demers, individually and d/b/a MD Go Green Construction (Demers), owed him \$2,215.60, in regular and overtime wages for work performed during the period of September 3, 2019, through November 26, 2019. Docs. 63-65.

2. On March 2, 2020, the Wage and Hour Unit issued an investigation report finding Demers owed Davis no regular wages and \$93.67 in overtime wages, with a penalty of 55%, for a total of \$145.19. Docs. 26-31.

3. On March 8, 2020, Demers filed a timely request for redetermination. Doc. 17.

4. On May 21, 2020, the Wage and Hour Unit issued a Wage Claim Investigation & Redetermination finding Demers owed Davis \$788.94 in regular wages, with a 15% penalty, and \$201.03 in overtime wages, with a 55% penalty, for a total of \$1,218.88. Docs. 8-12.

5. On June 26, 2020, the matter was transferred to the Office of Administrative Hearings (OAH) after mediation efforts were unsuccessful.

6. On July 6, 2020, OAH issued a Notice of Hearing and Telephone Conference setting the matter for a telephone conference on July 17, 2020. The notice provided:

The purpose of the conference is to set the dates for the hearing and establish a schedule for hearing preparation. If a party does not attend the conference, the hearing schedule will be set without that party's participation. A party's failure to appear for any conference, and/or failure to obey orders issued by the Hearing Officer, may result in sanctions against that party that can include entry of default, dismissal of an appeal, dismissal of the complaint, imposition of liability or other appropriate sanctions.

The notice further provided:

This hearing is being held because [Demers] appealed from a determination of the Department's Wage and Hour Unit that found wages are due the claimant. If [Demers] fails to appear at the hearing, the Office of Administrative Hearings will issue an order affirming the Wage and Hour Unit's determination, unless the opposing party seeks additional relief.

7. The Notice of Hearing and Telephone Conference was sent to both parties at the addresses of record. Neither mailing was returned as undeliverable.

8. On July 17, 2020, Hearing Officer Caroline A. Holien conducted a telephone conference in this matter with only Demers in attendance. The Hearing Officer was unable to reach Davis at the telephone number of record. The Hearing Officer set the pre-hearing deadlines and hearing date during this conference. Demers received actual notice of the pre-hearing deadlines and hearing dates.

9. On July 20, 2020, the Hearing Officer issued the Scheduling Order that set forth the pre-hearing deadlines and hearing dates. OAH staff mailed the Scheduling Order to the parties at the addresses of record. Neither mailing was returned as undeliverable. The Scheduling Order also included the following:

A party's failure to appear for any conference, and/or failure to obey orders issued by the Hearing Officer, may result in sanctions against that party that can include entry of default, dismissal of an appeal, dismissal of the complaint, imposition of liability or other appropriate sanctions.

.....

If the appellant fails to appear at the hearing, the Office of Administrative Hearings will issue an order affirming the Wage and Hour Unit's determination if the opposing party does not seek additional relief. If the opposing party has timely requested relief beyond that requested in the complaint, the hearing will proceed on that basis.

10. On August 11, 2020, Demers spoke with OAH administrative staff about seeking a delay in the proceedings so she could obtain counsel. Demers' request was denied, and she was advised that any request to delay the proceedings would have to be made by her attorney after the filing of a Notice of Appearance.

11. On September 23, 2020, OAH staff emailed the parties about rescheduling the final pre-hearing conference due to a conflict with the Hearing Officer's schedule. Demers did not respond to OAH efforts to contact her until after an order was issued September 29, 2020, resetting the date and time of the conference.

12. On October 2, 2020, Demers sent a text message to OAH staff indicating she wanted additional time to obtain counsel.¹ Demers was advised the conference was going forward as rescheduled. She was also reminded to file her pre-hearing disclosures that were due that day as set in the Scheduling Order.

13. On October 8, 2020, the Hearing Officer conducted the final pre-hearing conference. After delaying the conference approximately ten minutes, it proceeded with only Davis' participation due to Demers not being available.

14. On October 14, 2020, the Hearing Officer issued a Pre-Hearing Order setting forth the procedural background of the case and advising the parties that neither would be allowed to offer exhibits beyond that of the Administrative Record (Docs. 1-65) or call any witnesses in their case-in-chief due to their failure to file pre-hearing disclosures. The order also reminded the parties that the hearing was going forward as scheduled on October 26, 2020, at 9:00 a.m., MDT. The order was mailed to the parties at their addresses of record. Neither mailing was returned as undeliverable.

15. On October 26, 2020, the Hearing Officer convened a hearing in this matter. The Hearing Officer called Demers at her telephone number of record. Demers was not available. The Hearing Officer left her a voice mail message asking

¹ To date, no Notice of Appearance has been filed on behalf of Melissa Demers, individually and d/b/a MD Go Green Construction.

her to call OAH if she wished to participate in the hearing. After delaying the matter for ten minutes, the Hearing Officer called again and left Demers a second voice mail message advising her the matter may be dismissed and asked her to call OAH.²

16. The Hearing Officer then called Davis. The Hearing Officer informed Davis that, absent his objection, because Demers was the appellant in the case and was not present at the hearing, and based on the record, she intended to find Demers in default and affirm the redetermination of the Wage and Hour Unit. Davis did not object and affirmed that he was not seeking relief beyond what was found in the Wage and Hour Unit's redetermination.

II. ISSUE

Whether Melissa Demers, individually and d/b/a MD Go Green Construction owes regular and overtime wages for work performed, as alleged in the complaint filed by Delain Davis, and owes penalties or liquidated damages, as provided by law.

III. FINDINGS OF FACT

1. On July 6, 2020, OAH issued a Notice of Hearing and Telephone Conference that included:

This hearing is being held because [Demers] appealed from a determination of the Department's Wage and Hour Unit that found wages are due the claimant. If [Demers] fails to appear at the hearing, the Office of Administrative Hearings will issue an order affirming the Wage and Hour Unit's determination, unless the opposing party seeks additional relief.

2. Melissa Demers received proper notice of and participated in the telephone scheduling conference held on July 17, 2020.

3. On July 20, 2020, the Hearing Officer issued a Scheduling Order that set forth (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. The Scheduling Order included the following:

A party's failure to appear for any conference, and/or failure to obey orders issued by the Hearing Officer, may result in sanctions against

² As of the date of this decision, Demers has had no contact with OAH.

that party that can include entry of default, dismissal of an appeal, dismissal of the complaint, imposition of liability or other appropriate sanctions.

....

If the appellant fails to appear at the hearing, the Office of Administrative Hearings will issue an order affirming the Wage and Hour Unit's determination if the opposing party does not seek additional relief. If the opposing party has timely requested relief beyond that requested in the complaint, the hearing will proceed on that basis.

4. The Scheduling Order was mailed to the parties at the addresses of record. Neither mailing was returned as undeliverable.

5. Despite having received proper notice of the pre-hearing deadlines and hearing date, Demers has failed to comply with any orders of the Hearing Officer.

6. On October 26, 2020, Davis appeared for hearing and was prepared to proceed. Demers was contacted twice and was not available when called.

7. Demers owes Davis \$788.94 in unpaid regular wages and \$201.03 in unpaid overtime wages, as determined by the Wage and Hour Unit in its Wage Claim Investigation and Redetermination issued on May 21, 2020. Docs. 8-12.

8. Demers did not pay the unpaid wages by the deadline set forth in the redetermination.

9. Demers owes a 55% penalty of \$433.92 on the regular unpaid wages.

10. Demers owes a 110% penalty of \$221.14 on the unpaid overtime wages.

11. Demers owes Davis a total of \$1,645.03, including unpaid regular and overtime wages and penalties.

IV. DISCUSSION

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).

Demers is the appellant in this matter and is in default due to her failure to participate in the 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. Demers failed to participate in the scheduled hearing and failed to comply with the orders of the Hearing Officer. Demers' apparent indifference suggests she does not intend to pursue her appeal in this matter. Therefore, Demers 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 under Mont. Code Ann. § 39-3-201 et seq. *State v. Holman Aviation* (1978), 176 Mont. 31, 575 P.2d 925.

2. Melissa Demers, individually and d/b/a MD Go Green Construction has failed to follow the orders of this tribunal as set forth in the Scheduling Order and Pre-Hearing Order.

3. Melissa Demers, individually and d/b/a MD Go Green Construction failed to appear at the hearing that was scheduled as a result of her appeal. As a result, Melissa Demers, individually and d/b/a MD Go Green Construction failed to meet its burden of proof and entry of default is appropriate in this case.

4. There has been no showing that Davis' claim is subject to the Fair Labor Standards Act.

5. Melissa Demers, individually and d/b/a MD Go Green Construction has shown no basis to set aside the redetermination of the Wage and Hour Unit dated May 21, 2020. Therefore, Davis is owed \$788.94 in unpaid regular wages and \$201.03 in unpaid overtime wages.

6. A penalty of 55% on the unpaid regular wages is required under Admin. R. Mont. 24.16.7561(1)(b).

7. A penalty of 110% on the unpaid overtime wages is required under Admin. R. Mont. 24.16.7561(1)(b).

8. Melissa Demers, individually and d/b/a MD Go Green Construction, owes Davis a total of \$1,645.03, which includes \$788.94 in unpaid regular wages, \$433.92 in penalty on those regular wages, \$201.03 in unpaid overtime wages, \$221.14 in penalty on those overtime wages.

VI. ORDER

IT IS THEREFORE ORDERED that Respondent's appeal is DISMISSED. The Department's May 21, 2020, redetermination is affirmed and is therefore final. Melissa Demers, individually and d/b/a MD Go Green Construction, is hereby ORDERED to tender a cashier's check or money order in the amount of \$1,645.03 made payable to Delain Davis and mailed to the Employment Relations Division, P.O. Box 201503, Helena, MT 59624-1503, no later than 30 days after the date of mailing of this decision.

The Respondent may deduct applicable withholding taxes from the portion of the payments representing wages, but not from the portion representing liquidated damages or penalties.

DATED this 13th day of November, 2020.

DEPARTMENT OF LABOR & INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ CAROLINE A. HOLIEN
CAROLINE A. HOLIEN
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 59620-1503

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.