

5. On October 2, 2019, the matter was transferred to the Office of Administrative Hearings (OAH) after mediation efforts were unsuccessful.

6. On October 7, 2019, OAH issued a Notice of Hearing and Telephone Conference setting the matter for a telephone conference on October 18, 2019. 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 was sent to both parties at the addresses of record. Neither mailing was returned as undeliverable.

7. On October 18, 2019, Hearing Officer Caroline A. Holien convened a telephone conference in this matter at the appropriate date and time. The phone number for Starks was not operational, and the Hearing Officer was unable to leave Starks a message. The Hearing Officer delayed the conference for approximately ten minutes waiting for Starks to contact OAH. At that time, the scheduling conference proceeded in Starks' absence. Bruce F. Fain and Montana L. Funk, Attorneys at Law, appeared on behalf of Dynamond.

8. On October 22, 2019, the Hearing Officer issued a Scheduling Order in this matter that set the pre-hearing deadlines and contested case hearing date. The Scheduling Order was mailed to the parties at the addresses of record. Neither mailing was returned as undeliverable.

9. On January 7, 2020, the Hearing Officer conducted a final pre-hearing conference in this matter. The Hearing Officer called Starks at her telephone number of record but was unable to reach Starks. The Hearing Officer left two messages for Starks directing her to contact OAH. After approximately ten minutes, the Hearing Officer proceeded with the telephone conference. Both Fain and Funk appeared on behalf of Dynamond. Fain advised the Hearing Officer that Starks did not respond to his discovery requests and had no contact with him during the pre-hearing process. Fain moved for the dismissal of the matter based upon Starks' failure to participate in

any of the telephone conferences held in this matter; her failure to abide by the terms of the Scheduling Order; and her failure to respond to Dynamond's discovery requests. The Hearing Officer took the motion under advisement.

10. On January 8, 2020, the Hearing Officer issued a Notice of Intent to Dismiss. The notice provided Starks' appeal would be dismissed if she failed to file and serve a written argument as to why the matter should not be dismissed no later than January 21, 2020. The notice was mailed to the parties at the addresses of record. Neither mailing was returned as undeliverable. To date, nothing has been received from Starks, and she has had no contact with OAH.

II. ISSUE

Whether Dynamond Building Maintenance, Inc., a Montana corporation, owes regular and overtime wages for work performed, as alleged in the complaint filed by Karie M. Starks, and owes penalties or liquidated damages, as provided by law.

III. FINDINGS OF FACT

1. Karie M. Starks received proper notice regarding the scheduling conference held on October 18, 2019 and the final pre-hearing conference held on January 7, 2020. *See* Mont. Code Ann. § 26-1-602 (24) (establishing a disputable presumption that a letter duly directed and mailed was received in the regular course of the mail).

2. Starks has had no contact with either OAH or Dynamond's counsel during the pendency of this proceeding.

3. Starks has failed without good cause to participate in the proceedings initiated as a result of her appeal.

4. Starks is in default based upon her failure to participate in the proceedings and to abide by the orders of this tribunal.

5. Due to her failure to actively prosecute her claim, Starks has failed to show that Dynamond Building Maintenance, Inc., a Montana corporation, owes her any unpaid wages for work performed during the period of her wage claim.

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).

Starks is the appellant in this matter. Starks received proper notice with the Notice of Hearing and Telephone Conference and Scheduling Order that her appeal may be dismissed if she failed to actively prosecute her claim or otherwise abide by the orders of this tribunal. Starks has failed to appear for any telephone conference, and she has failed to have any contact with OAH. It is therefore determined that Starks is in default and her appeal is hereby dismissed.

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. Karie M. Starks has failed to follow the orders of this tribunal as set forth in the Notice of Intent to Dismiss. Starks is in default. Mont. Code Ann. § 2-4-603(1)(a).

3. Starks has failed to state good cause as to why her appeal should not be dismissed.

4. There has been no showing that the Wage and Hour Unit's dismissal of Starks' claim should be set aside.

VI. ORDER

Based on the foregoing, Karie M. Starks is found to be in default. Therefore, the appeal of Karie M. Starks is dismissed with prejudice. The Department's redetermination is final.

DATED this 23rd day of January, 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