

**STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
HEARINGS BUREAU**

<b>IN THE MATTER OF THE WAGE CLAIM</b>	)	<b>Case No. 1842-2003</b>
<b>OF ERIC W. GERMANN,</b>	)	
<b>Claimant,</b>	)	
	)	
<b>vs.</b>	)	<b>FINAL AGENCY DECISION</b>
	)	
<b>BUFFALO MARY'S LTD COMPANY, LLC,</b>	)	
	)	
<b>Respondent.</b>	)	

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**I. INTRODUCTION**

On April 14, 2003, Eric W. Germann filed a claim with the Department of Labor and Industry contending that Buffalo Mary's Ltd. Co.<sup>(1)</sup> had failed to pay him \$2,880.00 in wages due to him at the termination of his employment. On July 24, 2003, the Department's Employment Relations Division, Wage and Hour Unit, determined that Buffalo Mary's owed Germann \$2,300.00, and a statutory penalty.<sup>(2)</sup> On August 18, 2003, the Wage and Hour Unit issued an order on default ordering Buffalo Mary's to pay Germann \$3,565.00, representing \$2,300.00 in wages and \$1,265.00 in penalty. On August 29, 2003, the respondent requested a redetermination of the order on default. On October 20, 2003, the case was transferred to the Department's Hearings Bureau for hearing.

The hearing officer held a prehearing conference in the case on November 7, 2003. The claimant was present. Patrick Watt, attorney at law, represented the respondent. At the conference, the parties agreed to suspend the contested case proceedings and return to mediation in the Employment Relations Division. The hearing officer therefore ordered the case remanded for mediation.

On December 22, 2003, the Wage and Hour Unit transferred the case back to the Hearings Bureau because mediation efforts had been unsuccessful. The hearing officer held a prehearing conference in the case on January 20, 2004, after receiving notice that Patrick Watt was no longer representing the respondent. The claimant was present. Ashley Benner appeared on behalf of the respondent. At the prehearing conference, the parties agreed to a preliminary hearing to be held telephonically on January 24, 2004, on the question of whether the default should be set aside. A hearing on the merits of the claim was scheduled for February 18, 2004.

The hearing on the default was conducted on January 24, 2004. Germann and Benner were present and testified. Phyllis Henley appeared as a witness and testified. Documents numbered 3,

6, 14-15, 19-21, 27-30, 31, 62-63, 64, 65, 71, 72-73, 78, and 135-136 were admitted into evidence without objection.

Based on the evidence presented at hearing, the hearing officer finds no basis to set aside the default in this case. The findings of fact, conclusions of law, and discussion which follow set forth the rationale for this decision.

## **II. ISSUE**

The issue in this case is whether the respondent is entitled to relief from an order on default issued by the Wage and Hour Unit of the Department of Labor and Industry on August 18, 2003, requiring the respondent to pay the claimant \$3,565.00 in wages and penalties.

## **III. FINDINGS OF FACT**

1. On April 14, 2003, the claimant, Eric W. Germann, filed a claim with the Department of Labor and Industry contending Buffalo Mary's Ltd. Co. had failed to pay him wages and bonuses of \$2,880.00 after he left his employment. He identified the employer business address as 1027 Simms-Cascade Road and mailing address as P.O. Box 630, Cascade, Montana, 59421-0630.

2. On April 15, 2003, Bonnie Thorvilson of the Department's Wage and Hour Unit notified Buffalo Mary's of the claim by letter addressed to both the Simms-Cascade Road and P.O. Box 630 addresses. The letter requested a reply to the claim by April 25, 2003.

3. On April 28, 2003, Ashley Benner, on behalf of Buffalo Mary's, faxed a letter to Thorvilson. It stated, in part:

I received a letter dated April 15 from you on Saturday, April 26<sup>th</sup>. I can not explain the delay in it's [sic] delivery, but I hope you will accept this response even though it is past your deadline. . . . I will fill out the paperwork and mail it to you under separate cover.

4. On May 5, 2003, the Wage and Hour Unit received Buffalo Mary's answer to the claim. It was signed by Ashley Benner and dated April 29, 2003. It identified Benner as the registered agent and president of the business. It gave the business address as P.O. Box 630, Cascade, Montana 59421. A check payable to Germann was included with the response. The address for Buffalo Mary's on the check was P.O. Box 630, Cascade, MT 59421.

5. On June 3, 2003, Thorvilson sent a letter regarding Germann's wage claim to Buffalo Mary's at P.O. Box 630, Cascade Mt 59421. It stated, in part:

Upon receipt of your response to the above referenced wage claim, a copy was mailed to Mr. Germann for his review, consideration and response. Pursuant to the Department's policy of sharing information with both parties to a wage [sic], a copy of an addition to his initial wage claim is provided for your information.

Please submit any information in response to the enclosed information by no later than a postmarked date of **June 13, 2003**.

6. Buffalo Mary's did not reply to the letter of June 3, 2003.

7. From approximately July 10 to August 5, 2003, Ashley Benner and her family were away from home on vacation, traveling in Nevada and California. During their absence, Benner's father-in-law picked up the mail from P.O. Box 630, Cascade.

8. On July 24, 2003, the Wage and Hour Unit issued a determination in Germann's claim. The determination held that Germann was due \$480.00 in wages and \$2,300.00 in bonuses, less \$480.00 previously paid, for a total of \$2,300.00. It also assessed 15% penalty of \$345.00 on the \$2,300.00 if the wages were paid by August 11, 2003; if the wages were not paid by August 11, 2003, the penalty would increase to 55% or \$1,265.00. The determination further notified the parties that they could appeal or request a redetermination by August 11, 2003, but that if the Wage and Hour Unit received no timely appeal or request for redetermination, it would issue an order on default in the amount of the determination.

9. The Wage and Hour Unit mailed the determination of July 24, 2003, to Germann and to Buffalo Mary's Ltd. Co., Ashley Benner, Registered Agent, at the following addresses:

P.O. Box 630  
Cascade MT 59421

P.O. Box 57  
Heron MT 59844

1027 Simms Cascade Road  
Cascade MT 59421

10. Buffalo Mary's did not appeal the determination or request a redetermination prior to August 11, 2003. On August 18, 2003, the Wage and Hour Unit issued an order on default, ordering Buffalo Mary's to pay Germann \$3,565.00, comprised of \$2,300.00 in wages and \$1,265.00 in penalty. It mailed the order to Buffalo Mary's at the two addresses in Cascade, Montana: P.O. Box 630 and 1027 Simms Cascade Road.

11. On August 29, 2003, Benner faxed a request for redetermination of the order on default addressed to Amy Smith of the Wage and Hour Unit, contending she had no record of receiving the determination dated July 24, 2003. She indicated that the Heron and Simms-Cascade Road addresses were not valid addresses because the Heron address had not been valid since 1997 and there was no mail service to the Simms-Cascade Road address. She acknowledged the P.O. Box 630 address to be valid, but stated that she had no record of receiving the notice. She indicated that the fact she was out of state on vacation may have contributed to the problem.

12. The U.S. Postal Service does not deliver mail to the address at 1027 Simms-Cascade Road. When the Cascade post office receives mail addressed to that address, it delivers it to P.O. Box 630, Cascade, Montana.

#### **IV. DISCUSSION AND ANALYSIS<sup>(3)</sup>**

Montana law gives the Department of Labor and Industry authority to adjudicate and enforce claims made by employees for unpaid wages. Mont. Code Ann. §§ 39-3-201 to 39-3-216. When the Department determines that a wage claim is valid, if the employer does not appeal the determination, the Department may issue a default order against the employer for the amount of wages due and penalty assessed. Mont. Code Ann. § 39-3-216. The statute also directs the Department to adopt rules providing relief for a person who does not receive the determination by mail.

The Department's rules provide:

A party which alleges that it did not receive timely notice by mail of the . . . determination . . . provided by these rules has the burden 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.

Admin. R. Mont. 24.16.7544.<sup>(4)</sup> In addition, the Montana Supreme Court has articulated the following test for determining whether good cause exists to set aside a default order or judgment:

As noted in Rule 55(c), a default judgment may only be set aside "for good cause shown." We have previously specified what is necessary to establish such good cause:

"In order to justify the district court in granting the motion, the defendant was required to show: (a) That he proceeded with diligence; (b) his excusable neglect; (c) that the judgment, if permitted to stand, will affect him injuriously, and that he has a defense to plaintiff's cause of action upon the merits." [Citations omitted].

*Blume v. Metropolitan Life Ins. Co.* (1990), 242 Mont. 465, 468, 791 P.2d 784, 786.

The respondent seeks relief from the Department's order on default, contending that Buffalo Mary's did not receive the determination in the case. However, the respondent has failed to overcome the presumption that a letter duly directed and mailed was received in the regular course of the mail, and has otherwise failed to meet the requirements for relief from the default based on good cause.

Benner seemed sincere in her testimony that she did not receive the determination. However, the evidence established that not only was P.O. Box 630, Cascade, Montana, the correct address for Buffalo Mary's, but also, based on the testimony of the Cascade postmaster, that mail

addressed to 1027 Simms-Cascade Road was routed to P.O. Box 630. Therefore, Buffalo Mary's is contending that, unaccountably, it did not receive two copies of the determination mailed by the Wage and Hour Unit. Although mail is occasionally misdirected or not delivered in the United States mail system, it is improbable that both pieces of correspondence went undelivered.

Based on the evidence, the most likely explanation of what happened in this case is that Benner's father-in-law, who picked up the mail while she and her husband were on vacation, did not give the determinations to her. However, in having designated her father-in-law to pick up the mail in the absence of herself and her husband, she is accountable for his lack of diligence in insuring receipt of the determinations by Buffalo Mary's. Further, Benner was on notice of the pendency of Germann's claim due to earlier correspondence from the Department. However, her handling of that correspondence also suggests lack of diligence. She did not timely reply to the initial notice of the claim, and she did not respond in any fashion to the letter of June 3, 2003, which offered her the opportunity to rebut information provided by Germann. The letter of June 3, 2003, was mailed over a month before Benner and her family left on vacation, and Benner contends that she has information to rebut Germann's claims. Considering all of these facts together, the hearing officer is unable to conclude either that the determinations went undelivered or that Buffalo Mary's acted with diligence supporting a request to set aside the default.

Benner speculated that because the Wage and Hour Unit indicated that it had mailed the document to several addresses which were invalid as mailing addresses, that it may have failed to mail the determination to the correct address. The determination contains a certification that it was mailed to the employer at all three addresses. Further, as noted above, however, mail addressed to one of the invalid addresses was routed to the correct address. Benner points in particular to the Heron, Montana, address, because Buffalo Mary's had not used that address since 1997. The record does not demonstrate how or why the Wage and Hour Unit sent the determination to the Heron address. However, the document in evidence from the Secretary of State's office (exhibit 78) shows that the Heron address was still on record for Buffalo Mary's as late as November 2003. It is probable that the Department obtained the information concerning the address from the Secretary of State in an effort to be broadly inclusive in notifying the employer of the determination in the case. In view of this, it is not likely that the Department would have failed to mail the determinations to addresses provided by Buffalo Mary's itself.

Because Buffalo Mary's has failed to show any valid basis to set aside the default order in this matter, the date set for the hearing on the merits of Germann's claim and deadline for prehearing exchange established in the order of January 20, 2004, are hereby vacated.

## **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. Buffalo Mary's Ltd. Co. LLC has failed to prove by clear and convincing evidence that it did not receive the determinations issued by the Wage and Hour Unit of the Department of Labor and Industry regarding the wage claim of Eric W. Germann.

3. Buffalo Mary's Ltd. Co. LLC has failed to establish good cause to set aside the default order issued by the Department of Labor and Industry in the wage claim of Eric W. Germann.

## **VI. ORDER**

1. The request for administrative relief from the Department's Order on Default dated August 18, 2003, and the request to set aside that Order on Default, are hereby **DENIED**.

2. Buffalo Mary's Ltd. Co. LLC **IS HEREBY ORDERED** to comply with the Department of Labor and Industry's Order on Default by tendering a cashier's check or money order in the amount of \$3,565.00, representing \$2,300.00 in unpaid wages and \$1,265.00 as a penalty, payable to the claimant, Eric W. Germann, and delivered to the Employment Relations Division, P.O. Box 6518, Helena, Montana 59604-6518 no later than March 5, 2004.

3. The hearing date (February 18, 2004) and deadline for exchange of prehearing information (February 11, 2004) in this case are hereby vacated.

DATED this day of February, 2004.

DEPARTMENT OF LABOR AND INDUSTRY

By: /s/ ANNE L. MACINTYRE

Anne L. MacIntyre, Chief  
Hearings Bureau

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 service of the decision. *See also* Mont. Code Ann. § 2-4-702.

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, MCA. Such an application is not a review of the validity of this Order.

1. The Wage and Hour Unit captioned the respondent in this case as "Buffalo Mary's Ltd. Company, A Montana Corporation." However, documents admitted into evidence in the case indicate that the respondent is a limited liability company rather than a corporation. Therefore, the caption has been amended to reflect that the respondent is a limited liability company.

2. The determination held that Buffalo Mary's owed Germann \$2,780.00 in wages, but that \$480.00 had been tendered to the agency after the claim was filed, leaving a balance of \$2,300.00.

3. Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

4. The rule also contains an obsolete provision calling for appeal of a department order on default to the Board of Personnel Appeals. Although the Board still exists, it no longer hears appeals from agency final orders. Mont. Code Ann. § 39-3-216(4), as amended, Sec. 7, Ch. 90, Laws 1995.