

STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM OF MARHYA L. MISNER,	)	Case No. 2479-2004
	)	
	)	
Claimant,	)	
	)	<b>FINAL AGENCY DECISION</b>
vs.	)	
	)	
EL PECK ENTERPRISES, INC.,	)	
	)	
Respondent.	)	

\* \* \* \* \*

**I. INTRODUCTION**

On May 17, 2004, Maryha L. Misner filed a claim with the Department of Labor and Industry contending that EL Peck Enterprises, Inc., had improperly withheld \$190.85 due to her in wages. On June 11, 2004, Earleen Peck, owner, filed an answer to the claim indicating that she had in fact withheld \$190.85 from Misner’s wages for child care services, and was waiting for an indication from the state that Misner’s child was eligible to be covered by the state. On July 12, 2004, the Department’s Employment Relations Division, Wage and Hour Unit, determined that EL Peck Enterprises and Earleen Peck owed Misner \$190.85, and a statutory penalty. On August 16, 2004, the Wage and Hour Unit issued an order on default ordering the respondent to pay Misner \$295.82, representing \$190.85 in wages and \$104.97 in penalty. On September 16, 2004, the respondent filed an appeal of the order on default. On November 15, 2004, the case was transferred to the Department's Hearings Bureau for hearing.

Following a pre-hearing conference in the case, the Hearing Officer set the matter for hearing on January 6, 2005. When the Hearing Officer attempted to convene the hearing, Earleen Peck, on behalf of the respondent, requested a continuance of the hearing because of a medical emergency. Misner did not object to the continuance, and the hearing was held on January 7, 2005. The parties stipulated to the hearing being conducted by telephone.

Earleen Peck, Kelli Phillips, and Maryha Misner testified in the case. Exhibits 5 - 6, 7- 9, 13 - 14, 17 - 19, 20 - 21, 22, 23 - 24, 25 - 29, 31 - 32, and 38 were admitted during the hearing without objection. The Hearing Officer also notified the parties of her intent to admit exhibit 39, which had not been provided to the parties prior to the hearing. The Hearing Officer mailed a copy of exhibit 39 to each party, and gave them until January 18, 2005, to file any objection to the exhibit. Having received no objection, exhibit 39 is hereby admitted.

Based on the evidence presented at hearing, the Hearing Officer finds no basis to set aside the default in this case. Even if there was cause to set aside the default, the respondent did not timely appeal the default order. In addition, the evidence establishes that Misner's wages were improperly withheld. The findings of fact, conclusions of law, and discussion which follow set forth the rationale for this decision.

## **II. ISSUE**

The issues in this case are 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 16, 2004, requiring the respondent to pay the claimant \$295.82 in wages and penalties and, if so, whether EL Peck Enterprises, Inc., owes wages for work performed, as alleged in the complaint filed by Marhya L. Misner, and owes penalty, as provided by law.

## **III. FINDINGS OF FACT**

1. EL Peck Enterprises, Inc. (EL Peck) operated a day care facility in Lakeside, Montana, called Whitney's Playhouse. EL Peck employed Marhya L. Misner as a day care worker from April 9, 2004 through April 22, 2004. She worked 55 hours at an hourly wage of \$6.00, and earned \$330.00.

2. Misner's son was enrolled in the day care effective April 1, 2004. Misner signed an agreement to pay \$364.35 per month for his care. She believed that she was eligible for a child care subsidy through the Department of Public Health and Human Services (DPHHS) which would cover the care. However, when DPHHS approved eligibility for the subsidy, the effective date was April 17, 2004. Misner believed this was an error on the part of Peck in giving DPHHS the correct provider number and that her son should have been eligible effective April 1, 2004. DPHHS never paid for the care of Misner's son for the first part of April.

3. On May 7, 2004, EL Peck issued a check to Misner for her work in April. It withheld \$190.85 from Misner's wages for her son's day care prior to April 17, 2004.

4. The day care agreement Misner signed was not part of her employment agreement. It did not authorize deduction of the day care costs from her paycheck.

5. On May 17, 2004, Misner filed a claim with the Department contending that EL Peck had improperly withheld \$190.85 due to her in wages. On May 18, 2004, the Department's Employment Relations Division, Wage and Hour Unit, served the claim on the respondent, requesting a response to the claim to be postmarked no later than June 1, 2004.

6. On June 11, 2004, the Wage and Hour Unit received an answer to the claim from Earleen Peck, owner, indicating that she had in fact withheld \$190.85 from Misner's wages for child care services, and was waiting for an indication from the state that Misner's child was eligible to be covered by the state. Peck's signature was dated May 31, 2004.

7. On July 12, 2004, the Wage and Hour Unit determined that EL Peck Enterprises and Earleen Peck owed Misner \$190.85, and a statutory penalty. It served the determination by mail on July 12, 2004. It notified her that she could appeal the determination or request a redetermination, that the appeal or request for redetermination had to be made in writing, and had to be postmarked no later than July 30, 2004.

8. Earleen Peck wrote a letter to Tom Brodowy of the Wage and Hour Unit dated July 29, 2004. It stated that she regretted it had taken her so long to reply, but she had been waiting to hear whether Misner's child care would be covered by the state and had just received notification that the child was not covered until April 17, 2004.

9. The mailing envelope for Peck's letter of July 29, 2004, was postmarked in Kalispell, Montana, on August 3, 2004, and in Helena, Montana, on August 4, 2004. It was also marked "23¢ postage due." The Wage and Hour Unit received the letter on August 4, 2004.

10. On August 16, 2004, the Wage and Hour Unit issued an order on default ordering EL Peck to pay Misner \$295.82, representing \$190.85 in wages and \$104.97 in penalty. The order notified the respondent that it could seek judicial review of the order in district court or request administrative relief from the Department. A petition for judicial review had to be filed in district court within 30 days of service of the order. A request for administrative relief had to be sent to Amy Smith of the Department of Labor and Industry, and postmarked no later than September 3, 2004.

11. On September 16, 2004, the Department received an appeal of the order on default. The envelope was postmarked September 15, 2004. In the appeal letter, Peck stated that her response to the determination was late because she did not timely receive the information she needed concerning child care coverage for Misner's child. The Wage and Hour Unit treated the appeal as a request for administrative relief from the order on default, and transferred the case to the Hearings Bureau for a hearing on the request.

#### **IV. DISCUSSION AND ANALYSIS<sup>1</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

---

<sup>1</sup>Statements of fact in this discussion and analysis are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

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 default order *will* be issued if the employer fails to *timely* file a written response to the determination.

Admin. R. Mont. 24.16.7541(1) (emphasis added).

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>2</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 her response to the determination was late because she did not timely receive information she needed from DPHHS to address Misner’s claim. The respondent does not dispute receiving the determination dated July 12, 2004. Therefore, Admin. R. Mont. 24.16.7544 does not apply in this case.

---

<sup>2</sup>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.

The respondent has failed to show good cause to set aside the default issued by the Department. Earleen Peck is unable to show either that she proceeded with diligence or excusable neglect. She testified that she did not reply sooner to the determination because she was waiting to receive information from DPHHS. Accepting for the sake of argument that she needed this information to file her appeal, her own letter shows that she had the information on July 29, 2004. However, she did not mail the letter of appeal to the Wage and Hour Unit until August 3, 2004. At hearing, Peck was unable to account for why she did not mail the letter of appeal on the day she wrote it or by the appeal deadline of July 30, 2004. Phillips testified that she mailed the letter on July 29 or July 30, but this is not credible in view of the postmark. The correspondence between EL Peck and the Wage and Hour Unit shows a consistent pattern of failure to timely respond. The initial response to the wage claim was due June 1, 2004. Peck completed the response form on May 31, 2004, but the Wage and Hour Unit did not receive it until June 11, 2004. Further, the request for relief from the default order was not timely filed. It was due on September 3, 2004, but postmarked on September 15, 2004. All of these facts point to a failure to proceed with diligence by the respondent.

Even if the respondent could show that it proceeded with diligence and excusable neglect, it cannot show the third element, a defense to the claim on the merits. The respondent concedes that it withheld the wages from Misner. It contends that because Misner owes for day care services, it should be allowed to offset her wages for what she owes. However, the law does not allow such an offset against wages. An employer cannot withhold wages and apply such wages to an account which the employee has with the employer unless the account is for board, room, or other incidentals which the employee has agreed may be deducted as a condition of the employment. *See, e.g.*, Mont. Att. Gen. Op. 25-11 (1953). Misner did not agree that the day care services could be deducted from her pay. Therefore, whether or not Misner owes respondent for the day care, respondent cannot deduct these sums from her paycheck, and owes her the \$190.85 withheld. Further, Montana law assesses a penalty when an employer fails to pay wages when they are due. Mont. Code Ann. § 39-3-206. For claims involving compensation other than minimum wage and overtime compensation, a penalty of 55% must be imposed. Admin. R. Mont. 24.16.7566. Misner is therefore entitled to the wages and penalties determined by the Wage and Hour Unit.

## 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. EL Peck Enterprises, Inc., failed to file a timely appeal of the determination issued by the Department on July 12, 2004 finding wages and penalties due to Marhya L. Misner. A default order is therefore proper pursuant to Admin. R. Mont. 24.16.7541(1). EL Peck Enterprises, Inc., received the determination and is not entitled to relief from the default under Admin. R. Mont. 24.16.7544.

3. EL Peck Enterprises, Inc., 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 Marhya L. Misner.

4. EL Peck Enterprises, Inc., owes Marhya L. Misner wages improperly withheld from her paycheck in the amount of \$190.85, and a penalty of \$104.97.

## VI. ORDER

1. The request for administrative relief from the Department's Order on Default received September 16, 2004, and the request to set aside that Order on Default, are hereby **DENIED**.

2. EL Peck Enterprises, Inc., **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 \$295.82, representing \$190.85 in unpaid wages and \$104.97 as a penalty, payable to the claimant, Marhya L. Misner, and delivered to the Employment Relations Division, P.O. Box 6518, Helena, Montana 59604-6518 no later than March 28, 2005.

DATED this 23rd day of February, 2005.

DEPARTMENT OF LABOR AND INDUSTRY  
HEARINGS BUREAU

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.

\* \* \* \* \*

CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing document were, this day, served upon the parties or their attorneys of record by depositing them in the U.S. Mail, postage prepaid, and addressed as follows:

Marhya L. Misner  
P.O. Box 135  
Lakeside, MT 59922

El Peck Enterprises, Inc.  
Earleen Peck  
P.O. Box 865  
Lakeside, MT 59922

DATED this 23rd day of February, 2005.

/s/ SANDY DUNCAN

MISNER.FOF.AMD

MARHYA L MISNER  
PO BOX 135  
LAKESIDE MT 59922



EL PECK ENTERPRISES INC  
EARLEEN PECK  
PO BOX 865  
LAKESIDE MT 59922