

STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
HEARINGS BUREAU

|   |   |                            |
|---|---|----------------------------|
| IN THE MATTER OF THE WAGE CLAIM           | ) | Case No. 431-2005          |
| OF RON A. MORLEY II,                      | ) |                            |
|   | ) |                            |
| Claimant,                                 | ) | <b>FINDINGS OF FACT;</b>   |
|   | ) | <b>CONCLUSIONS OF LAW;</b> |
| vs.                                       | ) | <b>AND ORDER</b>           |
|   | ) |                            |
| GARDINER TOWN CLUB, INC.,                 | ) |                            |
| a Montana corporation d/b/a SINCLAIR TNT, | ) |                            |
|   | ) |                            |
| Respondent.                               | ) |                            |

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**I. INTRODUCTION**

In this matter, Respondent Gardiner Town Pump, Inc., (Gardiner) appeals a determination from a Wage and Hour Unit determination that defaulted Gardiner for failing to timely appeal the determination or request a redetermination as required by applicable statute and administrative regulation.

Hearing Examiner Gregory L. Hanchett conducted a telephonic hearing in this matter on February 16, 2005. Claimant Ron A. Morley II, represented himself. Wade Laubach, owner of Gardiner, appeared on behalf of the respondent. Both gentlemen testified under oath. In addition, the parties stipulated to the admission of Documents 1 through 26 contained in the Wage and Hour Unit file. For the reasons that follow, the hearing examiner concludes that there is no legal basis to set aside the default in this matter. This final order is based on the following findings of fact and conclusions of law.

**II. ISSUE**

Should the default order entered against Gardiner be set aside?

### III. FINDINGS OF FACT

1. Gardiner employed Morley as a store clerk between July 9, 2004 and August 16, 2004. On August 16, 2004, Laubach fired Morley for allegedly stealing a package of cigarettes.

2. On August 31, 2004, Morley filed a wage claim against Gardiner, alleging that he was due additional money in the form of unpaid wages (\$96.00) and improper withholdings from wages (\$378.00).

3. On September 2, 2004, a Wage and Hour Unit compliance specialist forwarded the wage complaint along with a cover letter (Document 23) to Laubach. The cover letter indicated that Laubach must file a written reply no later than September 13, 2004 or a default totaling the amount sought plus a 110% penalty would be levied against Gardiner.

4. Despite receiving the cover letter and complaint from the Wage and Hour Unit, Gardiner failed to respond. On September 22, 2004, Wage and Hour Unit compliance specialist Pam McDaniel issued a determination finding that Gardiner had failed to respond to the complaint. Documents 19 and 20. The determination ordered Gardiner to pay the entire amount claimed by Morley (\$474.00) plus the 110% penalty required by administrative regulation, amounting to \$521.40 ( $\$474.00 \times 110\% = \$521.40$ ). The determination informed Gardiner that it could request a redetermination no later than October 12, 2004. The determination further admonished Gardiner that if an appeal or redetermination were not made by October 12, 2004, an Order on Default would be entered.

5. On September 28, 2004, Laubach contacted compliance specialist Pam McDaniel by telephone to discuss the determination. During that conversation, McDaniel advised Laubach that he would have to file an appeal no later than October 12, 2004. Document 21.

6. Laubach received the determination in time to act upon it by October 12, 2004. He failed, however, to do so. On October 18, 2004, the Wage and Hour Unit issued its Order on Default, ordering Laubach to pay the wages claimed and the 110% penalty.

7. After learning that the default order had been issued on October 18, 2004, Laubach finally filed a request for redetermination. The Wage and Hour Unit received the request on October 20, 2004.

8. Subsequent to the entry of the Order on Default, Laubach paid an additional \$114.40 to Morley. Subtracting this amount from the amount sought by Morley reduces the amount of wages due Morley to \$361.50.

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

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<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.

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 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.

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 on the basis that he miscalendared the date by which he was required to file an appeal. He does not dispute that he received the determination in time to timely act upon his rights. Therefore, Admin. R. Mont. 24.16.7544 does not apply in this case.

In addition, the respondent has failed to show good cause to set aside the default issued by the Department. Gardiner cannot show that it acted with diligence in pursuing this matter. First, Gardiner never responded to the initial letter from the Wage and Hour Unit despite being advised in the letter that the failure to do so would result in a default being issued. Gardiner then received the adverse determination which plainly stated the need to file a timely appeal or request for redetermination and, once again, did nothing. Indeed, Gardiner took no action on the determination despite the additional reminder, provided during Laubach's telephone conversation with the compliance specialist on September 28, 2004, of the need to file an appeal no later than October 12, 2004.

Gardiner's proffered reason for its failure to timely file an appeal from the decision—miscalendaring of the appeal date—is not credible in light of its timely receipt of the determination, the clear admonition contained in the determination, and the compliance specialist's subsequent admonition about the need to file the appeal in a timely manner. All of these facts demonstrate Gardner's lack of diligence in pursuing its appeal. There is no legal basis for setting aside the default order.

## 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. Gardiner failed to file a timely appeal of the determination issued by the Department on September 22, 2004 finding wages and penalty due to Ron A. Morley II. A default order is therefore proper pursuant to Admin. R. Mont. 24.16.7541(1). Gardiner received the determination and is not entitled to relief from the default under Admin. R. Mont. 24.16.7544.

3. Gardiner 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 Ron A. Morley II.

4. After entry of the default order, Gardiner paid Ron A. Morley II additional wages of \$114.40. Gardiner is entitled to credit for that amount against the amount due to Ron A. Morley. Gardiner still owes Ron A. Morley wages in the amount of \$361.50. In addition, Gardiner owes a penalty of \$521.40.

## VI. ORDER

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

2. Gardiner Town Pump, Inc., d/b/a Sinclair TNT, **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 \$882.90, representing \$361.50 in unpaid wages and \$521.40 as a penalty, payable to the claimant, Ron A. Morley II and delivered to the Employment Relations Division, P.O. Box 6518, Helena, Montana 59604-6518 no later than 30 days from the date of this order.

DATED this 16th day of March, 2005.

DEPARTMENT OF LABOR & INDUSTRY  
HEARINGS BUREAU

By: /s/ GREGORY L. HANCHETT  
GREGORY L. HANCHETT  
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 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. 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:

RON A MORLEY II  
GENERAL DELIVERY  
DEATH VALLEY CA 92328-9999

WADE LAUBACH  
GARDINER TOWN CLUB INC  
PO BOX 127  
GARDINER MT 59030

DATED this 16th day of March, 2005.

/s/ SANDRA K. PAGE

Morley FOF ghp