STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM OF KYLE M. LEES, Claimant, vs. ERIC G. VOLDSETH AND VANESSA V. CAVANAUGH d/b/a V TECH, Respondents.	)	Case No. 716-2005 **FINDINGS OF FACT; CONCLUSIONS OF LAW; AND ORDER**

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I. INTRODUCTION

In this matter, Respondents Vanessa Cavanaugh and Eric Voldseth appeal a determination from a Wage and Hour Unit determination that defaulted them for failing to timely appeal an adverse determination or request a redetermination as required by applicable statute and administrative regulation.

Hearing Officer Gregory L. Hanchett conducted a telephonic hearing in this matter on June 3, 2005. Claimant Kyle Lees represented himself. Vanessa Cavanaugh represented Cavanaugh and Voldseth. The parties stipulated to the admission of Documents 1 through 40 contained in the Wage and Hour Unit file. For the reasons that follow, the hearing officer concludes that while the default should be set aside, Cavanaugh and Voldseth nonetheless owe wages and penalty as described below. This final order is based on the following findings of fact and conclusions of law.

II. ISSUES

A. Should the default order entered against Cavanaugh and Voldseth be set aside?

B. If the default should be set aside, are wages due Lees as claimed in his complaint and are penalties owed as provided by law?

III. FINDINGS OF FACT

A. *Facts Surrounding the Default.*

1. Kyle Lees filed a wage claim against Vanessa Cavanaugh and Eric Voldseth on September 29, 2004. Lees did not know the whereabouts of either Cavanaugh or Voldseth.

2. On October 8, 2004, the Employment Relations Division (ERD) forwarded a letter to Cavanaugh and Voldseth at 610 E. 1st Avenue North, Columbus, Montana, informing them of the claim. On October 15, 2004, ERD forwarded a letter to Cavanaugh and Voldseth at 410 E. 1st Avenue North, Columbus, Montana, informing them of the claim. Neither letter was delivered to the respondents and each was returned by the post office as "delivery attempted, not known." (Document 27)

3. On November 9, 2004, ERD issued a default determination advising the respondents that they owed Lees $1,210.00 in unpaid wages and $1,331.00 in a penalty, specifying that Cavanaugh and Voldseth had until November 29, 2004 to appeal the decision. ERD received no appeal by that date and on December 7, 2004, issued an order on default requiring the wages and penalty to be paid. That order was sent to 410 ***3*** 1st Avenue North, Columbus, Montana (not 410 ***E.*** 1st Avenue North) (emphasis added to both addresses) and 610 E. 1st Avenue North, Columbus, Montana. Both copies of the order were returned as "not deliverable as addressed." (Document 26)

4. On December 14, 2004, ERD reissued the Order on Default setting new appeal deadlines. This notice, too, was sent to 410 ***3*** 1st Avenue North, Columbus, Montana (not 410 ***E.*** 1st Avenue North) (emphasis added to both addresses) and 610 E. 1st Avenue North, Columbus, Montana. Both copies of the order were returned as "not deliverable as addressed." (Documents 20 and 21)

5. On December 22, 2004, ERD sought to have the respondents served with personal notice of the default by the Stillwater County Sheriff. The sheriff's office was unable to serve the respondents.

6. On January 6, 2005, Cavanaugh contacted the ERD and stated that she had received a copy of the November 9, 2004 order on January 3 or 4, 2005. Apparently, the order had been delivered to Cavanaugh's mother but her mother did not inform her of the order. Upon learning of the letter, Cavanaugh immediately contacted ERD to find out how to proceed.

B. *Substantive Facts.*

1. Vanessa Cavanaugh and Eric Voldseth are brother and sister. Cavanaugh, Voldseth and Kyle Lees have at all times material to this case been residents of the State of Montana.

2. Cavanaugh and Voldseth formed V-Tech and entered into a contract with Worland High School in Worland, Wyoming, to install video monitoring equipment in the school.

3. In the fall of 2003, Cavanaugh and Voldseth advertised in the Billings Gazette newspaper seeking employees to complete the installation of the monitoring system in the Worland High School. Lees responded to the advertisement and met with Cavanaugh at a hotel in Billings to discuss his employment with them. Cavanaugh and Lees agreed that Lees would be paid $15.00 dollars per hour to complete the installation of the video equipment at the high school. In addition, Cavanaugh agreed to pay for Lees' hotel and living expenses while he was in Worland completing the project. Cavanaugh also paid Lees approximately $400.00 up-front to help him cover his expenses.

4. Lees started work on the project on December 3, 2003. He worked four weeks in December 2003 and one week in January 2004. Lees kept track of the number of hours he worked each day (Documents 37 and 38). Lees worked a total of 194 hours as shown by Documents 37 and 38.

5. The project did not go well. The wrong cameras were ordered for the project and had to be reordered. Lees ran out of wiring and could not get any additional wiring from V-Tech. The project was never finished. Other than the $400.00 he had been fronted at the beginning of the job, Cavanaugh and Voldseth never paid Lees, despite Cavanaugh's repeated promises that Lees would be paid. Because he was not paid and because V-tech could not supply him with the materials he needed to complete the job, Lees quit.

IV. DISCUSSION AND ANALYSIS[1]

A. *The Default Should Be Set Aside.*

The Department of Labor and Industry has the 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 the 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,

[1]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.

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.

Here, Cavanaugh and Voldseth have met their burden. Cavanaugh credibly testified that her mother signed for the certified mail containing the copy of the November 9, 2004 order finding that she and Voldseth owed wages and penalty to Lees. Her testimony that her mother failed to inform Cavanaugh of the order until January 2005, within days before her contact with ERD, was also credible and was not rebutted. This interceding event prevented Cavanaugh, through no fault of her own, from receiving the November 9, 2004 order and timely appealing the order. Accordingly, good cause appears to set aside the default in this matter and proceed to consider the substance of the appeal.

B. *Cavanaugh and Voldseth Owe Wages and Penalty to Lees.*

Lees contends that he is owed $1,210.00 in unpaid wages. Cavanaugh contends that Lees was an independent contractor. Cavanaugh further contends that she paid Lees up-front at least $1,900.00.

Initially, the hearing officer must decide whether Lees was in fact an independent contractor. To be an independent contractor, the worker must be free from control over performance of services and the worker must be customarily engaged in an independent trade, occupation, profession and business. *Sharp v. Hoerner Waldorf Corp.*, (1978), 178 Mont. 419, 584 P.2d 1298. The control test is determined by considering four factors: (1) direct evidence of right or exercise of control; (2) method of payment; (3) furnishing of equipment; and (4) right to fire. *Sharp, supra*, 178 Mont. at 425, 584 P.2d at 1302. The *Sharp* Court specifically held "that the consideration to be given these factors is not a balancing process, rather . . . independent contractorship . . . is established usually only by a convincing accumulation of these and other tests, while employment . . . can if necessary often be solidly proved on the strength of one of the four items [above]." *Id.*

The evidence here demonstrates that Lees was not an independent contractor. He was paid an hourly wage for his work, not a lump sum for the entire project. He was provided with the materials to complete the installation. These two factors alone, under the circumstances adduced at the hearing in this case, show that Lees was an employee.

Cavanaugh also contends that Lees was paid up-front. However, Lees testified credibly that he received approximately $400.00 at the beginning but no more. Lees' testimony is consistent with the parties' employment agreement; that is, that he

would be paid hourly for his work as the work was completed. The up-front money was to cover initial expenses that Lees would incur while away from home working on the project in Wyoming. Cavanaugh's testimony is inconsistent with the parties' agreement that Lees would be paid by the hour for his work. Under these circumstances, the hearing officer concludes that Lee was paid only $400.00 for his work and was paid no more.

Lees' testimony regarding the number of hours worked was not substantially challenged–nor could it be–by Cavanaugh since neither she nor Voldseth was at the job site. An employee seeking unpaid wages has the initial burden of proving work performed without proper compensation. *Garsjo v. Department of Labor and Industry* (1977), 172 Mont. 182, 562 P.2d 473. To meet this burden, the employee must produce evidence to "show the extent and amount of work as a matter of just and reasonable inference." ***Id. at*** 189, 562 P.2d ***at*** 476-77, ***citing*** *Anderson v. Mt. Clemens Pottery Co.* (1946) 328 U.S. 680, 687, ***and*** *Purcell v. Keegan* (1960), 359 Mich. 571, 103 N.W.2d 494, 497; ***see*** *Marias Health Care Srv. v. Turenne*, 2001 MT 127, ¶¶13, 14, 305 Mont. 419, 422, 28 P.3d 494, 495. Once an employee has shown as a matter of just and reasonable inference that he or she is owed wages, "the burden shifts to the employer to come forward with evidence of the precise amount of the work performed or with evidence to negate the reasonableness of the inference to be drawn from the evidence of the employee. And if the employer fails to produce such evidence, it is the duty of the court to enter judgment for the employee, even though the amount be only a reasonable approximation.' * * *." *Garsjo,* 172 Mont. ***at*** 189, 562 P.2d ***at*** 477, ***quoting*** *Purcell*, ***supra at*** 576, 103 N.W.2d ***at*** 497.

Here, Lees provided proof to meet his initial burden to show the number of hours he worked. Cavanaugh did not substantially challenge Lees' figures as to the amount of hours he worked. Lees worked a total of 194 hours at a rate of $15.00 per hour. Subtracting from this amount the $400.00 he was paid up-front, he is owed at least the $1,200.00 in unpaid wages that he has sought in his complaint.

C. *Cavanaugh and Voldseth Owe the Statutory Penalty.*

Montana law assesses a penalty when an employer fails to pay wages when they are due. Mont. Code Ann. § 39-3-206. For minimum wage claims, a penalty of 110% applies in the absence of certain circumstances, none of which are present. Admin. R. Mont. 24.16.7561. The present Montana minimum wage requirement is $5.15 per hour. Admin. R. Mont. 24.16.1510. For claims other than minimum wage and overtime compensation, a penalty of 55% applies in the absence of certain circumstances, none of which are present. Admin. R. Mont. 24.16.7566.

The employment agreement in this case called for Lees to be paid $15.00 per hour, far more than the required minimum wage. Thus, minimum wage concerns are not implicated in this case and the appropriate penalty is 55% of the amount due as prescribed in Admin. R. Mont. 24.16.7566. Here, the required penalty is $660.00 ($1,200.00 wages due x .55= $660.00).

V. CONCLUSIONS OF LAW

1. The State of Montana and the Commissioner of the Department of Labor and Industry have jurisdiction over this complaint. Mont. Code Ann. § 39-3-201 et seq. *State v. Holman Aviation* (1978), 176 Mont. 31, 575 P.2d 925.

2. Vanessa Cavanaugh and Eric Voldseth owe Kyle Lees $1,200.00 in additional wages.

3. Vanessa Cavanaugh and Eric Voldseth owe Kyle Lees a penalty in the amount of $660.00.

VI. ORDER

Vanessa Cavanaugh and Eric Voldseth are hereby ORDERED to tender a cashier's check or money order in the amount of $1,860.00, representing $1,200.00 in unpaid wages and $660.00 in penalty made payable to Kyle Lees and mailed to the Employment Relations Division, P.O. Box 6518, Helena, Montana 59624-6518, no later than 30 days after service of this decision. Cavanaugh and Voldseth may deduct applicable withholding from the wage portion but not the penalty portion.

DATED this 5th day of July, 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.