

STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM ) Case No. 830-2004  
OF DAVID PLUARD, )

Claimant, )

vs. )

TIMBERLAND CONSTRUCTION, LLC, )  
a Montana limited liability company )  
currently in receivership, )

Respondent. )

**ORDER GRANTING  
MOTION TO DISMISS  
WITH PREJUDICE**

\* \* \* \* \*

**I. INTRODUCTION**

Respondent Timberland Construction, LLC, has moved to dismiss this matter on the basis that the claimant has failed to respond to discovery requests and has otherwise failed to participate at all in the hearing process. Despite being ordered to respond to the motion to dismiss, Pluard has failed to do so. Based on Pluard's failure to provide discovery as required by this tribunal, the hearing officer grants the motion to dismiss with prejudice as a discovery sanction. The rationale that supports this decision follows.

**II. FINDINGS OF FACT**

1. Pluard initiated a wage complaint with the Department of Labor and Industry Employment Relations Division (ERD). ERD found in favor of Pluard and ordered the respondent to pay \$568.00 in unpaid wages and an additional statutory penalty.

2. The respondent timely appealed the determination and requested a fair hearing before a hearing officer in the Hearings Bureau. Efforts to mediate a solution between the parties were unsuccessful.

3. On January 5, 2006, counsel for the respondent propounded requests for production upon the claimant pursuant to Rule 26, 33 and 34 of the Montana Rules of Civil Procedure. Despite being served with these requests, Pluard failed to respond.

The respondent then moved for dismissal due to Pluard's failure to respond and served a copy of the motion to dismiss on Pluard on March 13, 2006.

4. On April 11, 2006, after Pluard received the respondent's motion to dismiss, the hearing officer ordered Pluard to respond to the motion to dismiss no later than April 21, 2006. See, April 11, 2006 Order Directing Response. The hearing officer further admonished Pluard that a failure to respond would result in the motion to dismiss being granted. *Id.* Despite the motion and this hearing officer's order to respond, Pluard failed to respond. To date, Pluard still has not responded to the request for productions nor has he filed any objection to those requests.

5. Pluard has failed to participate in this hearing process at all. The information sought by the respondent in its requests for production was necessary in order to permit the respondent to fully assess the case and fairly defend against Pluard's allegations. The questions were also reasonably calculated to lead to discoverable evidence and were not unduly burdensome. By failing to respond to the requests for production, Pluard has deprived the respondent of its fundamental due process right to fully and fairly challenge the contentions of Pluard's complaint.

### **III. DISCUSSION**

Rule 37 of the Montana Rules of Civil Procedure provides that imposition of sanctions is appropriate when a party fails to serve answers or objections to requests for production in a timely manner. In determining an appropriate sanction, a tribunal must weigh (1) whether the consequences imposed by sanctions relate to the extent and nature of the actual discovery abuse, (2) the extent of the prejudice to the opposing party which resulted from the discovery abuse, and (3) whether the court expressly warned the abusing party of the consequences of engaging in the discovery abuse. *Smart v. Molinaro*, 2004 MT 21, ¶12, 319 Mont. 335, ¶12, 83 P.3d 1284, ¶12. In *Smart*, the Montana Supreme Court upheld dismissal of the plaintiff's tort claim after finding that the plaintiff engaged in dilatory tactics to hide his weak case and "consistently demonstrated little interest or ability in adjudicating his case on the merits." 2004 MT 21, ¶14.

Here, applying the analysis and rationale of *Smart*, dismissal with prejudice is warranted. The discovery abuse here is pervasive. The claimant has failed to participate in the fair hearing process since it was transferred to the Hearings Bureau in December, 2005. He has missed all deadlines for filing discovery and has not comported with any deadline imposed by this tribunal. Most egregiously, he has utterly failed to respond or object to the respondent's requests for production.

Imposition of the sanction of dismissal with prejudice is appropriate due to the pervasive nature of the discovery violations. The extent of the prejudice to the respondent is substantial. By failing to provide the information sought in the discovery requests, Pluard has effectively denied the respondent due process in the hearing

process by preventing the respondent from fairly defending itself against the allegations contained in the complaint. Finally, this tribunal expressly warned Pluard that his failure to respond to the motion to dismiss would result in that motion being granted. Nonetheless, despite being properly advised of the consequences, Pluard has failed to respond. Under the circumstances of this case, dismissal with prejudice is appropriate.

#### **IV. ORDER**

Based on the foregoing, the respondent's motion to dismiss Pluard's complaint with prejudice is granted.

DATED this 28th day of April, 2006.

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.