STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

UNEMPLOYMENT INSURANCE DIVISION,	)	Case No. 461-2007
	)	
Complainant,	)	**ORDER GRANTING UID'S**
	)	**MOTION FOR SUMMARY**
vs.	)	**JUDGMENT AND DENYING**
	)	**GREEN MOUNTAIN'S**
GREEN MOUNTAIN CONSTRUCTION,	)	**CROSS MOTION FOR**
LLC,	)	**SUMMARY JUDGMENT AND**
	)	**DISMISSING APPEAL**
Respondent.	)	

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This order grants the motion for summary judgment filed by complainant Unemployment Insurance Division (UID) in this contested case proceeding against respondent Green Mountain Construction, LLC, (Green Mountain) and denies Green Mountain's cross motion for summary judgment. The Hearing Officer finds and rules that the UID redetermination is final for lack of a timely appeal.

I. FACTS

In 2005, complainant UID conducted a field audit of respondent Green Mountain's records and determined that several "1% members" of Green Mountain were employees. On August 22, 2005, UID sent the audit report, with a cover letter, to James or Tara Van Patten, Green Mountain, to a post office box address in Big Sky, Montana. The cover letter stated an amount due from Green Mountain to UID for 2003 and 2004, for underpayments of taxes and penalties, was $25,081.67, and warned that the audit results would be final in ten days if no request for appeal or redetermination was made. The cover letter also asked that "if you disagree with the audit findings please indicated your specific reasons on the [audit] acknowledgement and return to me in the enclosed addressed envelope."

On August 30, 2005, Tara Van Patten responded on Green Mountain stationary. Her letter acknowledged receipt of the August 22 letter, requested a redetermination and indicated that "we believe we may need to consult with counsel." She did not return the audit acknowledgment to UID.

On September 6, 2005, UID sent a letter to James or Tara Van Patten, Green Mountain, enclosing the final audit report and noting the "appeal" (request for redetermination) of the audit findings. The letter also suggested that the initial question UID might ask in the redetermination would be whether the request for redetermination was seeking review of "all adjustments made" or of "just the inclusion of members [sic] wages as employees."

On September 13, 2005, Tara Van Patten sent UID a copy of her letter to the Montana State Fund, on Green Mountain stationary, stating that "the owners and managers of Green Mountain Construction, LLC have decided to be represented by counsel" and identifying the attorney for "the firm and its owner-managers" as Thomas C. Morrison.

All of the above correspondence was from or to Scott Moothart, a UID Field Representative in Missoula, Montana.

On September 29, 2005, UID (acting through Kayce Koehler, Tax Compliance Officer, in Helena, Montana) wrote to Tara Van Patten, Green Mountain, acknowledging receipt of the audit findings and the request "for review of areas of disagreement." UID stated, "in order to respond to your request for review of the audit, we need to know what part of the audit findings you are appealing." UID requested a written response within ten days to the UID Contribution Bureau at a Helena address, also providing a phone number to call with any questions. No mention of Morrison appeared in the letter, nor was he sent a copy.

On October 11, 2005, Thomas C. Morrison faxed to UID (Koehler) two IRS form 2848s, being each a power of attorney and declaration of representative used to appear as counsel for taxpayers in proceedings before the IRS. One form identified Morrison as attorney for Green Mountain. The other form identified Morrison as attorney for James Van Patten. Both forms identified, under the "tax matters" involved in the representation, the audit report, by its number ("MT UI 0799722"). Both forms stated that Morrison was authorized "to represent the taxpayer(s) with the same powers in all related and all similar state and local tax matters." Both forms were signed by James Van Patten. The cover sheet indicates that copies were sent to Tara Van Patten.

The cover sheet to the fax from Morrison to Koehler included a message indicating that Morrison represented both "Jamz Van Patten [a.k.a. James Van Patten, confirmed by current counsel for Green Mountain and James Van Patten in this contested case proceeding] and the Green Mountain Construction, LLC." Morrison requested "a delay on the response time for designating which adjustments on the WC adjustments are being appealed," indicating that he would be contacting James Van Patten after Tara Van Patten had her baby (expected within two weeks) and then would "set up a conference with both your offices." There is no genuine issue of material fact that Morrison was counsel of record for Green Mountain and James Van Patten in this matter, beginning at latest on October 11, 2005.

The current record does not indicate that Morrison or either of the Van Pattens communicated with UID or that UID had further communications with any of them between October 11, 2005, and November 25, 2005.

UID issued its redetermination on November 25, 2005, without any additional input from Green Mountain or either of the Van Pattens. UID sent the redetermination to Morrison only. The redetermination contained an "APPEAL RIGHTS" statement at the very bottom of the signature page, that the "decision will become final unless you file a written notice of

appeal" with UID within ten days of the date of the letter (giving the Helena address of the Contributions Bureau).

The Hearing Officer presumes that Morrison received the redetermination in due course of the mail. Green Mountain did not thereafter file a written notice of appeal with UID within ten business days of the date of the letter.

On March 3, 2006, UID, which had still not received any written notice of appeal, sent a notice to Morrison that the November 15, 2005, decision was final and that the amount currently due, including penalty and interest was $24,611.49. The letter indicates that a copy was sent to Green Mountain.

On March 31, 2006, UID (Dennis Huck, Collections Specialist, Helena) wrote to Green Mountain, (attention James Van Patten) to "inform you regarding the March 30, 2006, conversation I had with Mr. Thomas C. Morrison" about the Green Mountain balance due. UID enclosed a deferred payment contract signature and return by Green Mountain. The balance of the letter emphasized the actions that Green Mountain would have to take to comply with the payment plan.

Green Mountain retained its current counsel sometime in April 2006. On May 24, 2006, he sent a letter to UID, referring to the November 25, 2005, redetermination, citing its "appeal rights" provisions, and inquiring whether UID intended to hold "Jamz Van Patten" responsible for the liabilities of Green Mountain. The letter went on to state that UID should treat the May 24, 2006, as a notice of appeal from the November 25, 2005, letter, if UID intended to recover from James Van Patten for the Green Mountain liabilities. The May 24, 2006, letter bears a notation that it was copied by e-mail to the "clients."

UID did not treat the letter as a written appeal of the November 25, 2005, redetermination.

By letter dated August 10, 2006, current counsel for Green Mountain submitted Green Mountain's written notice of appeal of the November 25, 2005, redetermination.

Neither the May 24 nor the August 10 letters were timely appeals of the redetermination. Green Mountain did not have good cause to delay filing an appeal of the redetermination of Green Mountain's liability.

II. LEGAL ANALYSIS[1]

[1] Statements of fact in this legal analysis that do not appear in Section I herein are hereby incorporated by reference to supplement Section I. ***See***, *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

Summary judgment is proper when no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. Rule 56(c), Mont.R.Civ.P.[2] The party moving for summary judgment has the initial burden of establishing both the absence of genuine issue of material fact and the entitlement to judgment as matter of law. *Bowen v. McDonald* (1996), 276 Mont. 193, 915 P.2d 201, 204. To satisfy this burden, the movant must make a clear showing as to what the truth is so as to exclude any real doubt as to the existence of any genuine issue of material fact. *Minnie v. City of Roundup*, (1993), 257 Mont. 429, 849 P.2d 212, 214. The burden then shifts to the party opposing the motion to show, by more than mere denial and speculation, that there are genuine and material fact issues for trial. *Sunset Point v. Stuc-O-Flex Int'l* (1998), 287 Mont. 388, 954 P.2d 1156, 1159; *Bowen*. The party opposing the summary judgment is entitled to have any inferences drawn from the factual record resolved in his or her favor. Rule 56(c), M.R.Civ.P.

Pursuant to Mont. Code Ann. § 39-51-1109(2), a UID tax determination or redetermination is a decision involving contribution liability, which "is final unless an interested party entitled to notification submits a written appeal of the decision, determination, or redetermination." The same subsection provides that the written appeal "must be made in the same manner as provided in 39-51-2402 for the appeal of a decision relating to a claim for unemployment insurance benefits."

The crux of this case is whether notice to an "interested party" of the redetermination must be sent to the interested party as well as that party's attorney of record before it is effective. Pursuant to Mont. Code Ann. § 39-51-2402(3), "a determination or redetermination is final unless an interested party entitled to notice of the decision applies for reconsideration of the determination or appeals the decision within 10 days after the notification was mailed to the interested party's last-known address. The 10-day period may be extended for good cause." In other words, did UID satisfy its statutory duty to give the notice, so that the 10-day period started to run on November 26, 2005, and if so, did Green Mountain show good cause to extend the 10-day period?

Due process "generally requires notice of a proposed action which could result in depriving a person of a property interest and the opportunity to be heard regarding that action." *Pickens v. Shelton*, ¶13, 2000 MT 131, 300 Mont. 16, 3 P.3d 603. "Notice sufficient to comport with due process is that which is reasonably calculated, under all circumstances, to inform parties of proceedings which may directly affect their legally protected interests." *Pickens*, ¶15. "The opportunity to be heard is not meaningful if the notice provided does not accurately inform the person to whom it is given of how to take advantage of that opportunity." *Pickens*, ¶18.

[2] Even when the statutory rules of evidence and civil procedure do not apply, the principles underlying them do. *Bean v. State Bd. of Labor Appeals*, ¶¶ 12-32 ***generally***, 1998 MT. 222, 290 Mont. 496, 965 P.2d 256.

Service upon a represented party's attorney is all the due process required, even when a party's fundamental rights are involved:

> Due process requires that a party have notice of an action or judgment and a reasonable opportunity to be heard. *In re Marriage of Robbins* (1985), 219 Mont. 130, 711 P.2d 1347, 1352. Here, service of the decree of dissolution constituted sufficient notice of the natural father's obligation to pay child support and did not deprive him of his due process rights, particularly where there was nothing in the record to indicate that the natural father's original attorney was relieved before or after the child support order was entered, and where he failed to keep in contact with his attorney after he instituted the divorce proceedings. ***See, e.g.,*** *Bennet v. Bennet* (1984), 71 N.C.App. 424, 322 S.E.2d 439, 440. Furthermore, at all times that the natural father resided with S.P.M. in Washington he knew of the whereabouts of his former wife and other two children. He made no effort to provide for the support of the other two children during his absence. If he had he would have been apprised of the divorce decree and his obligation to pay support. Service of the decree upon his attorney is all the notice that due process requires in this case, and if appellant failed to receive actual notice of the support obligation it was the result of his own lack of diligence or possibly his own intentional acts.

In re Adoption of R.M. (1990), 241 Mont. 111, 785 P.2d 709, 712.

UID apparently now sends determinations and redeterminations to the represented party as well as to that party's attorney. Nonetheless, mailing written notice to the attorney of record only is adequate notice in judicial proceedings. Mont. R. Civ. P., Rule 5(b). Since mailing written notice to the attorney of record for a party is sufficient to give notice in judicial proceedings, it is sufficient also in administrative proceedings. The law certainly does not require more notice in less formal proceedings.

There is no evidence in this record to rebut the presumption that Morrison received the redetermination, duly directed and mailed, in the ordinary course of the U.S. mail service. Mont. Code Ann. § 26-1-602(24). Thus, the record in this administrative proceeding simply establishes that Green Mountain (and James Van Patten) duly appointed Morrison as their attorney for this matter, that UID subsequently mailed the redetermination to Morrison only, and that Green Mountain, either through Morrison or otherwise, did not timely appeal it.

Green Mountain has presented a number of arguments regarding why, in this particular case, notice served by mail upon the attorney should not be sufficient. These arguments, in effect, are arguments that there is good cause for the department to extend the appeal deadline for the benefit of Green Mountain, as allowed by the statute. None of these arguments are persuasive.

The administrative record on this summary judgment motion and cross-motion is silent as to why Morrison, the original attorney in this case, did not timely file an appeal from the

redetermination. Green Mountain's arguments pertain strictly to its contention that its principal and its office manager did not see or know of the redetermination until much later. These arguments all involve a single premise: that only when Green Mountain itself knew about the redetermination sent to its attorney should UID begin to count the time for a written appeal. Green Mountain pointed to information about when the Van Pattens saw or knew about the redetermination letter. It pointed to information about the prior interactions between UID and Green Mountain. It pointed to information about UID changing its procedures regarding service by mail of its decisions and notices. Green Mountain did not provide information about why Morrison failed timely to file its appeal, even though Green Mountain had retained Morrison and designated him as its attorney. Therefore, all of Green Mountain's arguments are insufficient to establish good cause to extend the deadline.

Even with all its arguments about when it actually learned that a redetermination of the amount it owed had issued on November 25, 2005, with an appeal time of ten days, the last possible date on which Green Mountain itself, with its current counsel, had actual notice of the redetermination would be the end of April 2006.[3] This is, on the current record, a hypothetical, far removed and far fetched appeal date, picked by the Hearing Officer as the last possible date, making every conceivable assumption in favor of Green Mountain, by which Green Mountain had actual notice.

Using this "what if" date, which is unsupported in the record, and assuming for the sake of analysis that UID had acted upon the conditional May 24, 2006, appeal, Green Mountain has not shown good cause to extend the deadline to allow that appeal. Green Mountain had ample notice and time to appeal after its current counsel was advising it and after Green Mountain had actual notice of the redetermination, before the May appeal. Green Mountain and James Van Patten retained current counsel in April 2006. Certainly by then Green Mountain had actual notice of the redetermination, from UID's correspondence after the redetermination, if in no other way. Yet, the first appeal Green Mountain appeal, conditional upon UID planning to seek payment from James Van Patten, was filed on May 24, 2006, 20 business days (25 calendar days) after the last day of April, two to two and one-half times longer than the ten-day appeal time even if that time could reasonably be extended to begin on the last day of April 2006.

Green Mountain still did not file its own designated unconditional appeal until August 10, 2006. This is 102 days after the last day of April, more than ten times longer than the ten-day appeal time from the last day of April 2006, by which time Green Mountain had actual notice. By a factor of ten, Green Mountain missed filing its own appeal within ten days of the end of April, when it is clear it had actual notice of the redetermination. ***See***, *Federal Sav. & Loan v. Anderson* (1988), 233 Mont. 339; 760 P.2d 80, 82-83 (failure to appear at default hearing despite having actual notice obviates any need to analyze sufficiency or timeliness of written notice of hearing).

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[3] Although Tara Van Patten, office manager of Green Mountain, averred that she typically was involved in the process of deciding whether Green Mountain would exercise appeal rights of the type referenced in UID's November 25, 2005, redetermination and that she first became aware of and read the redetermination on or about July 21, 2006, this is not dispositive of when Green Mountain and/or James Van Patten had actual notice of the redetermination, with new counsel's May 24, 2006, letter, and does not create any genuine issue of material fact.

The issue raised by Green Mountain and/or James Van Patten, that UID waived its statutory right to impose liability upon James Van Patten for the liability of Green Mountain, is not decided by this order. Since there was no timely appeal, any decision addressing waiver would be *dicta* at best.

III. ORDER OF DISMISSAL

These contested case proceedings are dismissed.

DATED this 9th day of April, 2007.

By: /s/ TERRY SPEAR
Terry Spear, Hearing Officer
Hearings Bureau, DLI

This decision is the final decision of the Montana Department of Labor and Industry in this case. You may appeal this decision to the Board of Labor Appeals within 10 days after this decision was mailed to your last known address. The time for appeal may be extended for good cause. Your appeal must be filed with the Board of Labor Appeals (BOLA), P.O. Box 1728, Helena, Montana 59624; phone (406) 444-3311; fax (406) 444-9038.