STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM OF TIMOTHY E. PATACINI, Claimant, vs. RUDOLPH S. KETCHUM INDIVIDUALLY AND/OR NETWORK MONTANA AKA PERFORMANCE SOLUTIONS LLC, AN INVOLUNTARILY DISSOLVED LLC AS OF 09/04/2001, Respondent.	)	Case No. 1090-2007 **FINAL AGENCY DECISION**

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I. INTRODUCTION

On January 8, 2007, Timothy E. Patacini, a/k/a Rico Patacini filed a claim with the Department of Labor and Industry, Wage and Hour Unit, contending that Network Montana had failed to pay him wages for work performed and had illegally withheld wages during the period August 22, 2006 through the termination of his employment, December 29, 2006. He contended he had not been paid for wages of $4,351.15, and was unable to determine the amount of the illegal withholding.

On January 22, 2007, Rudolph S. Ketchum filed an answer to the claim. In the answer, he stated that Patacini had not been paid the wages claimed, contending that Patacini was not an employee, but instead was an independent contractor. The Wage and Hour Unit referred the case to the Independent Contractor Central Unit (ICCU) for a determination as to whether Patacini was an employee.

On February 23, 2007, the ICCU prepared a determination concerning the employment status of Patacini, finding him to be an employee. The ICCU sent its determination to the Wage and Hour Unit. On February 27, 2007, the Wage and Hour Unit issued a determination incorporating the ICCU determination and finding that respondent owed Patacini $3,420.95 in unpaid wages, plus a penalty. The determination stated that it would be final unless respondent filed an appeal or a request for redetermination, postmarked on or before March 19, 2007. On March 26, 2007, after receiving an appeal from Ketchum postmarked March 21, 2007, the Wage

and Hour Unit issued an order on default ordering respondent to pay Patacini $5,302.47, representing $3,420.95 in wages and $1,881.52 in penalty. On April 16, 2007, the respondent filed an appeal, requesting administrative relief from the order on default. On May 4, 2007, following mediation efforts, the case was transferred to the Department's Hearings Bureau for hearing.

Hearing Officer Anne L. MacIntyre conducted a scheduling conference in this matter on May 22, 2007, with Patacini and Ketchum by telephone. She decided to bifurcate the issue of relief from the order on default from the issue of the merits of the wage claim and scheduled a hearing on the default issue for June 12, 2007.

The hearing took place on June 12, 2007, at 2:00 p.m. by telephone. Ketchum and Patacini were present, and stipulated to proceeding by telephone. Both testified. Other witnesses who testified were Bonnie Thorvilson, compliance specialist with the Wage and Hour Unit, who appeared in person with attorney Joe Nevin of the Department, Ed Dawes of the ICCU, Phillip Aguirre and Roseanne Palakovich. Documents 4 - 7, 10 - 12, 53, 55 - 63, 107 - 109, 116 - 117, and 119 from the Wage and Hour Unit investigative file were admitted by the stipulation of the parties. Documents 103 and exhibit KET-10 were also admitted into evidence. Exhibits KET-1 through KET-9 and Claimant-1 were not proposed, nor were the balance of the marked documents from the investigative file.

II. ISSUE

The issue in this case is 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 March 26, 2007, requiring the respondent to pay the claimant $5,302.47 in wages and penalties.

III. FINDINGS OF FACT

1. Timothy E. Patacini, whose nickname is Rico, filed a claim with the Wage and Hour Unit on January 8, 2007, claiming that Network Montana had failed to pay him wages for work performed and had illegally withheld wages during the period August 22, 2006 through the termination of his employment on December 29, 2006. He contended he had not been paid for wages of $4,351.15, and was unable to determine the amount of the illegal withholding because Network Montana never gave him pay stubs.

2. Network Montana was the assumed business name of Performance Solutions, LLC, an involuntarily dissolved limited liability company. It performed computer services for Golden Sunlight Mine in Whitehall, Montana. Rudolph S. Ketchum was the owner of this company.

3. On January 22, 2007, Ketchum filed an answer to the claim. In the answer, he stated that Patacini had not been paid the wages claimed, contending that Patacini was not an

employee, but instead was an independent contractor. He stated that he had not paid Patacini some of what was due him because Patacini failed to submit his hours, and also that Golden Sunlight was withholding payment.

4. In a letter attached to the answer, Ketchum stated, "Originally I offered Rico employment at $20/hour. (That contract was ignored when he threatened to stop working if I would not pay him more). We reached an agreement that would allow him to work as a subcontractor. . . . Last, if you calculate the hours and pay, you will see that Rico has received almost exactly $20/hour as contractor pay less about $500 over 4 months for insurance that I paid for him up front as required by the Sunlight Mine."

5. Because Ketchum contended that Patacini was an independent contractor, the Wage and Hour Unit referred the case to the ICCU for a determination as to whether Patacini was an employee.

6. Ed Dawes, compliance specialist in the ICCU, was assigned to determine whether Patacini was an employee or an independent contractor. In an exchange of electronic mail messages between February 14, and February 17, 2007, Ketchum told Dawes he recognized it was unlikely that Patacini would be regarded as a contractor, and stated he would ask to have the matter addressed by the "employee board." Dawes requested clarification, and asked if Ketchum intended to acknowledge Patacini as an employee and proceed with the defense of the claim through the Wage and Hour Unit. He told Ketchum that if he acknowledged Patacini as an employee, the ICCU would "accept that no dispute of working relationship exists and close the investigation and determination process. [Dawes would] send a formal letter to that effect and notify all interested parties. The letter will state [Ketchum's] rights to appeal." Ketchum responded that he conceded to treating Patacini as an employee. He also stated that he would be out of state and unavailable until February 26.

7. On February 23, 2007, Dawes prepared a determination concerning the employment status of Timothy Patacini. The determination concluded, "The ICCU finds no dispute of worker status at this time. [Network Montana] (Rudy Ketchum) and Timothy Patachini [sic] are in agreement that Patachini was an employee of [Network Montana]." This determination was based on Ketchum's acknowledgment that Patacini was an employee.

8. The ICCU sent its determination to the Wage and Hour Unit. On February 27, 2007, Bonnie Thorvilson of the Wage and Hour Unit issued both the ICCU determination and a Wage and Hour determination incorporating the ICCU's conclusion that Patacini was an employee.[1] The Wage and Hour determination stated:

[1] The Wage and Hour determination and certificate of mailing are dated February 27, 200**6**, but it is clear from the record that this was a typographical error, and the determination was actually issued on February 27, 200**7**.

> [T]his determination is based upon the information submitted by the claimant as the employer failed to submit payroll information as requested. Since Mr. Patacini is considered an employee the hours worked on the enclosed timesheet are hours that were supplied by Mr. Patacini. The wrongful withholding is from the admission of the employer for the "withholding of Insurance" of $500.00 for four months. The amount per hour was provided in a pay stub submitted by the claimant.

9. Attached to the determination was a spreadsheet prepared by Thorvilson. Based on her calculations, Thorvilson concluded that Ketchum, Network Montana, or both owed Patacini $3,420.95 in unpaid wages, plus a penalty of 15% ($513.14) if paid by the "time specified below." If not paid by that time, respondent would owe a penalty of 55% or $1,881.52.

10. The basis for Thorvilson's conclusion of unpaid wages is not clear from the record. Ketchum provided a copy of only one check from which wages paid could be established. In arriving at her conclusion of unpaid wages, Thorvilson multiplied the number of hours worked by Patacini times an hourly rate of $26.50, then subtracted amounts that Ketchum conceded he owed Patacini, calculated at a rate of $20.00 per hour. It is not clear that these amounts were actually ever paid, however. To the result, Thorvilson added $2,000.00 that she concluded had been improperly withheld for insurance. However, Thorvilson misconstrued Ketchum's statement; Ketchum deducted $500.00, not $2,000.00. Further, Thorvilson used a flawed methodology in adding the withholdings back in. Thus, it is probable that Thorvilson's calculation of wages owed is incorrect. However, without evidence of actual payments to Patacini, it is by no means certain that the errors, when netted together, disfavor Ketchum.

11. The Wage and Hour determination contained a notice of appeal rights advising the parties:

> The employer or employee may either appeal this Determination or request a Redetermination. Either request must be in writing, to the attention of Tonya McCormack, Bureau Chief, Labor Standards Bureau, Employment Relations Division, PO Box 6518, Helena, MT 59604-6518. The Appeal (Hearing), or request for Redetermination must be postmarked by *03/19/07*. You must set out the reason for the request including any new or additional information that would alter or affect this original Determination.
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> If an appeal or request for redetermination is not filed, or payment is not made by the above state date, this Determination will be final to the Wage and Hour Unit and an Order on Default will be issued in the amount of this Determination.
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> The mailing of this determination constitutes the mailing of the employment status decision by the Independent Contractor Central Unit. The

determination of the Independent Contractor Central Unit is final unless a party dissatisfied with the decision appeals by filing with the workers' compensation court within 30 days of the mailing of this decision. You may obtain the required Workers' Compensation Court appeal form at www.wcc.dli.mt.gov/forms/petition-appeal_ic_determination.pdf or by contacting Clara Wilson at 444-7794 to have the appeal form mailed to you. The address of the court is:

WORKERS' COMPENSATION COURT
P.O. BOX 537
HELENA MT 59624-0537

12. Ketchum received the determination on or before March 9, 2007. He read it and disagreed with it. He believed that the Wage and Hour Unit was going to give him five working days from the issuance of the ICCU determination to provide additional information before issuing its own determination and that he had never been given an adequate opportunity to provide information in the case.

13. Ketchum was also confused by the deadlines stated in the determination. He initially obtained the appeal form from the Workers' Compensation Court and filled it out. He also had conversations with Clara Wilson at the Workers' Compensation Court, and spoke to his accountant, Phillip Aguirre. His letter requesting relief from the order of default states that he called Tonya McCormack of the Wage and Hour Unit, but there is no evidence that he spoke to her, let alone of the substance of any conversation between them.

14. Ketchum believed that in order to contest the determination, he needed to supply the Wage and Hour Unit with pay stubs to support his version of what he should have paid Patacini. These pay stubs did not exist at the time the Wage and Hour Unit issued its determination. Ketchum hoped to have Aguirre prepare this documentation, but Aguirre was unavailable because it was tax season. Therefore, Ketchum prepared "pay stubs" to support his version of Patacini's earnings.[2] He enclosed these pay stubs together with certain other documentation and a letter of appeal in an envelope. He knew that the deadline for having his appeal or request for redetermination postmarked was March 19, 2007, and he testified that he mailed the envelope to the Wage and Hour Unit on that date. The envelope is postmarked March 21, 2007, however. Ketchum also sent a copy of his letter of appeal by electronic mail to the Wage and Hour Unit on March 20, 2007. Ketchum in fact mailed the appeal on March 21, 2007.

15. The Wage and Hour Unit received Ketchum's appeal on March 22, 2007. On March 26, 2007, it issued its Order on Default on the grounds that Ketchum did not file his

[2] In his letter of appeal, Ketchum states that the pay stubs were recalculated by "Accounting" but Aguirre testified he did not prepare them.

appeal in a timely manner. Ketchum then filed a request for administrative relief from the Order on Default on April 16, 2007.

IV. DISCUSSION AND ANALYSIS[3]

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 within 15 days after the determination is mailed, 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.[4]

The notice clearly stated that Ketchum's appeal or request for redetermination had to be postmarked by March 19, 2007. Ketchum received the determination no later than March 9, 2007, which was timely notice to allow him to file an appeal by March 19, 2007. Thus, Admin. R. Mont. 24.16.7544, providing for relief from the default for a person who fails to receive the determination by mail, is not applicable to this situation. Therefore, the question is whether Ketchum has good cause to set aside the default.

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[3] 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.

[4] 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 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:
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> "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].
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> *Blume v. Met. Life Ins. Co.* (1990), 242 Mont. 465, 468, 791 P.2d 784, 786.

When Ketchum received the determination, he read it and, despite some initial confusion regarding the appeal rights, he understood it. He failed, however, to insure that he appealed timely. Under the statute, Ketchum's appeal was actually due on March 14, 2007, which is 15 days after the determination was mailed.[5] Had Ketchum appealed within the time set forth in the notice, the inaccurate or misleading information given to him by the Department concerning the time to appeal the department determination would establish good cause fo the untimely appeal. *Pickens v. Shelton-Thompson*, 2000 MT 131, 300 Mont. 16, 3 P.3d 603. Ketchum, however, did not appeal within the time set forth in the notice of appeal rights.

Ketchum presented a great deal of testimony in an effort to establish his diligence and excusable neglect. He is a single father, working full-time in addition to running his business. He believed the Department should have given him more time to present data before issuing the Wage and Hour determination. He testified that Ed Dawes of the ICCU told him that he would have 5 days from the independent contractor determination to present more data.[6] He testified that he asked the Department for more time to present additional data, because he was going to be out of town. The only specific evidence of such a request was the electronic mail message to Dawes, stating that Ketchum would be out of town until February 26, 2007. The Wage and Hour Unit did not issue the determinations until February 27, 2007. Ketchum testified that the trip he mentioned to Dawes was postponed, and that he was actually out of

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[5] It is unclear why the notice advises the respondent that he has until March 19, 2007, to have the appeal postmarked. Thorvilson testified that the Wage and Hour Unit allows 3 days for mailing in addition to the 15 days provided for by law. However, Rule 6(e) of the Montana Rules of Civil Procedure, requiring the addition of 3 days when a party is required to take an action following service, and service occurs by mail, does not apply to appeals under Mont. Code Ann. § 39-3-216. *Flynn v. Uninsured Employers' Insurance Fund*, 2005 MT 269, ¶¶ 16 - 17, 329 Mont. 122, ¶¶ 16 - 17, 122 P.3d 1216, ¶¶ 16 - 17 . Mont. Code Ann. § 39-3-216 does not use the term "service;" it requires the appeal to be made within 15 days of mailing. However, treating the date of mailing (postmark) as the date of appeal is proper. *Johansen v. State*, 1999 MT 187, 295 Mont. 339, 983 P.2d 962.

[6] Dawes testified that he did not recall telling Ketchum this, and it would not have been consistent with his normal practice to do so.

town for from February 26 until March 9, 2007, but there is no evidence he communicated this information to the Department. In any event, whether he was afforded an adequate opportunity to present evidence in the investigation is irrelevant to whether he proceeded with diligence or whether his neglect was excusable. His remedy for the problem of not having the opportunity to present adequate information in the Wage and Hour investigation was to appeal or to request a redetermination in a timely manner.

Ketchum also contended that once he received the determination, the 10 remaining days were not sufficient to prepare the information required to file his appeal. He believed that it was necessary for him to provide data not provided during the investigation to support the appeal, and that doing so required him to "create data" in the form of pay stubs that would show the earnings and deductions applicable to Patacini had Ketchum treated him as an employee rather than a contractor. It is unclear why Ketchum believed that theoretical data, rather than records showing his actual payments to Ketchum, were required or why this should have been an onerous or time-consuming process. He wanted his accountant to prepare this "data" but his accountant could not do so because of the short time frame available to file the appeal. However, Ketchum then testified that he was able to prepare the materials he believed were necessary to appeal and in fact mailed them on March 19, 2007, the deadline stated in the determination. This testimony proved that Ketchum knew that the deadline was March 19, 2007, and was able to prepare the materials he believed would support his appeal by that date.

Unaccountably then, the envelope in which the appeal was mailed was postmarked March 21, 2007, not March 19, 2007. When asked to explain this discrepancy, Ketchum stated that he deposited the envelope in the outgoing mail of his employer, St. James Hospital, on March 19, 2007, but did not know that the mail would not be delivered to the post office the same day. Ketchum's testimony on this point is not credible. A businessperson, in the exercise of ordinary diligence, knowing that an important document had to be mailed by a certain date, would take steps to insure that it was mailed from a post office where it would be postmarked the same day. Further, March 19, 2007, was a Monday. It is unlikely that mail from a large enterprise such as a hospital would not be delivered to the post office daily. If Ketchum in fact mistakenly left the envelope in the mail room too late to go out on March 19, then it should have been postmarked on March 20, 2007. The most probable explanation is that Ketchum did not mail the appeal until March 21, 2007. The evidence shows that Ketchum failed to act with diligence and that his neglect was not excusable.

With respect to the third element of good cause to set aside a default, Ketchum has not clearly established a defense to the claim on the merits. As noted in the findings, it does appear that the calculation of wages due contained errors. It is not at all certain, however, that if those errors were corrected Ketchum would owe Patacini less than the amount calculated by the Wage and Hour Unit.

For all of these reasons, Ketchum has failed to establish that he is entitled to relief from the order of default issued by the Department on April 16, 2007.

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. Rudolph S. Ketchum and/or Network Montana a/k/a Performance Solutions, LLC, failed to file a timely appeal of the determination issued by the Department on February 27, 2007 finding wages and penalties due to Timothy E. Patacini. A default order is proper pursuant to Admin. R. Mont. 24.16.7541(1). The respondent Ketchum and/or Network Montana, received the determination and is not entitled to relief from the default under Admin. R. Mont. 24.16.7544.

3. Rudolph S. Ketchum and/or Network Montana a/k/a Performance Solutions, LLC, failed to establish good cause to set aside the default order issued by the Department of Labor and Industry in the wage claim of Timothy E. Patacini.

4. Rudolph S. Ketchum and/or Network Montana a/k/a Performance Solutions, LLC, owes Timothy E. Patacini wages in the amount of $3,420.95, and a penalty of $1,881.52.

VI. ORDER

1. The request for administrative relief from the Department's Order on Default received April 16, 2007, and the request to set aside that Order on Default, are hereby **DENIED**.

2. Rudolph S. Ketchum and/or Network Montana a/k/a Performance Solutions, LLC, **ARE 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 $5,302.47, representing $3,420.95 in unpaid wages and $1,881.52 as a penalty, payable to the claimant, Timothy E. Patacini, and delivered to the Employment Relations Division, P.O. Box 6518, Helena, Montana 59604-6518 no later than July 27, 2007.

3. The hearing scheduled for June 26, 2007, is vacated.

DATED this ____ day of June, 2007.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ ANNE L. MACINTYRE
Anne L. MacIntyre, 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, MCA. Such an application is not a review of the validity of this Order.

Patacini.FAD