STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM OF DAN W. MURRAY,	)	Case No. 1543-2007
Claimant,	)	**FINDINGS OF FACT; CONCLUSIONS OF LAW; AND ORDER**
vs.	)	
RITA AND CHRIS MCADAM, INDIVIDUALLY AND/OR AS PARTNERS,	)	
Respondents.	)	

I. INTRODUCTION

In this matter, Rita and Chris McAdam appealed from a default order finding that they owe Dan W. Murray wages totaling $400.00 and a statutory penalty of 110% of the wages due, amounting to $440.00.

The Hearing Officer held a contested case hearing in this matter by telephone on July 25, 2007. Dan Murray appeared and represented himself. Toby McAdam, Rita McAdam's brother-in law and Chris McAdam's father, represented the respondents. Chris McAdam appeared as a witness for the respondents.

During the scheduling conference which took place on July 13, 2007, Exhibits 1 through 16 were admitted into the record without objection. During the hearing on July, 25, 2007, Exhibits C-1 through C-4, photographs offered by Murray, were admitted into the record without objection.

Based upon testimony presented during the hearing, and the Exhibits entered into the record, the Hearing Officer makes the following findings of fact, conclusions of law, and final order in this matter:

II. ISSUES

A. Should the default order entered against Rita and Chris McAdam be set aside?

B. If the default order is set aside, is Murray entitled to additional wages and penalty as provided by law?

III. FINDINGS OF FACT

A. *Facts related to the default order.*

1. On March 28, 2007, Dan Murray filed a wage claim against Rita and Chris McAdam. On March 28, 2007, the Wage and Hour Unit sent notice and a copy of the wage claim to Rita McAdam at 1103 E Gallatin St. in Livingston, Montana.

2. At the time Chris McAdam was living with Rita at that address and attending Montana State University on a full-time basis. Jeremy Jinks and Chrystal Davis, friends of Rita and Chris, were also living at that address at the time and may have mishandled McAdam's mail.

3. The mail is delivered to that address between 2:00 p.m. and 4:00 p.m., daily. Chris checks the mailbox every day when he gets home from school, between 3:00 p.m. and 4:00 p.m., and takes the mail into the house.

4. During the scheduling conference which was held in this matter on July 13, 2007, both parties agreed that the mail delivery system in the Livingston area is unreliable. At that time, both parties stipulated that all subsequent mail provided by the Hearings Bureau to the parties and by the parties to each other would be sent by certified mail, return receipt requested. Both parties complied with that stipulation.

5. Chris does not recall receiving the notice and copy of Murray's wage claim. Neither Rita nor Chris were aware of the claim and had no communication with the Wage and Hour Unit.

6. On April 12, 2007, the Wage and Hour Unit made a determination based upon the information received from Murray, indicating that Rita and Chris McAdam owed Murray $400.00 in unpaid wages and $440.00 in penalty, representing a 110% penalty because the respondents failed to respond to the claim.

7. Chris does not recall receiving the determination. Neither Rita nor Chris were yet aware that Murray had filed a claim for unpaid wages and had no reason to communicate with the Wage and Hour Unit.

8. On May 8, 2007, the Wage and Hour Unit issued a default order on the basis that Rita and Chris McAdam had not appealed the April 12, 2007 determination. The order was mailed to Rita and Chris at 1103 E. Gallatin and advised that administrative relief may be requested in writing, postmarked no later than May 29, 2007.

9. On or about May 16, 2007, Rita and Chris received the default order. Rita contacted Toby McAdam, the brother of her deceased husband, and asked what it was and what she should do about it. Toby told her he would take care of it.

10. On May 17, 2007, Toby called the Wage and Hour Unit and left a message on Amy Smith's voice mail indicating that the default order was all they had received and that Dan Murray had not been employed by them. He asked that his call be returned. Smith called him back later that day and he asked for administrative relief. He thought the mail sent prior to the default order had been mishandled. Smith asked him to submit his appeal in writing.

11. By letter dated May 27, 2007, Toby McAdam filed a request for reconsideration on behalf of Rita and Chris.

B. *Facts related to the merits of the claim*.

1. Murray previously worked for Fred McAdam in a small engine repair shop. Fred, Rita's deceased husband, died in February of 2006, without a significant estate. Fred had collected a number of old lawn mowers, cars, small engines, and snowmobiles and had stored them on his property at 1103 E. Gallatin in Livingston.

2. Murray has subsequently become significantly disabled. He has had a total knee replacement and heart surgery. He is on Social Security Disability benefits and is medically unable to work a full day.

3. In January of 2007, Rita, Chris and Toby decided to get rid of the stuff Fred had collected on the property at 1103 E. Gallatin. They thought the stuff had some value for small engine parts and scrap metal and that it would be fair to pay someone the cost of their gasoline to haul it away, if they wanted to sell the stuff.

4. On February 1, 2007, Chris asked Murray to haul the lawn mowers, small engines and snowmobiles off the property. He offered to pay Murray the cost of his gasoline to do so and that he could have whatever he could get for the parts and scrap metal. He told Murray he could use his seven by fifteen foot trailer to haul the stuff.

5. Murray checked around and could not find anyone interested in buying the lawn mowers, small engines and snowmobiles for parts. He did not consider selling them for scrap metal. Scrap metal dealers have long been willing to pay $0.01 per pound for lawn mowers, small engines and snowmobiles. Murray talked to Gene Brue, who owns a salvage yard in the

Livingston area, who agreed to take the stuff but refused to buy it. Murray concluded that the stuff had no value and that he should be paid wages to haul it.

6. Murray told Chris he wanted $500.00 to haul the stuff away because it was not worth anything and he had come up with a place to which he could haul it. Murray thought Chris agreed to pay him wages. Chris denies that he agreed to pay Murray wages. According to Murray, he started work without an agreement that he would be paid wages and during the next 2.5 hours, understood that Chris would pay him $300.00 to haul the stuff away. Chris maintains he told Murray that the stuff he was to haul away was probably worth $300.00 in parts and scrap metal. Murray maintains he agreed to take $300.00 to do the job. Rita and Chris gave Murray $25.00 for gasoline that day. Over the following six weeks, they gave Murray another $15.00 for gasoline.

7. Murray did not keep track of the hours or days he worked on the project. He did not work on any day he did not have sufficient gasoline in his truck to do so. He estimates that each load took 2.5 hours to do and that he completed six or seven loads. He worked one or two days a week and did one load each day he worked. He did not work during every week. He asked Chris for wages every time he saw him. Chris repeatedly told Murray they would talk about it later. Chris also maintains that Murray did not haul more than four loads.

8. On March 13, 2007, Murray had completed between four and seven loads and saw that there were still several loads to take. He decided that Rita and Chris were not going to pay him any wages and that he would not do any more work for them until they agreed to do so. Two weeks later, he filed a claim for unpaid wages in the amount of $400.00.

IV. DISCUSSION AND ANALYSIS[1]

A. *Good Cause Exists to set aside the Order of Default.*

The applicable administrative rules provide that a default order, such as the one entered in this case, will be issued if the employer fails to timely file a written response to a determination. Admin. R. Mont. 24.16.7541 (1). An employer's failure to file a timely written response to a wage complaint will result in the entry of a determination that is adverse to the employer. Admin. R. Mont. 24.16.7527 (5).

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

[1]Statements of fact in this discussion are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

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.[2]

The parties in this matter agreed that the mail delivery service in their area is unreliable. In addition, Rita and Chris had house guests whom they maintain may have mishandled their mail. The record is replete with convincing information confirming that the respondents did not receive timely notice of the claim or of the determination against it. It is significant that the respondents, having received notice of the claim and the determination against it, has diligently pursued administrative relief since becoming aware of the claim. There is, therefore, clear and convincing evidence to rebut the statutory presumption that a letter duly mailed was received in the regular course of the mail. Further, the Montana Supreme Court has specifically held that the Montana Department of Labor and Industry has the authority to suspend, waive or modify its rules in order to prevent manifest prejudice to a party, to assure a fair hearing, or to afford substantial justice. *Centech Corporation v. Sprow*, 2001 MT 298, ¶20, 307 Mont. 481, ¶20, 38 P. 3d 812, ¶20. As a result, failure to set aside the Order of Default in this matter would defy substantial justice and result in manifest prejudice. Overall, good cause exists to set aside the default order.

B. *Murray is Not Due Additional Wages.*

Montana law requires that employers pay wages when due, in accordance with the employment agreement, pursuant to Mont. Code Ann. § 39-3-204. Except to set a minimum wage, the law does not set the amount of wages to be paid. That determination is left to the agreement between the parties. "Wages" are any money due an employee by the employer. Mont. Code Ann. § 39-3-201(6).

An employee seeking unpaid wages has the burden of proving work performed without proper compensation. *Anderson v. Mt. Clemens Pottery Co.* (1946), 328 U.S. 680; *Garsjo v. Dept. 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." *Garsjo at* 189, 562 P.2d at 476-77, *citing Anderson*, 328 U.S. at 687, and *Purcell v. Keegan* (1960), 359 Mich. 571, 103 N.W. 2d 494, 497; *Marias Health Care Srv. v. Turenne*, 2001 MT 127, ¶¶13, 14, 305 Mont. 419, 28 P.3d 494.

Murray has not met his burden of persuasion to show that he was due additional wages. The evidence shows that the respondents offered to pay Murray for the gasoline he used and the value of the stuff he hauled. Murray accepted $40.00 in payment for the gasoline he used. The amount of work he did is reasonably in dispute. He hauled between four and seven loads. He did not keep records and did not work on days he did not have sufficient gasoline in his truck.

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[2] 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.

He did not work during every week of the six weeks he spent on the project. The photographs he submitted are of the current state of the property, after he hauled an undetermined amount of debris away. He acknowledges that there is more to haul away. There are no photographs of the property taken before he started in this record, to support his claims.

After Murray had the opportunity to show, as a matter of just and reasonable inference, that he is owed wages, the respondents adequately negated the reasonableness of the inference to be drawn from Murray's evidence. The respondents reasonably determined that there was value in the debris to be hauled, which could be sold either as parts, over a period of time, or promptly, as scrap metal.

Further, there was no clear or implied agreement to pay wages to Murray. The respondents offered to pay for his gasoline and told him he could have whatever he could get for the debris. Murray maintains there was no value in it and demanded wages. However, there is no clear evidence that the respondents agreed to pay the wages he demanded. Murray has failed to show that there was no value in the debris and that there was, therefore, a reasonable basis for demanding wages.

It appears to be necessary to address credibility in this matter. There was a significant contradiction in the testimony presented, between Murray and Chris McAdam. This fact finder assumes that the truth of the matter lies somewhere in between the extremes of the testimony. The facts cited above reflect that.

Murray maintained in his cross-examination of Chris McAdam that Chris was not credible because Fred McAdam had told him not to believe a thing Chris said. Yet Murray claimed that the respondents failed to pay him $400.00 in wages when he filed his claim. During the hearing he maintained that he had agreed to do the work for $300.00. Chris countered that he told Murray that he estimated the value of the debris to be hauled at $300.00.

This fact finder does not find one party more credible than the other, but does conclude that there is no merit to Murray's claim because there was no clear or implied agreement to pay wages to him, over and above the cost of his gasoline and the value of the debris he was to haul.

C. *Rita and Chris McAdam do not owe a Penalty.*

Montana law assesses a penalty when an employer fails to pay wages when they are due. Mont. Code Ann. § 39-3-206. Since the respondents did not agree to pay any wages which it has not paid, no penalty can be assessed.

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. Good cause exists to set aside the default in this matter.

3. The respondents have not failed to pay any wages which it agreed to pay.

VI. ORDER

Murray's claim for unpaid wages is dismissed.

DATED this 23rd day of August, 2007.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ DAVID H. FRAZIER
David H. Frazier
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.