

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM)	Case No. 235-2013
OF BRIT GARRETT,)	
)	
Claimant,)	
)	
vs.)	FINAL AGENCY DECISION
)	
LITHIA CDH, INC., a Montana corporation,)	
a/k/a LITHIA MOTORS, INC., d/b/a LITHIA)	
CHRYSLER JEEP DODGE OF HELENA,)	
)	
Respondent.)	

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I. INTRODUCTION

Claimant Brit Garrett filed a late appeal of a determination issued by the Wage and Hour Unit of the Department of Labor and Industry finding his claim without merit and dismissing the matter.

On January 30, 2013, a telephone scheduling conference was held with Garrett and Karla Kocina, who represented the respondent. The parties agreed they were prepared to proceed to hearing on February 20, 2013.

On February 20, 2013, Hearing Officer Caroline A. Holien held a contested case hearing in this matter. The parties agreed to proceed by telephone. Brit Garrett represented himself. Attorney Paul Tranel represented the respondent, Lithia CDH, Inc., a Montana corporation, a/k/a Lithia Motors, Inc., d/b/a Lithia Chrysler Jeep Dodge of Helena.

Garrett testified under oath. The employer presented no testimony. The administrative record compiled at the Wage and Hour Unit (Documents 1 - 75) was admitted into the record without objection. Based on the evidence and argument presented at hearing, the hearing officer makes the following findings of fact, conclusions of law, and final agency decision.

II. ISSUE

Whether Brit Garrett filed a timely appeal to the Wage and Hour determination dated October 26, 2012.

III. FINDINGS OF FACT

1. On August 9, 2012, Brit Garrett filed a claim for unpaid wages with the Wage and Hour Unit of the Department of Labor and Industry. Garrett listed "4 Ambush Ridge, Clancy, Montana 59634" as his mailing address. (Documents 55, 56). Garrett has received mail at this address for more than one year.

2. Garrett's mail is delivered to a mailbox located on the highway, which is approximately one mile from his home. Garrett's neighbor, whose address is 4 Hole in the Wall, sometimes receives Garrett's mail and vice versa. Garrett and his neighbor typically place misdirected mail in the appropriate mail box.

3. On September 14, 2012, Renee Crawford, Compliance Specialist, mailed a letter to Garrett advising him that the respondent had submitted additional information and a written reply to his claim. The letter was mailed to Garrett's correct mailing address. Crawford inadvertently failed to include a due date for Garrett's written reply. (Document 14). Garrett received this letter within a few days of its mailing date. Garrett observed that the letter appeared to be a template and that a date for appeal had not been included. Garrett did not contact Crawford for clarification.

4. On October 3, 2012, Crawford mailed a letter to Garrett noting she had mistakenly failed to include a due date in the September 14, 2012 letter. Crawford advised Garrett that his response was due no later than October 10, 2012. This letter was mailed to Garrett's correct mailing address. (Document 13).

5. On October 26, 2012, Crawford issued a decision dismissing Garrett's claim based upon her finding that Garrett had failed to submit substantial evidence showing he was owed additional wages. The dismissal stated, in part, "The Request for Redetermination or an Appeal (hearing), whichever is requested, must be postmarked by November 13, 2012." (Documents 8 - 11). Crawford completed a Certificate of Service, which stated, "The undersigned does hereby certify that a true and correct copy of the foregoing Dismissal was served upon the following on the 26 day of October 2012, postage paid and addressed or delivered as indicated." (Document 12). Garrett's address is listed. Three individuals representing the employer were also listed. (Document 12).

6. On November 27, 2012, Garrett contacted Crawford to inquire about the status of his claim. Crawford informed Garrett that his claim had been dismissed and the date for appeal had passed. Garrett informed Crawford that he had not received the Dismissal. Crawford informed Garrett that her office had not received anything from the U.S. Postal Service indicating the mail had been returned as undeliverable. (Document 7). Crawford advised Garrett to write a letter to Pam McDaniel, Supervisor at the Wage and Hour Unit, explaining the situation and to submit whatever additional information he may have with his letter.

7. On November 30, 2012, the Wage and Hour Unit received Garrett's letter and a screen shot of text messages between him and Dee Jay Pointer. (Documents 5, 6). Garrett's letter does not explain how or why he had not received the Dismissal or that he had any difficulties getting mailings sent to him by the Wage and Hour Unit.

8. On December 3, 2012, the Wage and Hour Unit referred the matter for mediation. After mediation efforts were unsuccessful, the matter was transferred to the Hearings Bureau on January 14, 2013.

IV. DISCUSSION

A party who has received an adverse decision from a compliance specialist must request a formal hearing within 15 days of the date that the final determination or redetermination was mailed to the party. Admin. R. Mont. 24.16.7537. The department, by rule, shall provide relief for a person who does not receive the redetermination by mail. Mont. Code Ann. § 39-3-216(3). Administrative Rules of Montana 24.16.7544(1) provides:

A party which alleges that it did not receive timely notice by mail of the claim, determination or hearing process provided by these rules has the burden of proof 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.

The Montana Supreme Court has addressed the situation where a party disputes the receipt of mail:

Montana law presumes that a letter mailed in the ordinary course of business has been received. MCA 26-1-602(20)(24). In this case, while it is true that there is no direct evidence of actual mailing of the confirmation form, the presumption of receipt nevertheless arises.

Crissey v. State Highway Commission (1966), 147 Mont. 374, 413 P.2d 308. It is enough that there is an office practice or custom and that this practice or custom was carried out. *Crissey*, 147 Mont. at 379, 413 P.2d 308. However, in this case, the respondent denies receipt of the confirmation order. In *Crissey*, we held that an addressee's positive denial of receipt does not nullify the presumption, but leaves the question for the determination of the jury, or the court sitting without a jury, with such weight given to the presumption as they think it is entitled to. The presumption is not conclusive and may be controverted by other evidence.

General Mills, Inc. v. Zerbe Bros., Inc., 207 Mont. 19, 22-23, 627 P.2d 1109, 1111 (1983).

Garrett denied receiving the decision dated October 26, 2012 that dismissed his claim. Garrett testified that he sometimes has difficulty getting his mail in a timely fashion and that the mail person often places his mail in his neighbor's mailbox and vice versa. Garrett testified he asked his neighbor prior to hearing if he had received any mailings from the Wage and Hour Unit that were addressed to Garrett and the neighbor denied having received any such mailings. Garrett testified he did not speak to the mail person or anyone with the U.S. Postal Service about his not having received the mailing.

Garrett recalled receiving several mailings from the Wage and Hour Unit after he filed his claim on August 9, 2012 and prior to the decision dismissing his claim being issued on October 26, 2012. Garrett testified he was frequently overwhelmed by the amount of mail he received from the Wage and Hour Unit during that period. Garrett acknowledged receiving information sent to him by the Wage and Hour Unit regarding mediation in December 2012 and January 2013. These documents were mailed to Garrett at the address he confirmed was correct during the hearing. Garrett also acknowledged receiving the Notice of Hearing and Telephone Conference and the Scheduling Order mailed to him by the Hearings Bureau on January 16, 2013 and January 30, 2013. Those documents were also mailed to Garrett at the address he confirmed was correct during the hearing.

Garrett offered no additional evidence, apart from his own testimony, to show he had not received the October 26, 2012 decision from the Wage and Hour Unit. The evidence shows Crawford completed a certificate of mailing, which she signed and dated, and sent to Garrett's home address, which he confirmed was correct during the hearing. Garrett has not presented clear and convincing evidence that the department failed to mail the determination to Garrett at his correct address. Garrett has not rebutted the presumptions set forth in Montana Code Annotated § 26-1-602.

Garrett's appeal is determined to be untimely under Mont. Code. Ann. § 39-3-216(3).

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. Garrett failed to file a timely appeal as required under Mont. Code Ann. § 39-3-216(3). Therefore, the decision dismissing his claim properly became final on November 13, 2012, when the time for appeal had passed.

VI. ORDER

Brit Garrett's appeal is dismissed.

DATED this 1st day of March, 2013.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ CAROLINE A. HOLIEN
CAROLINE A. HOLIEN
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 the date of mailing of the hearing officer's decision. See also Mont. Code Ann. § 2-4-702.