

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

IN THE MATTER OF THE WAGE CLAIM)	Case No. 621-2018
OF MELINDA K. CULBERTSON,)	
)	
Claimant,)	
)	
vs.)	FINAL AGENCY DECISION
)	
MOSS VETERINARY SERVICES, INC.,)	
a Montana corporation d/b/a CREEKSIDE)	
VETERINARY HOSPITAL,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

On October 17, 2017, Melinda K. Culbertson filed a claim with the Wage and Hour Unit of the Department of Labor and Industry (Wage and Hour Unit) contending Moss Veterinary Services, Inc., d/b/a Creekside Veterinary Hospital (Creekside) owed her \$5,752.12 in unpaid vacation/paid time off (PTO) for the period of June 5, 2014 through September 28, 2017.

On October 25, 2017, Jarrod Moss, D.V.M., filed a response on behalf of Creekside. On November 24, 2017, Moss sent another letter to the Wage and Hour Unit indicating Culbertson was not owed any additional compensation for accrued vacation time. On December 13, 2017, Moss sent a letter to the Wage and Hour Unit that included a calculation of vacation time used by Culbertson during the period of June 2014 through September 30, 2017.

On January 12, 2018, the Wage and Hour Unit issued a determination finding Creekside owed Culbertson \$8,761.76 for unpaid vacation time, as well as a 15% penalty, for a total of \$10,076.02. On January 31, 2018, Moss filed a timely appeal on behalf of Creekside.

Following mediation efforts, the Wage and Hour Unit transferred the case to the Office of Administrative Hearings (OAH) on June 11, 2018.

On June 15, 2018, OAH mailed a Notice of Hearing and Telephone Conference to both parties at the addresses of record. Neither mailing was returned as undeliverable.

The Notice of Hearing and Telephone Conference included the following:

This hearing is being held because [Creekside] appealed from a determination of the Department's Wage and Hour Unit that found wages are due the claimant. If [Creekside] fails to appear at the hearing, the Office of Administrative Hearings will issue an order affirming the Wage and Hour Unit's determination, unless the opposing party seeks additional relief.

On June 26, 2018, a telephone scheduling conference was held at which Culbertson appeared along with her attorney, Amy McNulty. The Hearing Officer attempted to contact Moss at the telephone numbers of record but was unable to reach him or leave a message for him at either number. McNulty informed the Hearing Officer that Moss had closed the practice in March 2018 and had moved out of state. To date, Moss has had no contact with OAH.

On June 26, 2018, OAH mailed the Scheduling Order to both parties at the addresses of record. Neither mailing was returned as undeliverable. The Scheduling Order included the hearing preparation deadlines and set the date and time for the telephone hearing. The Scheduling Order also included the following:

A party's failure to appear for any conference, and/or failure to obey orders issued by the Hearing Officer, may result in sanctions against that party that can include entry of default, dismissal of an appeal, dismissal of the complaint, imposition of liability or other appropriate sanctions.

....

If the appellant fails to appear at the hearing, the Office of Administrative Hearings will issue an order affirming the Wage and Hour Unit's determination if the opposing party does not seek additional relief. If the opposing party has timely requested relief beyond that requested in the complaint, the hearing will proceed on that basis.

On August 30, 2018, McNulty filed and served her Request for Relief, Final Contentions, and Exhibit and Witness list. Nothing was received from Moss.

Hearing Officer Caroline A. Holien convened a telephone hearing in this matter on September 24, 2018 pursuant to the Scheduling Order. McNulty appeared with Culbertson and announced that she and her client were ready to proceed to hearing. The Hearing Officer attempted to reach Moss at the telephone number of record. Unable to reach him and after leaving a voice mail message directing him to contact OAH if he wished to participate in the hearing, the Hearing Officer re-attempted to reach him approximately ten minutes later. Moss was not available; nor did he have any contact with OAH either prior to or during the course of hearing.

At the start of hearing, the Hearing Officer informed Culbertson that, absent her objection, because Creekside was the appellant in the case and was not present at the hearing, and based on the record, she intended to find Creekside in default and affirm the redetermination of the Wage and Hour Unit. Culbertson did not object and affirmed that she was not seeking relief beyond what was found in the Wage and Hour Unit's redetermination.

II. ISSUE

Whether Moss Veterinary Services, Inc., d/b/a Creekside Veterinary Hospital, owes wages, as alleged in the complaint filed by Melinda K. Culbertson, and owes penalties or liquidated damages, as provided by law.

III. FINDINGS OF FACT

1. On June 15, 2018, OAH issued a Notice of Hearing and Telephone Conference that included the following:

This hearing is being held because [Creekside] appealed from a determination of the Department's Wage and Hour Unit that found wages are due the claimant. If [Creekside] fails to appear at the hearing, the Office of Administrative Hearings will issue an order affirming the Wage and Hour Unit's determination, unless the opposing party seeks additional relief.

2. On June 26, 2018, a Scheduling Order was sent to the parties which informed them about (1) the date and time of the hearing, (2) the method for conducting the hearing, (3) the consequence of not participating in the hearing, and (4) the requirement of setting aside four hours to be available for the hearing. The Scheduling Order also included the following:

A party's failure to appear for any conference, and/or failure to obey orders issued by the Hearing Officer, may result in sanctions against that party that can include entry of default, dismissal of an appeal, dismissal of the complaint, imposition of liability or other appropriate sanctions.

. . . .

If the appellant fails to appear at the hearing, the Office of Administrative Hearings will issue an order affirming the Wage and Hour Unit's determination if the opposing party does not seek additional relief. If the opposing party has timely requested relief beyond that requested in the complaint, the hearing will proceed on that basis.

3. Moss has had no contact with OAH and has not complied with any of the orders of the Hearing Officer.
4. None of the documents sent to the parties were returned as undeliverable.
5. On September 24, 2018, Culbertson and her counsel appeared for hearing and were prepared to proceed. Moss was contacted twice and was not available when called either time.
6. Creekside owes Culbertson \$8,761.76 in unpaid vacation time as determined by the Wage and Hour Unit in its January 12, 2018, determination. Culbertson does not seek any additional relief.
7. Creekside also owes a 55% penalty of \$4,818.97 for a total amount owed of \$13,580.73.

IV. DISCUSSION¹

This is a contested case proceeding subject to the Montana Administrative Procedures Act (MAPA) pursuant to Mont. Code Ann. § 2-4-601 et. seq and § 39-3-302. MAPA specifically provides that informal disposition may be made of any contested case by, among other things, a default unless such disposition is precluded by law. Mont. Code Ann. § 2-4-603(1)(a). Nothing in Title 39 or Title 2 prohibits imposition of a default where a party fails to comport with any facet of a

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

scheduling order, fails to respond to a tribunal's direct order, or fails to appear for a scheduled hearing.

The Department has adopted the Attorney General's model rules, which provide in pertinent part, "[I]n a contested case, if a party does not appear to contest an intended agency action, the agency may enter a default order. If a default is entered, pursuant to Mont. Code. Ann. § 2-4-623, the order must be in writing and include findings of fact and conclusions of law" (emphasis added). Admin. R. Mont. 1-3-213(1) and 24-2-101(1). Furthermore, the model rules state that, "A corporation appearing before an agency is considered a separate legal entity and may not appear on its own behalf through an agent other than an attorney." Admin. R. Mont. 1.3.231(2).

Creekside, the appellant, is in default because it failed to participate in the scheduled hearing. Because "a party is responsible for developing legal analysis that supports its position. . ." (*Wohl v. City of Missoula*, 2013 MT 46, ¶ 48, 369 Mont. 108, 300 P.3d 1119), the Hearing Officer will not undertake that effort for the respondent/appellant. Creekside failed to participate in a scheduled hearing and failed to follow orders issued by the Hearing Officer. Therefore, Creekside is in default in this case.

V. CONCLUSIONS OF LAW

1. The State of Montana and the Commissioner of the Department of Labor and Industry have jurisdiction over this complaint. Mont. Code Ann. § 39-3-201 et seq. *State v. Holman Aviation* (1978), 176 Mont. 31, 575 P.2d 925.

2. Moss Veterinary Services, Inc., a Montana corporation, d/b/a Creekside Veterinary Hospital failed to appear for any pre-hearing conferences in this matter; failed to obey the orders issued by the Hearing Officer; and failed to appear at the telephone hearing convened on September 24, 2018. As a result, Moss Veterinary Services, Inc., a Montana corporation, d/b/a Creekside Veterinary Hospital failed to meet its burden of proof and entry of default is appropriate in this case.

3. Moss Veterinary Services, Inc., a Montana corporation, d/b/a Creekside Veterinary Hospital, the appellant, has shown no basis to set aside the Wage and Hour Unit's January 12, 2018, determination. Culbertson is due a total of \$13,580.73 in unpaid wages and penalties.

VI. ORDER

IT IS THEREFORE ORDERED that Respondent's appeal is DISMISSED. The Department's July 24, 2017, determination is affirmed and is therefore final. Moss Veterinary Services, Inc., a Montana corporation, d/b/a Creekside Veterinary Hospital, is hereby ORDERED to tender a cashier's check or money order in the amount of \$13,580.73 made payable to Melinda K. Culbertson and mailed to the Employment Relations Division, P.O. Box 201503, Helena, MT 59624-1503, no later than 30 days after the date of mailing of this decision.

The Respondent may deduct applicable withholding taxes from the portion of the payments representing wages, but not from the portion representing liquidated damages or penalties.

DATED this 28th day of September, 2018.

DEPARTMENT OF LABOR & INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

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. Please send a copy of your filing with the district court to:

Department of Labor & Industry
Wage & Hour Unit
P.O. Box 201503
Helena, MT 59624-1503

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. Such an application is not a review of the validity of this Order.