

III. FINDINGS OF FACT

A. *ENSI MED Failed To Secure An Attorney To Represent The Corporation At Hearing.*

1. ENSI MED is incorporated under the laws of the state of Montana. ENSI MED's global financial officer is Joe Michaud.

2. On October 11, 2007, the Hearings Bureau issued notices of hearing that included a provision that the hearing officer may require the corporation to be represented by an attorney.

3. Hearing Officer David Scrimm held a scheduling conference in this matter on October 23, 2007. The claimants appeared on their own behalf. Michaud appeared on behalf of ENSI MED. Michaud is not an attorney and is not licensed to practice law in the state of Montana.

4. At the time of the conference, the hearing officer advised Michaud that the corporation had to be represented by an attorney licensed in Montana and that the corporation could not be represented by Michaud. The hearing officer also advised Michaud that the corporation's attorney would have to file a notice of appearance.

5. On December 27, 2007, the hearing officer conducted a pre-hearing conference wherein Michaud was again informed that ENSI MED must have an attorney represent it. Michaud acknowledged that fact and stated he would locate an attorney for hearing.

6. On December 31, 2007, two days before the hearing, Michaud contacted the Hearings Bureau and informed staff that he was thus far unable to retain the services of an attorney and thus wanted to continue the hearing. After conferring with the hearing officer, staff informed Michaud that due to the late request and the fact that several claimants were coming from out of state to attend the hearing that no continuance would be granted. Michaud was also informed that while he would not be able to represent ENSI MED, the hearing officer would ask him questions regarding the matter.

7. On January 2, 2008, Michaud appeared at the hearing and objected to the proceedings going forward based on his belief that the first time he had heard that ENSI MED must have an attorney represent it was at the December 27, 2007 prehearing conference. His objection was overruled and several claimants responded that he was told of the requirement at the October 23, 2007 scheduling conference.

8. Michaud then requested that he be allowed to represent ENSI MED. That request was denied because Michaud is not an attorney. The hearing officer, however, examined Michaud as a fact witness and permitted the claimants to cross examine him. The claimants voiced no objection to doing this.

B. Thybulle is owed additional Wages and Penalty.

1. Gregory Thybulle (Thybulle) began his employment with ENSI MED in April 2007. He worked until July 9, 2007. Thybulle and ENSI MED were parties to an employment contract that provided Thybulle was to be paid \$16,666.67 per month and that in the event of termination of the contract by ENSI MED, Thybulle was to be paid his monthly salary until the end of the contract term.

2. Thybulle filed his wage claim with the Wage & Hour Division of the Montana Department of Labor & Industry on July 31, 2007.

3. Thybulle seeks unpaid wages in the amount of \$66,666.67 for the months of April, May, June and July 2007. In addition he seeks \$1,017.00 in unpaid expenses.

4. ENSI MED does not dispute that it owes wages to Thybulle for the months of April, May and June 2007.

5. Thybulle worked for ENSI MED at least through July 9, 2007. Pursuant to his employment contract Thybulle was paid on a monthly salary basis. Thybulle proved he is owed wages for the months of April, May, June and July 2007 in the total amount of \$66,666.67.

6. Thybulle's claimed expenses are not recoverable under the Montana Wage Payment Act.

7. Pursuant to Admin. R. Mont. 24.16.7556, Thybulle is owed a 110% penalty on the unpaid wages in the amount of \$73,333.34 due to ENSI MED's previous violation of similar wage and hour laws and for issuing paychecks without sufficient funds in its accounts. Case Nos. 73-2008, 74-2008, 110-2008 and 170-2008.

C. Sacry is owed additional Wages and Penalty.

1. Sacry filed her wage claim with the Wage & Hour Division of the Montana

Department of Labor & Industry on August 2, 2007.

2. Sacry seeks unpaid wages in the amount of \$3,333.33 for the month of July 2007.
3. ENSI MED does not dispute that it owes unpaid wages to Sacry in the amount of \$3,333.33.
4. Sacry proved she is owed wages for the month of July 2007 in the total amount of \$3,333.33.
5. Pursuant to Admin. R. Mont. 24.16.7556, Sacry is owed a 110% penalty on the unpaid wages in the amount of \$3,666.67 due to ENSI MED's previous violation of similar wage and hour laws. Case Nos. 73-2008, 74-2008, 110-2008 and 170-2008.

D. Hill is owed additional Wages and Penalty.

1. Hill filed her wage claim with the Wage & Hour Division of the Montana Department of Labor & Industry on August 13, 2007.
2. Hill seeks unpaid wages in the amount of \$1,250.00 for the weeks of July 15 to July 31, 2007.
3. ENSI MED does not dispute that it owes \$1,250.00 in wages to Hill for the weeks of July 15 to 31, 2007.
4. Pursuant to Admin. R. Mont. 24.16.7556 Hill is owed a 110% penalty on the unpaid wages in the amount of \$1,375.00 due to ENSI MED's previous violation of similar wage and hour laws. Case Nos. 73-2008, 74-2008, 110-2008 and 170-2008.

E. *Skeel is owed additional Wages and Penalty.*

1. Skeel filed her wage claim with the Wage & Hour Division of the Montana Department of Labor & Industry on August 14, 2007.

2. Skeel seeks unpaid wages in the amount of \$8,250.00 for the months of May, June, and July 2007.

3. ENSI MED does not dispute that it owes \$8,250.00 in wages to Skeel for the months of May, June and July 2007.

4. Skeel proved she is owed wages for the months of May, June and July 2007 in the total amount of \$8,250.00.

5. Pursuant to Admin. R. Mont. 24.16.7556 Skeel is owed a 110% penalty on the unpaid wages in the amounts of \$9,075.00 due to ENSI MED's previous violations of similar wage and hour laws and its issuance of insufficient funds checks to Skeel. Case Nos. 73-2008, 74-2008, 110-2008 and 170-2008.

IV. DISCUSSION¹

A. *The Corporation Could Not Appear At Hearing Through Michaud.*

Michaud objected to the hearing officer's refusal to let him represent the corporation at hearing. Michaud is not an attorney licensed to practice in Montana. In fact, he is not an attorney. In light of the corporate status of the respondent and Michaud's not being a licensed attorney in Montana, the hearing officer had no choice but to refuse to let him represent the corporation at hearing.

The case law in Montana is abundantly clear that a corporation can only appear in a legal proceeding through a licensed attorney. *Audit Services, Inc. v. Frontier West, Inc.*, (1992), 252 Mont. 142, 148, 827 P.2d 1241, 1246; *Cont. Realty, Inc. v. Gerry*, (1991), 251 Mont. 150, 152, 822 P.2d 1083, 1085; *Weaver v. Graybill*, (1990), 246 Mont. 175, 178, 803 P.2d 1089, 1091. Moreover, only licensed attorneys may practice law or represent others in legal proceedings. *Traders State Bank v. Mann*, (1993), 258 Mont. 226, 852 P.2d 604 (overruled on other grounds, *Turner v. Mountain Engineering & Construction*, (1996), 276 Mont. 55, 915 P.2d 799). In *Audit Services*, the Montana Supreme Court specifically cautioned district courts not to permit officers of a corporation who are not licensed to practice law to represent the corporation in legal proceedings. In *Weaver*, the shareholder filed claims on his own behalf and on behalf of the corporation. In refusing to consider the shareholder's claims on behalf of the corporation,

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.

the court noted:

While, as Weaver contends, shareholders and directors of a corporation have the right to "take action" on the corporation's behalf under § 35-1-930, MCA, **that does not entitle those persons to practice law on behalf of the corporation.** A corporation is a separate legal entity and cannot appear on its own behalf through an agent other than an attorney. *Annotation, Propriety and Effect of Corporation's Appearance Pro Se, Through Agent Who Is Not Attorney*, 19 A.L.R.3d 1073 (1968). Therefore, Weaver cannot represent Weaver Maxwell, Inc., or Weaver Maxwell Havre, Inc. Weaver cannot appear on behalf of his wife or the Maxwells, either, without being guilty of contempt of court. Section 37-61-210, MCA. Therefore, the only claims which we consider, and the only damages which could be awarded, are those of and to Weaver individually. We will discuss each count of the complaint separately.

Weaver, supra. (emphasis added)

It is apparent from the rationale of *Audit Services, Weaver*, and *Turner* that the supreme court does not permit an unlicensed person to practice law on behalf of a corporation in matters where such representation amounts to the practice of law. The question then becomes whether the proceeding before this tribunal amounts to the practice of law. The answer is an unequivocal "yes." *See, for persuasive value only, Steele v. McGregor*, BDV 96-882, First Judicial District Court of Montana, Lewis and Clark County, December 27, 1996 (holding specifically that practice before an administrative tribunal amounts to the practice of law and further holding that non-attorney representation of a corporation in an administrative proceeding is prohibited). The Montana State Bar in Ethics Opinion 000008, a pre-1985 Montana State Bar Ethics Opinion, stated:

Corporation representatives who are not attorneys may not engage in any activity which constitutes the practice of law. We have already determined that appearing before administrative agencies constitutes the practice of law, just as it would be if engaged in by a lawyer. Since this activity constitutes the practice of law, it follows that non-lawyers may not appear in a representative capacity--the same rule which of course applies to any other activity deemed the practice of law such as appearing in the courts.

There remains the pro se question, but it is not difficult. A corporation is an artificial entity created by law, and not a natural person. As such it cannot (being an artificial entity) represent itself as an individual could. Its officers or representatives would, in effect, be representing another. (*See Nicholson Supply Co. v. First Federal Saving and Loan Association of Hardee County*, 184 So. 2d 438, 19 A.L.R. 3d 1967 (Fla. App. 1966).) (See generally pages 157 et seq.,

Unauthorized Practice Handbook, American Bar Foundation (1972).

Because Michaud is not a licensed attorney, the hearing officer could not permit him to represent the corporation in this matter without running afoul of the case law. Michaud provided no relevant authority (such as a statute or administrative rule applicable to wage and hour proceedings or a relevant case from another jurisdiction) that would permit the hearing officer to ignore the supreme court's clear admonition with regards to a corporation's representation in a legal proceeding. Accordingly, the hearing officer did not let Michaud represent the corporation at the hearing.

B. *ENSI MED owes unpaid wages to the claimants*

At hearing and in documents entered into the record, ENSI Med admitted that it owed the wages and penalties in the amounts determined by the department to Skeel, Sacry and Hill. ENSI MED further admitted that it owed unpaid wages to Thybulle in the amount of \$50,000, but disputed that it owed wages for the month of July 2007 or any penalty on the unpaid wages.

Montana law requires employers to pay wages when due, and in no event later than 15 days following termination of employment. Mont. Code Ann. §§ 39-3-204 and 39-3-205.

An employee seeking unpaid wages has the initial burden of proving work performed without proper compensation. *Anderson v. Mt. Clemens Pottery Co.* (1946), 328 U.S. 680; *Garsjo v. Department 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." *Id.* 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; *see also*, *Marias Health Care Srv. v. Turenne*, 2001 MT 127, ¶¶13, 14, 305 Mont. 419, 422, 28 P.3d 494, 495 (holding that lower court properly concluded that the plaintiff's wage claim failed because she failed to meet her burden of proof to show that she was not compensated in accordance with her employment contract).

Once an employee has shown as a matter of just and reasonable inference that he or she is owed wages, "the burden shifts to the employer to come forward with evidence of the precise amount of the work performed or with evidence to negate the reasonableness of the inference to be drawn from the evidence of the employee, and if the employer fails to produce such evidence, it is the duty of the court to enter judgment for the employee, even though the amount be only a reasonable approximation.' * * *." *Garsjo*, 172 Mont. at 189, 562 P.2d at 477, **quoting** *Purcell v. Keegan, supra*, 359 Mich. at 576, 103 N.W. 2d at 497.

Thybulle's testimony and that of other witnesses called at hearing is sufficient to meet his burden to show that he was not paid for the regular hours of work that he is claiming. Moreover, Michaud's testimony, while arguing that Thybulle resigned some time in June, showed that Thybulle actually worked at least through July 9, 2007. Pursuant to Thybulle's

employment contract he was due wages for the entire month as he was a salaried employee paid on a monthly basis. The hearing officer finds that Thybulle, Sacry, Hill and Skeel have proven by a preponderance of the evidence that they are owed the unpaid wages as stated in the Findings of Fact.

C. *ENSI MED must pay a penalty on the unpaid wages due Thybulle, Sacry, Hill and Skeel.*

Montana law assesses a penalty when an employer fails to pay wages when they are due. Mont. Code Ann. § 39-3-206. Montana administrative rules require the imposition of a 110% penalty when aggravating factors, several of which are present in this case, are found to exist. Admin. R. Mont. 24.16.7566. ENSI violated similar wage and hour statutes when it failed to provide information requested by the department and when it failed to paid wages owed in case numbers 73-2008, 74-2008, 110-2008, and 170-2008. In addition, ENSI MED issued two insufficient funds paychecks to Skeel.

Applying these three regulations, ENSI MED owes penalties in the amounts of \$3,666.66 (110% of \$3,333.33); \$1,375.00 (110% of \$1,250.00); and \$9,075.00 (110% of \$8,250.00); to Sacry, Hill and Skeel, respectively. ENSI MED disputes that it owes any penalty on the unpaid wages it owes to Thybulle because he allegedly induced the company into writing at least three of the checks for which the company stopped payment when Thybulle indicated his intention to deposit them. ENSI MED's expressed reason for stopping payment was that there was insufficient funds to cover the checks. The law requires that ENSI MED pay at least a 55% penalty on the unpaid wages it owes Thybulle. Admin R. Mont. 24.16.7566. In this case, however there are several circumstances that justify imposing the maximum penalty of 110%. First, the other violations determined in case numbers 73-2008, 74-2008, 110-2008 and 170-2008 provide a sufficient basis for imposing the maximum penalty. Secondly, ENSI MED's argument that it was somehow induced into issuing checks to Thybulle and should not be penalized when it later stopped payment on those checks is without merit. ENSI MED simply should not have issued checks for payment of wages knowing that it did not have the funds to honor those checks. It was not unreasonable for Thybulle, after waiting several months, to attempt to deposit the checks. Moreover, it appears from the evidence that ENSI MED also stopped payment on a check (#1090) that it issued on its own initiative. The hearing officer finds that Thybulle is owed a 110% penalty on the wages owed in the amount of \$73,333.34.

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. ENSI MED owes Thybulle, Sacry, Hill and Skeel unpaid regular wages in the amounts identified in the Findings of Fact. ENSI MED also owes penalties as identified in the Findings of Fact.

VI. ORDER

ENSI MED is hereby ORDERED to tender a cashier's check or money order in the amount of \$140,000.01, representing \$66,666.67 in wages (less appropriate withholding of taxes from those wages) and \$73,333.34 in penalty, made payable to Gregory Thybulle.

ENSI MED is FURTHER ORDERED to tender a cashier's check or money order in the amount of \$6,999.99, representing \$3,333.33 in wages (less appropriate withholding of taxes from those wages) and \$3,666.66 in penalty, made payable to Denise R. Sacry.

ENSI MED is FURTHER ORDERED to tender a cashier's check or money order in the amount of \$2,625.00, representing \$1,250.00 in wages (less appropriate withholding of taxes from those wages) and \$1,375.00 in penalty, made payable to Barbara J. Hill.

ENSI MED is FURTHER ORDERED to tender a cashier's check or money order in the amount of \$17,325.00, representing \$8,250.00 in wages (less appropriate withholding of taxes from those wages) and \$9,075.00 in penalty, made payable to Shanelle L. Skeel.

All payments required above shall be mailed to the Employment Relations Division, P.O. Box 6518, Helena, Montana 59624-6518, no later than 30 days after service of this decision.

DATED this 13th day of February, 2008.

DEPARTMENT OF LABOR AND INDUSTRY

By: /s/ DAVID A. SCRIMM
David A. Scrimm, Chief
Hearings Bureau

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