

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIMS)	Case Nos. 706-2007 and 707-2007
OF WILLIAM A. FISCHER AND)	
CLARICE M. FISCHER,)	
)	
Claimants,)	
)	
vs.)	FINDINGS OF FACT;
)	CONCLUSIONS OF LAW;
)	AND ORDER
PWS, INC. d/b/a TROPICAL WORLD)	
PET CENTER,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

In this matter, Respondent PWS, Inc. (PWS) appeals from a determination of the Montana Department of Labor and Industry's Wage and Hour Unit determination and redetermination that found PWS owed Clarice and William Fischer wages and penalty. The cases were consolidated and Hearing Officer Gregory L. Hanchett held a contested case hearing in this matter in Missoula, Montana, on October 5, 2007. The Fischers appeared and represented themselves. PWS was deemed not to have appeared because no attorney appeared on behalf of the corporation. The Fischers testified under oath. In addition, Michael McKay was called as a witness by the hearing officer and testified under oath. The Fischers stipulated to the admission of Documents 1 through 129 in the Clarice Fischer case and Documents 1 through 140 in the William Fischer case. For the reasons stated below, the hearing officer finds that additional wages and penalty are due to the Fischers.

II. ISSUES

Are Clarice and William Fischer due additional wages and penalty as prescribed by law?

III. FINDINGS OF FACT

A. *PWS Refuses To Secure An Attorney To Represent The Corporation At Hearing.*

1. PWS is incorporated under the laws of the state of Montana. PWS's president and majority shareholder is Michael McKay.

2. On July 31, 2007, Hearing Officer Gregory L. Hanchett held a scheduling conference in this matter. William and Clarice Fischer appeared on their own behalf. McKay appeared on behalf of PWS. McKay is not an attorney and is not licensed to practice law in the state of Montana.

3. At the time of the conference, the hearing officer advised McKay that the corporation had to be represented by an attorney licensed in Montana and that the corporation could not be represented by McKay. McKay acknowledged this and indicated that PWS would be retaining an attorney to represent the corporation. McKay, fully cognizant that PWS had to be represented by an attorney at hearing, agreed to set the hearing in this matter for October 5, 2007.

4. On August 1, 2007, the hearing officer issued a scheduling order memorializing the fact that PWS could not be represented by McKay and McKay's acknowledgment of that fact.

5. On September 5, 2007, McKay requested a one-week extension of time in which to file a request for an in-person hearing. The reason for the request was that McKay was still seeking an attorney to represent PWS. This request was granted.

6. On September 12, 2007, PWS requested that the hearing be held in person in Missoula, Montana. This request was granted.

7. On September 14, 2007, McKay contacted the Hearings Bureau to inquire why the corporation had to be represented by an attorney. In response, the hearing officer caused to be forwarded through staff an e-mail to both McKay and the Fischers stating the legal basis for not permitting McKay to represent the corporation at hearing. McKay was again admonished that because he was not a licensed attorney, he could not represent the corporation at hearing.

8. In the late afternoon of October 4, 2007, less than one day before the hearing, McKay filed an objection to having to hire an attorney to represent the corporation. No copy of the motion was provided to the claimants and, because of the late hour of the filing of the objection, the hearing officer could not provide a copy to the claimants or contact them to advise them of the objection.

9. The hearing convened in Missoula at 9:00 a.m. on October 5, 2007. Immediately prior to the hearing, the hearing officer provided a copy of PWS's objection to the claimants and then invited oral argument on the objection. After oral argument, the hearing officer

considered and then denied PWS's objection to requiring the corporation be represented by an attorney. As no attorney appeared on behalf of PWS, the corporation was not permitted to appear through McKay and the corporation was deemed to not have appeared at the hearing. The hearing officer, however, examined McKay as a fact witness and permitted the claimants to cross examine him. The claimants voiced no objection to doing this.

B. Clarice Fischer's Complaint.

1. PWS is a duly incorporated entity under the laws of the state of Montana. Michael McKay served as PWS corporate president at all times material to this case.

2. On September 20, 2005, William and Clarice assigned 70% of the stock they owned in PWS back to McKay pursuant to a 1995 agreement between the Fischers and McKay. Clarice Fischer retained a 3% share of the stock in the corporation. Documents 129, 130.

3. At all times pertinent to this complaint, Clarice Fischer was an employee of PWS.

4. In 2004, 2005, and 2006, PWS provided Clarice with a federal tax form W-2 in order to report her income to the Internal Revenue Service (IRS). In addition, beginning in 1998 until the time Clarice Fischer quit, PWS reported her wages as employee wages to the Montana Unemployment Insurance Division. At no time did PWS ever provide her with a Form 1099 for purposes of reporting income.

5. PWS, specifically McKay, set Clarice's hours of work.

6. On January 24, 2007, the Montana Unemployment Insurance Division determined that Clarice was an employee for purposes of the Montana Unemployment Insurance Act. PWS had the opportunity to fully and fairly litigate that issue in that proceeding. PWS did not appeal that determination.

7. Clarice's testimony establishes (and the hearing officer so finds) that she was not paid \$1,410.00 in wages she had earned in her employment with PWS.

8. McKay admitted at hearing that PWS had failed to pay Clarice \$1,410.00 that she was due.

9. Fifty-five percent penalty on the amount Clarice is owed amounts to \$775.50 ($\$1,410.00 \times .55 = \775.50). The total of the unpaid wages and penalty due Clarice is \$2,185.50 ($\$1,410.00 + \$775.50 = \$2,185.50$).

B. William Fischer's Complaint.

1. PWS is incorporated under the laws of the state of Montana. PWS's president and majority shareholder is Michael McKay.

2. On September 20, 2005, William and Clarice assigned 70% of the stock they owned in PWS back to McKay pursuant to a 1995 agreement between the Fischers and McKay. William retained a 27% share of the stock in the corporation. In addition, William was the corporate secretary. Documents 129, 130.

3. From September 20, 2005 until William Fischer quit on October 9, 2006, PWS had an employment agreement with William whereby PWS agreed to pay him at a rate of \$340.00 per week. William quit on October, 9, 2006 because he had not been paid since July 2006.

4. During the time between September 20, 2005 and October 9, 2006, McKay maintained the corporation's checkbook and did all of the payroll. William Fischer had no control over the expenses of the corporation and did not handle any of the corporation's receipts.

5. In 2004, 2005, and 2006, PWS provided William with a federal tax form W-2 in order to report William's income to the IRS. In addition, beginning in 1998 until the time William quit, PWS reported his wages as employee wages to the Montana Unemployment Insurance Division. At no time did PWS ever provide him with a Form 1099 for purposes of reporting income.

6. PWS, specifically McKay, set William's hours of work.

7. On January 24, 2007, the Montana Unemployment Insurance Division determined that William was an employee for purposes of the Montana Unemployment Insurance Act. PWS had the opportunity to fully and fairly litigate that issue in that proceeding. PWS did not appeal that determination.

8. At all times pertinent to this complaint, William was an employee of PWS.

9. William kept records on how many hours he worked each week and when and how much he was paid for his work. The facts in this case reveal that between the last full week of October 2005 and the week ending October 14, 2006, William worked the following hours and was paid the following wages:

Week ending	Regular Hours	Overtime Hours	Wages due	Wages paid
10/29/2005	40	5	372.88	340.00
11/05/2005	40	15.5	496.51	
11/12/2005	40	5	372.88	340.00
11/19/2005	40	16.5	508.29	340.00
11/26/2005	36	0	282.60	340.00

12/03/2005	40	16.5	508.29	
12/10/2005	40	5	372.88	340.00
12/17/2005	40	16.5	508.29	340.00
12/24/2005	40	5	372.88	
12/31/2005	40	17	514.18	340.00
1/07/2006	40	5.5	378.76	340.00
1/14/2006	40	17	514.18	340.00
1/21/2006	40	5	372.88	340.00
1/28/2006	40	14	478.85	340.00
2/04/2006	40	5	372.88	340.00
2/11/2006	40	16.5	508.29	340.00
2/18/2006	40	5.5	378.76	340.00
2/25/2006	40	16.5	508.29	340.00
3/04/2006	40	5	372.88	340.00
3/11/2006	40	16.5	508.29	
3/18/2006	40	5	372.88	340.00
3/25/2005	40	16.5	508.29	340.00
4/01/2006	40	17	514.18	340.00
4/08/2006	40	16.5	508.29	
4/15/2006	40	5	372.88	340.00
4/22/2006	40	17	514.18	340.00
4/29/2006	40	5	372.88	340.00
5/06/2006	40	17	514.18	340.00
5/13/2006	40	5.5	378.76	
5/20/2006	40	17	514.18	340.00
5/27/2006	40	5.5	378.76	340.00
6/03/2006	36	0	282.60	340.00
6/10/2006	40	5.5	378.76	
6/17/2006	40	17.5	520.06	340.00
6/24/2006	40	17.5	520.06	

7/01/2006	40	17	514.18	
7/08/2006	40	30	667.25	340.00
7/15/2006	40	36	737.90	340.00
7/22/2006	40	34	714.35	
7/29/2006	40	34	714.35	340.00
8/05/2006	40	11.5	449.41	
8/12/2006	40	5	372.88	
8/19/2006	40	5	372.88	
8/26/2006	40	5	372.88	
9/02/2006	40	16.5	508.29	
9/09/2006	37	0	290.45	
9/16/2006	40	19.5	543.61	
9/23/2006	40	5	372.88	
9/30/2006	40	16.5	508.29	
10/07/2006	40	5.5	378.76	
10/14/2006	1	0	7.85	
		TOTALS	\$22,880.79	\$10,200.00

10. William complained to McKay on several occasions about not being paid. In response, McKay would promise to pay him “later.” Despite repeated requests to McKay for payment, PWS failed to pay William \$12,680.79 that he was due in wages for his work.

11. PWS’s failure to pay included giving William a check on April 10, 2006 which PWS subsequently stopped payment on. William did not immediately cash the check and held onto it until after he initiated this wage claim in order to have proof that his employment agreement called for him to be paid \$340.00 per week. When William attempted to cash the check, PWS stopped payment on the check.

12. PWS’s appeal, while challenging the determination that wages were due and the amount of wages due William, did not challenge the Wage and Hour Unit’s method of calculating penalty. Since the hearing officer finds that the Wage and Hour correctly determined the amount of wages due to William, the appellant has presented no basis for questioning the amount of penalty that the Wage and Hour Unit found to be due. On this basis alone, the hearing officer finds that William is due a 110% penalty.

13. There is an additional basis for finding that 110% penalty is due. PWS stopped payment on William's April 10, 2006 check. This constitutes a special circumstance under applicable administrative rules that requires the imposition of the maximum penalty of 110% on the unpaid wages. The penalty due to William on his unpaid wages amounts to \$13,948.86. The total of the unpaid wages and penalty due to William is \$26,629.65 (\$12,680.79 + \$13,948.86 = \$26,629.65).

IV. DISCUSSION¹

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

McKay objected to the hearing officer's refusal to let him represent the corporation at hearing. McKay 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 McKay'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, 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

¹Statements 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.

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 McKay 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. McKay 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 McKay represent the corporation at the hearing.²

Finally, McKay’s motion was incredibly untimely. Filing the motion just hours before the hearing, not serving the objection on the other side, and leaving the hearing officer no time to continue the hearing put the hearing officer in an untenable position. The hearing had been scheduled for over two months and no effort was taken to raise any objection until literally the

² The hearing officer, while not licensed to practice law in Montana, is licensed (inactive status) to practice law in both Arizona and Nebraska. The hearing officer is prohibited by the ethical rules by which he is bound (ER 5.5 (a), Arizona Ethical Rules; Rule 5.5 (a) Nebraska Ethical Rules) from aiding in the unauthorized practice of law. Permitting McKay to represent the corporation in this case might have placed the hearing officer in violation of the ethical rules by which he is bound.

eleventh hour and 59th minute. Because PWS had requested an in-person hearing, the hearing officer was required to drive 120 miles to the hearing site and the state incurred substantial expense in providing the hearing officer with transportation and paying the hearing officer for his travel time. The hearing officer could not postpone his travel because PWS's late filing precluded the hearing officer from contacting the claimants to either ascertain their position on the motion or to advise them that the case would be postponed. The hearing officer had no choice but to make the round trip from Helena to Missoula (a total of 240 miles) and wait until the claimants appeared at the place of hearing in order to both advise them of the objection and to ascertain their position on the objection. Had PWS been timely in filing its objection, the hearing officer could have avoided the travel and expense. Because the objection's untimeliness both prevented the hearing officer from being able to continue the case and necessitated both travel and expense to the state, the objection was in any event properly overruled.

B. *Clarice Fischer Is Due Additional Wages.*

As PWS had no representative at hearing, the hearing officer was necessarily relegated to reviewing the pleadings PWS filed with the Wage and Hour Unit in order to determine its arguments. In its pleadings, PWS conceded that Clarice was due \$1,410.00 in unpaid wages. Its only contention with respect to Clarice stemmed from its argument that she was not an employee. This argument is incorrect.

Montana law requires "every employer of labor in the state of Montana to pay each employee the wages earned by the employee . . ." 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. Montana Code Annotated § 39-3-201(3) defines the term "employ" to mean "to permit or suffer to work." Montana Code Annotated § 39-3-201(4) defines an "employee" to be "any person who works for another for hire."

Where a stockholder enters into an agreement which creates an employment relationship between the stockholder and the corporation, wages that are due as a result of the employment relationship can be recovered in a wage and hour case. *Hovine, Verick, & Amrine, P.C. v. Comm'r of Labor* (1989), 237 M. 525, 774 P.2d 995 (Fact that claimant was a stockholder did not prevent him from seeking wages under the Montana Wage and Hour Act where the entity in which he was a stockholder was an "employer" for purposes of the Act and an employment agreement designating the stockholder as an employee of the entity existed between the entity and the stockholder).

Clarice's 3% stock position in the corporation does not change the fact that she was an employee of PWS. The employment relationship is demonstrated by the fact that at all times pertinent to this case, PWS provided her a W-2 and reported her as an hourly employee to the IRS. PWS also reported her wages as employee wages to the Montana Unemployment Insurance Division. Thus, PWS incorrectly asserts that Clarice was not an employee of the corporation. Accordingly, Clarice is due \$1,410.00 in unpaid wages plus applicable penalty as required by law.

C. *William Fischer Is Due Additional Wages.*

PWS's main disagreement lies with the wages sought by William. From PWS's pleadings, it appears that PWS attacks the Wage and Hour determination on three bases. First, PWS argues that William was not an employee but instead "a working partner." Document 20, PWS's request for redetermination. See also, Documents 5, 6 and 7. PWS also challenges the amount found to be due to William, arguing that it does not owe that much because there was no agreement as to the amount of wages to be paid and, therefore, William is due only the minimum hourly wage required by statute - \$5.15 per hour. Document 20. Third, PWS argues that Wage and Hour failed to properly offset for the wage garnishment executed against William through PWS. Documents 5, 6, and 7. None of these contentions is correct as the facts show.

William's position as corporate secretary and his 27% minority stock position in the corporation do not change the fact that he had an employee relationship with PWS. The employment relationship is demonstrated by the fact that at all times pertinent to this case, PWS provided him a W-2 and reported him as an hourly employee to the IRS. PWS reported his wages as employee wages to the Montana Unemployment Insurance Division.

In addition, PWS never provided William with a Form 1099 at any time during the time period in question in this case. William's work schedule was set by the corporation. He was not free to come and go as he wished. He did not control the corporate purse and he had no control over payroll. The checkbook and payroll were all controlled by McKay. Under these facts, an employment relationship existed between William and PWS. *Hovine, Verick, & Amrine, P.C., supra.*

Likewise, PWS's contention that it has paid all wages due to William is incorrect. William's testimony establishes that the employment agreement called for him to be paid \$340.00 per week for 40 hours of work. William's testimony and Documents 51, 52, and 65 show that during the time in question he should have been paid a total of \$22,880.79 but he was only paid \$10,200.00. The Wage and Hour Unit's determination regarding the amount of wages due William was correct. PWS kept no records as required to counter William's evidence. PWS thus owes William \$12,680.79 in additional wages.

Finally, it is clear from Document 16 (McKay's agreement that PWS used William's personal credit card to obtain goods and services for PWS, that PWS was borrowing money from William, and that PWS agreed to indemnify William for the purchases made on William's personal credit card) that PWS cannot offset the amounts owed to William because of the garnishment. That garnishment was placed against William's income only because he agreed to let PWS use his personal credit card to obtain goods and services for PWS. Under these circumstances, no offset is permissible under the wage and hour laws.

D. *Penalty Is Due On The Wages Due To Both Clarice And William Fischer.*

Montana law assesses a penalty when an employer fails to pay wages when they are due. Mont. Code Ann. § 39-3-206. For claims involving compensation other than minimum wage and overtime compensation, a penalty of 55% must be imposed. Admin. R. Mont. 24.16.7566. Where wages remain unpaid because an employer issued an insufficient funds check (or because an employer stopped payment), imposition of the maximum penalty of 110% is required. Admin. R. Mont. 24.16.7556(d). Applying these regulations, and considering the facts as found in this case, PWS owes Clarice penalty in the amount of \$775.50 on her unpaid wages. PWS owes William 110% penalty in the amount of \$13,948.86.

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. McKay could not represent the corporation at the hearing in this matter.

3. William and Clarice Fischer were employees of PWS.

4. PWS owes Clarice Fischer unpaid wages totaling \$1,410.00 and penalty in the amount of \$775.50.

5. PWS owes William Fischer unpaid wages totaling \$12,680.79 and penalty in the amount of \$13,948.86.

VI. ORDER

PWS, Inc. is hereby ORDERED to tender the following cashier's checks or money orders in the following amounts (1) a cashier's check or money order in the amount of \$2,185.50, representing \$1,410.00 in wages and \$775.50 in penalty, made payable to Clarice Fisher and (2) a cashier's check or money order in the amount of \$26,629.65, representing \$12,680.79 in wages and \$13,948.86 in penalty, made payable to William Fischer. These checks and/or money orders must 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. PWS, Inc. may deduct applicable withholding from the wage portion but not the penalty portion of the amounts due.

DATED this 26th day of December, 2007.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ GREGORY L. HANCHETT
GREGORY L. HANCHETT
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. Such an application is not a review of the validity of this Order.