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

IN THE MATTER OF THE WAGE CLAIM OF JACOB S. BOX, Claimant, vs. ELITE FIRE PROTECTION CORPORATION, a Montana corporation, Respondent.	)	Case No. 1437-2014 **FINAL AGENCY DECISION**

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I. INTRODUCTION

On March 5, 2014, Jacob S. Box filed a claim with the Department of Labor and Industry contending that Elite Fire Protection Corporation (Elite) owed him $12,954.55 in unpaid wages for the time period from September 1, 2013 to December 13, 2013. On March 20, 2014, Elite filed a response to the claim, contending that Box was not an employee, there was no agreement for a specific rate of pay, and that Box had received money from Elite as an owner during the time period of the claim.

On April 23, 2014, the Department's Wage and Hour Unit issued a determination finding that Box was owed $13,125.00 in unpaid wages, plus penalty. On May 8, 2014, Elite requested a hearing on the matter.

Following mediation efforts, the Wage and Hour Unit transferred the case to the Department's Office of Administrative Hearings on June 6, 2014. On June 9, 2014, the Office of Administrative Hearings issued a notice of hearing. On June 19, 2014, a scheduling conference was conducted. Marcel Quinn, attorney at law, represented the claimant and Craig Charlton, attorney at law, represented Elite. The matter was set for hearing on October 7, 2014.

Hearing Officer David A. Scrimm held a contested case hearing in this matter on October 7, 2014. Box and Shawn Hash provided sworn testimony. Documents 1-83, 100-348, and A through I were admitted into the hearing record.

Based on the evidence and argument presented at the hearing, the hearing officer makes the following findings of fact, conclusions of law, and final agency decision.

II. ISSUE

The issue in this case is whether Elite Fire Protection Corporation owes wages for work performed, as alleged in the claim of Jacob S. Box and owes penalties or liquidated damages, as provided by law.

III. FINDINGS OF FACT

1. Box worked for Elite Fire Protection Corporation from April 27, 2012 until December 12, 2014.

2. Box and Rash were shareholders in Elite with Rash owning 70% of the shares and Box the remaining 30%. Docs. 32, 122-113. As shareholders they agreed that Elite would pay each of them a salary of $3,750.00 per month. Both Rash and Box were employees of Elite. Both had Medicare, Social Security, and state and federal income taxes withheld from their gross pay. Docs. 45-60. Elite filed quarterly tax returns and unemployment insurance tax forms, and issued W-2s identifying both Rash and Box as employees. Docs. 61, 100, 101-106, 140. Both men reported their income from Elite as wages on their tax returns. Docs. 126, 142, 144.

3. Box assisted with some corporate matters during April 2012, but was not an employee of Elite until April 27, 2012 and the work he performed before that date was not as an employee but as a shareholder setting up a new company.

4. Elite paid its employees as early in the month as it could depending on cash flow. In October, November, and early December 2012, Elite had cash flow problems and delayed paying Box (and Rash) during this period. Elite received a large payment in December 2012 and by December 14, 2012 it had caught up on any wages owed to Box. Rash and Box agreed to the delays in wage payments as the shareholders of Elite because they wanted the company to succeed. When it could not pay Box fully during this period, it did make some payments to him for rent and

other living expenses. Those payments were not reported as wages to any tax authority, including Box's W-4.

5. In 2013, Box received his regular monthly salary until September when Elite again had cash flow problems. Box was ultimately paid for September 2013, but has not been paid for October, November, or the first 12 days of December. Box and Rash worked every day of the week if needed to get a contract finished. Box is owed $3,750.00 for October and for November and 12/31 of $3,750.00 ($1,451.61) for December for a total amount of wages owing of $8,951.61. Box is also owed a 55% penalty on the unpaid wages equaling $4,923.39.

IV. DISCUSSION AND ANALYSIS[1]

Montana law allows employees owed wages, including wages due under the FLSA, to file a claim with the Department of Labor and Industry to recover wages due. Mont. Code Ann. § 39-3-207; Hoehne v. Sherrodd, Inc. (1983), 205 Mont. 365, 668 P.2d 232.

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 the 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).

Through testimony and the exhibits admitted into the evidentiary record Box proved he is owed unpaid wages for October, November, and part of December 2013. Hash admitted Box was not paid for those months.

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

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

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.

Elite argues that because there was no written employment contract and because Box was a part owner of Elite he is not eligible to make a claim under Montana's Wage Payment Act. The WPA includes the following provisions:

> 39-3-201. Definitions. The following are the definitions used for the purpose of this part:
>
> (4) "Employee" includes any person who works for another for hire, except that the term does not include a person who is an independent contractor.
>
> (5) "Employer" includes any individual, partnership, association, corporation, business trust, legal representative, or organized group of persons acting directly or indirectly in the interest of an employer in relation to an employee but does not include the United States.
>
> (6)(a) "Wages" includes any money due an employee from the employer or employers, whether to be paid by the hour, day, week, semimonthly, monthly, or yearly, and includes bonus, piecework, and all tips and gratuities that are covered by section 3402(k) and service charges that are covered by section 3401 of the Internal Revenue Code of 1954, as amended and applicable on January 1, 1983, received by employees for services rendered by them to patrons of premises or businesses licensed to provide food, beverage, or lodging.

Under these provisions Elite is clearly an employer and Box's monthly salary meets the definition of wages. The Montana Supreme Court looked at a similar instance where a shareholder was paid wages and determined that the person was an employee of the legally distinct corporation.

> We determine that the District Court correctly interpreted § 39-3-201 as it applies to this case. The professional corporation clearly falls within the definition of an employer under the section, which means that the corporation itself had a separate and distinct identity from its stockholders. Moats Trucking Company, Inc. v. Gallatin Dairies, Inc.

> (Mont. 1988), [231 Mont. 474,] 753 P.2d 883, 885, 45 St.Rep. 772, 775. It is further clear that the definition of an "employee" within the meaning of the section covers Vervick and Amrine. They had entered into contracts of employment with the professional corporation, a separate legal entity.

Hoven, Vervick & Amrine, P.C. v. Montana Comm'r Labor, 237 Mont. 525, 531 (Mont. 1989).

While there was no written contract identifying Box as an employee, Box and Hash as shareholders of the distinct corporation agreed to pay him a salary $3,750.00 per month. Elite identified Box as an employee on tax returns, pay stubs, W-2 forms, and UI tax returns. It also identified the salaries it paid to Box and Hash as wages on its tax returns as opposed to dividends. Box identified the wages as such on his tax return, separately identifying his dividends. These actions by Elite and its shareholders clearly indicate that Box was an employee.

The Ninth Circuit Court of Appeals, in deciding if an employer-employee relationship exists, applies an "economic reality" test which identifies four factors:

> whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.

Gilbreath v. Cutter Biological, Inc., 931 F.2d 1320, 1324 (9th Cir. Ariz. 1991). Under the test one looks at the totality of the circumstances rather than one individual factor. Id.

Under the Gilbreath test Box is also an employee: the employer fired him in December 2013; Elite controlled the work schedules; Box and Rash acting as Elite determined the rate and method of payment for Box; and Elite maintained employment records regarding Box and its other employees.

Accordingly, Box has proved he is owed unpaid wages. Elite failed to prove Box was not an employee and therefore not subject to the provisions of WPA.

V. CONCLUSIONS OF LAW

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

2. Elite Fire Protection Corporation is an "employer." Mont. Code Ann. § 39-2-201(5).

3. Jacob S. Box was an "employee" of Elite Fire Protection Corporation. Mont. Code Ann. § 39-3-201(4).

4. Elite Fire Protection Corporation owes Jacob S. Box $8,951.61 in unpaid wages.

5. Elite Fire Protection Corporation must also pay Jacob S. Box a 55% penalty amounting to $4,923.39. Admin. R. Mont. 24.16.7566. None of the special circumstances justifying the maximum penalty are present. Admin. R. Mont. 24.16.7556.

VI. ORDER

Elite Fire Protection Corporation is hereby ORDERED to tender a cashier's check or money order in the amount of $13,875.00, representing $8,951.61 in unpaid wages and $4,923.39 in penalty, made payable to Jacob S. Box, and mailed to the **Employment Relations Division, P.O. Box 201503, Helena, Montana 59620-1503**, no later than 30 days after service of this decision. Elite may deduct applicable withholding from the wage portion but not the penalty portion.

DATED this 23rd day of October, 2014.

DEPARTMENT OF LABOR & INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ DAVID A. SCRIMM
DAVID A. SCRIMM
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.