

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

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|-------------------------------------|------------------------------|
| IN THE MATTER OF THE WAGE CLAIM) | Case No. 1961-2017 |
| OF JACQULYN M. FRANKLIN,) | |
|) | |
| Claimant,) | |
|) | |
| vs.) | FINAL AGENCY DECISION |
|) | |
| BEST TABLE EVENTS, LLC, a Montana) | |
| limited liability company,) | |
|) | |
| Respondent.) | |

* * * * *

I. INTRODUCTION

1. On June 5, 2017, Jacquelyn M. Franklin filed a claim with the Wage and Hour Unit of the Montana Department of Labor and Industry (Wage and Hour Unit) contending Best Table Events, LLC owed her \$1,683.86 in unpaid wages for work performed during the period beginning November 23, 2016 through April 15, 2017. The Wage and Hour Unit sent a request for information to Best Table Events, LLC the following day and received no response.

2. On July 7, 2017, the Wage and Hour Unit issued a determination finding Franklin was owed \$1,683.86 in unpaid wages and imposed a 110% penalty in the amount of \$1,852.25 due to Best Table's failure to timely respond to the claim. On July 26, 2017, the Wage and Hour Unit received the appeal of Best Table Events, LLC, which it treated as timely.

3. On August 1, 2017, the matter was referred to mediation. Mediation did not occur in this case due to the failure of Best Table Events, LLC to respond to contacts made by the mediator assigned to the matter. On October 26, 2017, the Wage and Hour Unit transferred the case to the Office of Administrative Hearings (OAH).

4. On November 1, 2017, OAH mailed a Notice of Hearing and Telephone Conference to both parties at the addresses of record setting a telephone scheduling

conference for November 13, 2017. The notice also provided, “Corporations, partnerships, limited liability companies (LLCs), and similar entities are required to be represented by an attorney pursuant to Admin. R. Mont. 1.3.231(12).” The language was underscored in the original. Neither mailing was returned as undeliverable.

5. The telephone scheduling conference was rescheduled to November 15, 2017 at the request of Jason Paranto on behalf of Best Table Events, LLC.

6. On November 15, 2017, the Hearing Officer conducted a telephone scheduling conference. Both Franklin and Paranto participated. The Hearing Officer advised Paranto that Best Table Events, LLC must be represented by counsel due to its corporate status. Paranto indicated that attorney William McCarthy would be representing Best Table Events, LLC and would be filing a Notice of Appearance.

7. On November 15, 2017, the Hearing Officer issued a Scheduling Order setting the matter for hearing on January 15, 2018. The Scheduling Order also included an advisory that Best Table Events, LLC must be represented by counsel. Additionally, Paranto, who had spoken with Chief Administrative Law Judge David Scrimm on or about November 15, 2017 regarding the pre-hearing conference conducted by the undersigned, had again been advised during that conversation that Best Table Events, LLC must be represented by counsel.

8. On January 12, 2018, Chief Administrative Law Judge Scrimm conducted the final pre-hearing conference in this matter on behalf of the Hearing Officer, who was out of the office due to a family emergency. Paranto represented that attorney William McCarthy would be handling the matter on behalf of Best Table Events, LLC. McCarthy’s office was contacted and he was not available. The hearing was rescheduled to January 29, 2018 due to the assigned Hearing Officer’s absence.

9. On January 12, 2018, an Order Rescheduling Hearing was mailed to the parties at the addresses of record. The order rescheduled the hearing to January 29, 2018 at 9:00 a.m., MST. Neither mailing was returned as undeliverable.

II. ISSUE

Whether Best Table Events, LLC, a Montana limited liability corporation and the appellant, owes wages for work performed, as alleged in Jacquelyn M. Franklin’s complaint, and owes any penalties.

III. FINDINGS OF FACT

1. On November 1, 2017, OAH issued a Notice of Hearing and Telephone Conference. The notice informed the parties that corporations, partnerships and limited liability companies must be represented by an attorney and a failure to appear could result in default.

2. On November 15, 2017, both Franklin and Paranto participated at the scheduling conference. Since Best Table Events, LLC did not have an attorney present, the Hearing Officer advised Jason Paranto that Best Table Events, LLC was required to have legal counsel represent the corporation in the contested case proceedings. Paranto indicated he was in contact with an attorney who he thought would represent Best Table Events, LLC. The Hearing Officer advised Paranto to ensure the attorney filed a Notice of Appearance with OAH as soon as possible.

3. The November 15, 2017 Scheduling Order informed the parties this matter was set for a hearing on January 15, 2018. The Order also stated:

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.

4. On January 12, 2018, both Franklin and Paranto participated in the final pre-hearing conference. The Hearing Officer who conducted the conference on behalf of the undersigned reminded Paranto that Best Table Events, LLC was required to have a licensed Montana attorney represent the corporation at the hearing that had been rescheduled to January 29, 2018. Paranto advised the Hearing Officer that attorney William McCarthy would be representing the business at hearing.

5. As of the date of this decision, OAH has not received a Notice of Appearance from any attorney indicating the attorney represented Best Table Events, LLC in these contested case proceedings.

6. On January 29, 2018, the Hearing Officer attempted to contact Best Table Events, LLC for hearing by calling the only telephone number that had been provided. When no one answered her call, the Hearing Officer left a voice mail message stating the date and time of hearing and warning the matter would be dismissed if no contact was made within ten minutes. The Hearing Officer attempted to call Best Table Events, LLC again at the telephone number provided

and no one answered her call. When no one on behalf of Best Table Events, LLC was available the second time, the Hearing Officer closed the record in this matter.

7. Without good cause, the appellant, Best Table Events, LLC, failed to appear at the hearing in this matter.

8. Best Table Events, LLC failed to present a prima facie case showing it is entitled to any relief. There is nothing in the administrative record or the Wage and Hour determination that shows any error of fact or law in the determination issued by the Wage and Hour Unit.

9. Best Table Events, LLC owes Franklin \$1,683.86 in unpaid wages.

10. Best Table Events, LLC is assessed penalties in the total amount of \$1,852.25 (a 110% penalty for regular wages pursuant to Mont. Code Ann. § 39-3-206).

IV. DISCUSSION AND ANALYSIS¹

A. Best Table Events, LLC is in default because it failed to appear in accordance with Montana law.

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 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).

¹Statements 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.

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. A corporation is a separate legal entity and cannot appear on its own behalf through an agent other than an attorney. *Weaver v. Graybill*, (1990), 246 Mont. 175, 178, 803 P.2d 1089, 1091, quoting *Annotation, Propriety and Effect of Corporation's Appearance Pro Se, Through Agent Who is Not Attorney*, 19 A.L.R. 3d 1073 (1968).

Since November 1, 2017, Best Table Events, LLC has been on notice that an attorney licensed to practice law in Montana must represent Best Table Events, LLC in this contested case proceeding. Paranto informed both the assigned Hearing Officer and the Chief Administrative Law Judge that he had an attorney who he believed would be representing the respondent at hearing. No attorney contacted OAH to indicate Best Table Events, LLC was represented by legal counsel.

No one appeared on behalf of Best Table Events, LLC when contacted for hearing on January 29, 2018. As of the date of this decision, no one on behalf of Best Table Events, LLC has contacted the Hearing Officer or OAH about this matter. Best Table Events, LLC failed to follow the orders issued by the Hearing Officer. Therefore, Best Table Events, LLC is found in default.

- B. A penalty of 110% is appropriate due to the failure of Best Table Events, LLC to cooperate in the Wage and Hour Unit's investigation of Franklin's claim.

Montana Code Annotated § 39-3-206 provides, "A penalty must . . . be assessed against and paid by the employer to the employee in an amount not to exceed 110% of the wages due and unpaid." Failing to provide information requested by the department and/or failing to cooperate in the department's investigation of the wage claim constitutes special circumstances justifying the imposition of the maximum penalty allowed by law. Admin. R. Mont. 24.16.7556(1)(a).

The evidence of record, which includes the administrative record (Admin. Rec. 1 - 19) compiled by the Wage and Hour Unit and sent to the parties with the Notice of Hearing and Telephone Conference on November 1, 2017 shows Best Table Events, LLC failed to respond to the Department's request for information related to Franklin's claim. See Admin. Rec. 7 - 11. The request was mailed not only to Best Table Events, LLC, but also to Paranto and Worden Thane & Haines, PC, which was listed as the Registered Agent for Best Table Events, LLC. There is no evidence showing why Best Table Events, LLC or its Registered Agent failed to respond to the

request for information or otherwise cooperate in the Department's investigation of Franklin's wage claim. Indeed, the pattern of failing to cooperate continued through to the date of hearing when neither Paranto nor the Registered Agent of Best Table Events, LLC appeared at the hearing that was scheduled due to its appeal. Therefore, the 110% penalty imposed by the Wage and Hour Unit is proper and continues to be imposed by this decision.

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. 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. A corporation is a separate legal entity and cannot appear on its own behalf through an agent other than an attorney. *Weaver v. Graybill*, (1990), 246 Mont. 175, 178, 803 P.2d 1089, 1091, quoting *Annotation, Propriety and Effect of Corporation's Appearance Pro Se, Through Agent Who is Not Attorney*, 19 A.L.R. 3d 1073 (1968). 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).

3. Best Table Events, LLC failed to respond to the Department's request for information and failed to cooperate in the investigation of Franklin's wage and hour claim necessitating the imposition of a 110% penalty pursuant to Admin. R. Mont. 24.16.7556(1)(a).

4. Best Table Events, LLC failed to follow the Scheduling Order dated November 15, 2017 and the directives of the hearing officers on November 15, 2017; on or about November 15, 2017; and January 12, 2018.

5. Best Table Events, LLC failed to appear with a licensed attorney at the contested case hearing scheduled for January 29, 2018.

6. By failing to appear at the hearing, the appellant, Best Table Events, LLC, has shown no basis to set aside the Wage and Hour Unit's determination. Franklin is due a total of \$3,536.11 in unpaid wages and penalties as described in Findings of Fact 9 and 10.

VI. ORDER

It is ORDERED that the respondent's appeal is DISMISSED. The Department's determination is final. Best Table Events, LLC owes Jacquelyn M. Franklin \$1,683.86 in unpaid wages and a penalty of \$1,852.25. Best Table Events, LLC is ORDERED to tender a cashier's check or money order in the amount of \$3,536.11 made payable to Jacquelyn M. Franklin and mailed to the Employment Relations Division, P.O. Box 201503, Helena, MT 59620-1503, no later than 30 days after service of this decision. Best Table Events, LLC may deduct applicable withholding from the wage portion, but not the penalty portion.

DATED this 31st day of January, 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.