

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

IN THE MATTER OF THE WAGE
CLAIM OF JEFF W. FILICETTI,

Claimant,

vs.

EVERTS CONTRACTING GROUP,
LLC D/B/A WESTERN FLATWORKS,

Respondent.

Case No. 1257-2022

FINAL AGENCY DECISION

I. PROCEDURAL BACKGROUND

On August 9, 2021, Claimant Jeff Filicetti (Filicetti) filed a claim with the Wage and Hour Unit of the Montana Department of Labor and Industry (Wage and Hour Unit) alleging Respondent, Everts Contracting Group, LLC d/b/a Western Flatworks (ECG), owed him \$12,004.00 in unpaid wages for work performed during the period of May 12, 2021 through July 30, 2021.

On September 17, 2021, the Wage and Hour Unit issued a determination finding ECG owed \$5,290.00 in wages, and assessed a 110% penalty of \$5,819.00. Additionally, the determination found ECG owed \$3,045.00 in overtime compensation, with a 110% penalty of \$3,349.50. ECG filed a timely appeal. Following unsuccessful mediation efforts, the matter was transferred to the Office of Administrative Hearings (OAH) on February 8, 2022.

On September 13, 2023, at the final pre-hearing conference, ECG failed to appear with an attorney. As a result, the Hearing Officer issues the following order.

II. ISSUE

Whether ECG owes Filicetti wages for work performed, as alleged in the complaint filed by Filicetti, and owes penalties, as provided by law.

III. FINDINGS OF FACT

1. On August 9, 2021, Filicetti filed a wage claim against ECG alleging that he was owed a total of \$12,004.00 in wages for work performed during the period of May 12, 2021 through July 30, 2021.

2. On September 17, 2021, the Wage and Hour Unit issued its determination that ECG owed Filicetti wages in the amount of \$5,290.00 and assessed a 110% penalty on these unpaid wages in the amount of \$5,819.00.

3. The Wage and Hour Unit also determined that ECG owed Filicetti \$3,045.00 in overtime compensation and assessed a 110% penalty on the unpaid overtime in the amount of \$3,349.50.

4. On February 11, 2022, OAH issued a Notice of Hearing and Telephone Conference setting the matter for a telephone scheduling conference. The notice provided:

RIGHT TO LEGAL COUNSEL. Each party has the right to be represented by an attorney. Individuals are not required to be represented by an attorney. 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(2). Any party that is represented by an attorney must hire and pay for that counsel. If you intend to find an attorney to represent you, begin your search today. (Emphasis in original).

5. The notice was sent to both parties at the addresses of record.

6. The Hearing Officer convened a scheduling conference on February 23, 2022.

7. At the scheduling conference, Mitchell Everts (Everts) appeared on behalf of the corporation.

8. The Hearing Officer inquired, at that time, as to whether Everts was in the process of obtaining legal counsel to represent ECG. Everts stated that he was in the process of retaining counsel but had not done so at that time.

9. Based upon Everts' representation, the Hearing Officer allowed Everts to participate in the scheduling conference for the purpose of setting the schedule.

10. Following the scheduling conference, the Hearing Officer issued a scheduling order. The scheduling order again provided the following provision:

RIGHT TO LEGAL COUNSEL. Each party has the right to be represented by an attorney. Individuals are not required to be represented by an attorney. 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(2). Any party that is represented by an attorney must hire and pay for that counsel. If you intend to find an attorney to represent you, begin your search today. (Emphasis in original).

11. The scheduling order also warned that **“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, imposition of liability or other appropriate sanctions.”** (Emphasis in original).

12. On October 26, 2022, the Hearing Officer convened a final pre-hearing conference. At that conference, Everts appeared on behalf of the ECG, and the Hearing Officer, once again, reminded Everts that he needed to retain counsel to represent ECG in these proceedings.

13. On October 27, 2022, the Hearing Officer issued an order vacating the contested case hearing and setting a status conference. The Hearing Officer vacated the contested case hearing because neither party filed their final pre-hearing statements or their respective exhibits and witness lists, and had not demonstrated that they were prepared to go forward with the hearing.

14. In the order vacating the contested case hearing, the Hearing Officer advised ECG that, *“Respondent must be represented by counsel at the status conference. If Respondent appears through its individual principals, then it will be considered to not have appeared at all and a **default may be entered against it.**”* (Emphasis in original).

15. The Hearing Officer convened a status conference on November 2, 2022. At the status conference, Everts, again, appeared on behalf of ECG. The Hearing Officer inquired as to the status of obtaining counsel to represent the

corporation, and Everts intimated that he still had not retained counsel, but wanted to resolve this matter by paying the wage claim.

16. Shortly thereafter, OAH was notified that ECG was interested in resolving this matter informally. As such, OAH sent the matter back to the Wage and Hour Unit.

17. The parties were unable to resolve this matter informally, and it was sent back to OAH for hearing.

18. On March 9, 2023, a scheduling conference was convened in this matter. Everts appeared on behalf of the corporation.

19. The Hearing Officer issued a second scheduling order after the scheduling conference which, once again, contained the following provision: “[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, imposition of liability or other appropriate sanctions.”

20. On June 6, 2023, despite not having retained an attorney, Everts filed a Motion to Dismiss on behalf of ECG wherein he sought dismissal of Filicetti’s wage claim based on alleged discussions during mediation.

21. That same day, the Hearing Officer convened a final pre-hearing conference that had been scheduled for that day. During the conference, several issues came to light, which necessitated continuing the contested case hearing. One such issue was Everts’ failure to obtain counsel to represent ECG.

22. Everts represented that he had spoken to counsel who was willing to represent ECG, but that they would not make an appearance until such time that the motion to dismiss was decided.

23. In order to allow ECG to obtain counsel and to resolve other issues, the Hearing Officer continued the hearing for 60 days and set a pre-hearing schedule.

24. In his order, the Hearing Officer specifically stated that “unless otherwise contradicted or negated herein, all other provisions set forth within orders previously issued by the Hearing Officer herein, including, but not limited to, the scheduling orders, remain in full force and effect.”

25. For purposes of the record, on June 22, 2023, the Hearing Officer denied ECG's motion to dismiss, and subsequently denied a motion for reconsideration that was filed by Everts on behalf of ECG due to lack of jurisdiction over discussions during mediation.

26. On July 11, 2023, the Hearing Officer convened a status conference. The purpose of the conference was to discuss the parties' recent filings, which included a motion for sanctions filed by Filicetti and various motions filed by Everts on behalf of ECG.

27. At the status conference, the Hearing Officer advised the parties that he was summarily denying the motions filed by the parties and continuing the contested case hearing.

28. The Hearing Officer advised Everts, both orally and via order, that no further pleadings filed on behalf of ECG would be considered unless filed by duly-licensed counsel.

29. The Hearing Officer, again, continued the hearing for 60 days in order to allow ECG to retain counsel to represent it; however, the Hearing Officer also advised the parties that no additional continuances of this matter would be entertained.

30. The Hearing Officer set a contested case hearing for September 20, 2023 and a final pre-hearing conference for September 13, 2023.

31. At no time prior to the September 13, 2023 final pre-hearing conference did an attorney file an appearance on behalf of ECG.

32. Moreover, ECG never filed any pre-hearing disclosure statement by the deadline set in the scheduling order.

33. At the final pre-hearing conference, Everts attempted to appear on behalf of ECG.

34. Since counsel had not appeared on behalf of ECG, the Hearing Officer deemed ECG to not have appeared at the hearing due to its failure to obtain counsel to represent it and its failure to submit its final pre-hearing statement.

35. Upon finding that ECG had not appeared for the final pre-hearing conference, the Hearing Officer notified Filicetti that because the appealing party failed to appear, he could request ECG be found in default, which, if entered, would result in reinstatement of the Wage and Hour Unit award.

36. Filicetti made a motion for default and ultimate dismissal.

IV. DISCUSSION

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 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.

To reiterate what has already been communicated by the Hearing Officer on several occasions, Everts could not appear on behalf of ECG, a limited liability corporation, in these proceedings. "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). A corporate officer who is not an attorney may not appear on behalf of a corporation. *Audit Servs. v. Frontier-West*, 252 Mont. 142, 148, 827 P.2d 1242 (1992) (citing *Weaver v. Law Firm of Graybill, et al.*, 246 Mont. 175, 178, 803 P.2d 1089, 1091 (1990) ("A corporation is a separate legal entity and cannot appear on its own behalf through an agent other than an attorney.")). Only attorneys licensed in Montana may practice law and represent others in legal proceedings in this State. Mont. Code Ann. § 37-61-210; *see also Traders State Bank v. Mann*, 258 Mont. 226, 234, 852 P.2d 604, 609 (1993) (citations omitted).

Because ECG, the appellant in this matter, has failed to obtain counsel or make required filings, it has failed to appear to contest an agency action. The Department has adopted the Attorney General's model rules, which provide in pertinent part, "in a contested case, if a party does not appear to contest an intended agency action, the agency may enter a default order." Admin. R. Mont. 1.3.214(1), 24.2.101(1).

As a result of ECG's failure to obtain counsel as required by law, its failure to abide by this tribunal's orders, and its failure to otherwise actively prosecute its appeal, ECG was found to be in default.

V. CONCLUSIONS OF LAW

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

2. Filicetti timely filed a wage and hour claim within the 180-day period provided for under Mont. Code Ann. § 39-3-207(1).

3. Filicetti was an employee of ECG because ECG suffered and permitted Filicetti to work at ECG. Mont. Code Ann. § 39-3-201(3).

4. "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). A corporate officer who is not an attorney may not appear on behalf of a corporation. *Audit Servs. v. Frontier-West*, 252 Mont. 142, 148, 827 P.2d 1242 (1992) (citing *Weaver v. Law Firm of Graybill, et al.*, 246 Mont. 175, 178, 803 P.2d 1089, 1091 (1990) ("A corporation is a separate legal entity and cannot appear on its own behalf through an agent other than an attorney.")).

5. ECG failed to appear in this matter due to its failure to retain counsel who could duly represent it in these proceedings.

6. "[I]n a contested case, if a party does not appear to contest an intended agency action, the agency may enter a default order. Admin. R. Mont. 1.3.214(1).

7. By failing to appear, ECG failed to contest the Wage and Hour Unit's determination in this matter, and such constitutes a default.

8. Since ECG has defaulted in this matter, Filicetti is deemed the prevailing party.

VI. ORDER

Based on the foregoing, the Hearing Officer affirms the determination of the Wage and Hour Unit. ECG is hereby ORDERED to tender a cashier's check or money order in the amount of \$17,503.50, representing wages and penalties, made payable to Jeff Filicetti. ECG may deduct applicable withholding taxes from the portion of the payments representing wages, but not from the portions representing penalties. All payments shall be mailed to Department of Labor and Industry, Wage and Hour Unit, P.O. Box 201503, Helena, Montana, 59620-1503, no later than 30 days after service of this decision.

Having found ECG in default, the contested case hearing is hereby vacated.

DATED this 19th day of September, 2023.

DEPARTMENT OF LABOR & INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ JEFFREY DOUD
JEFFREY DOUD
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 59620-1503

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.