

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

J & J AUTO BODY LLC

DECISION OF THE HEARING OFFICER

Appearances: James Romeyn Davis Esq., Attorney for the Employer

Nature of Dispute: RSA 275:43 I unpaid commissions and wages

Employer: J & J Auto Body, LLC, 103 South Street, Troy, NH 03465

Date of Hearing: February 27, 2014, May 22, 2014
Written closings due on June 9, 2014

Case No. 46887

BACKGROUND AND STATEMENT OF THE ISSUES

A Wage Claim was filed with the Department of Labor on October 23, 2014. The notice was sent to the employer and there was an objection. The objection was sent to the claimant and there was a request for a hearing. The Notice of Hearing was sent to both parties on February 6, 2014.

The Wage Claim was filed for \$30,932.00 in unpaid wages and commissions. After the first day of hearings, the claimant adjusted the Wage Claim to \$45,891.00.

The claimant testified that he worked for the employer for over four years. He was an hourly employee from 8:00 am until 5:00 pm. His hourly rate was \$16.50. For this Wage Claim the claimant went back three years.

The claimant testified that he did not get any lunch break for four days a week. He was sent out on calls just about every day and was only paid for eight hours a day. The claimant believes that over the last three years he is due \$9,672.00 in unpaid lunch breaks.

The claimant also maintains that once he left work for the day he was very often the on call person to respond to accidents or any towing situation. The claimant stated that this part, of his duties, was not covered under an hourly rate. The agreement with the employer was that when a "ticket" was prepared for the tow, the claimant would be paid 1/3 of the "ticket" amount. These amounts were reported weekly with the pay check. The claimant believes that he did receive some payments, they did not equate to the 1/3 provision that he was to be paid under.

The claimant believes that he is due \$15,600.00 for the time he was required to answer night calls and that he is due an additional \$15,600.00 for the unpaid percentage in the "tickets" he wrote on tows.

The claimant also testified that he had to deliver cars back to the owners after they were worked on at the employer's garage. These deliveries were done after 5:00 pm and so he was off the time sheet and this time was never recorded and therefore not paid. The claimant believes that he is due \$3,744.00 for these deliveries.

On October 29, 2011 there was a heavy snowstorm in the area where the claimant worked. He worked all through the storm with his boss and there were many tows that were paid in cash. The claimant believes that he never received a correct accounting for this day and he feels that the employer put him on an hourly rate instead of paying the commission percentage.

There was also a commission incident where the claimant was paid \$100.00 for selling a car. He sold the car and was paid the \$100.00. It was later taken back in a pay check when the deal fell through. The claimant maintains that the employer was at fault and should not have deducted the commission from his wages paid.

There were two accidents that the claimant responded for service. One on September 6, 2011 he believes that there was \$700.00 due and he only received \$500.00. The other accident was on May 17, 2012. It occurred at 11:00 am and he never received the commission percentage that he was entitled to receive.

The employer provided testimony that the claimant was paid 40 hours for every week that he worked for over four years. It was the company policy that all employees take a lunch break and that they did. In fact the managers often ate with the employees. The employer stated that the claimant would often leave to go home for lunch and this became more routine once the claimant was diagnosed with having diabetes. The claimant often took time to attend to personal issues like school functions. In the four years of work the claimant never made an issue out of lunch breaks. It was only after the Wage Claim was filed that the issue was brought up.

The claimant did not raise the other issues with the employer until after he was separated from the company. The employees would submit "tickets" on a weekly basis and they were factored into the pay check. Again, the claimant never questioned the payment of the "tickets". The claimant submitted his tow slips during the normal working hours and was paid weekly. The employer stated that any reviews requested were dealt with as soon as possible and the questions were answered and any mistakes were corrected or explained.

There may have been some times when cars were returned to their owners after the normal work day but for the most part, the cars were returned during the work day. The claimant never complained about this practice and again he was paid the hours due every payday.

The claimant often volunteered to take the night phone calls. If he or another employee did not do it, there was a phone answering service that took the calls. The claimant liked to have the night phone because he often took the most lucrative tows for himself. Other employees complained about this practice but the employer said that the claimant was a good employee and got the job done. The claimant was paid for the "tickets" he wrote on the tows. There is no reimbursement for having the phone at night because it was on a volunteer basis and was a benefit to the employee having the phone. There was at least one other employee who wanted the phone on his cover nights because he could then decide on which jobs to take or which ones to assign.

The claimant was paid for all "tickets" submitted and for all tows done outside of the normal working hours. The employer was surprised by the Wage Claim because the claimant was a good employee and dependable. It was only after he left the employ of the company that these issues were raised.

The claimant did agree to sell a vehicle, for the employer, from his front lawn. The employer stated that there would be \$100.00 paid for the sale. The claimant sold the vehicle and was paid the \$100.00. The employer said that the vehicle was to be sold for parts and not for road service. The buyer, when it was discovered that the vehicle was not to be on the road, cancelled the purchase. The employer said that after they paid for the commission on the vehicle, they deducted it from a subsequent pay check.

The employer believes that all hourly wages have been paid and all "tickets" on authorized tows have been paid. The employer paid weekly and used all submissions from the employees to arrive at the final weekly wage for each employee. The employer said that at the times they were questioned, they reviewed the submissions and explained the findings to the employee. The claimant is not due any additional wages.

FINDINGS OF FACT

RSA 275:43 I. Every employer shall pay all wages due to employees within 8 days including Sunday after expiration of the week in which the work is performed, except when permitted to pay wages less frequently as authorized by the commissioner pursuant to paragraph II, on regular paydays designated in advance by the employer and at no cost to the employee.

803.01 (a). Pursuant to RSA 275:43, I and II, every employer shall pay all wages due to his/her employees within 8 days, including Sundays, after the expiration of the workweek on regular paydays designated in advance. Biweekly payments of wages shall meet the foregoing requirement if the last day of the second week falls on the day immediately preceding the day of payment. Payment in advance and in full of the work period, even though less frequently than biweekly, also meets the foregoing requirement.

This is the section of the law that mandates an employer to pay an employee all wages due at the time the wages are due and owing. The issue of commissions is also under this section of the law.

It is the finding of the Hearing Officer after a review of the evidence submitted and the testimony presented for the hearing, that the Wage Claim is invalid. The claimant has the burden to show that there are wages due and owing and he failed to meet this burden.

The one issue that stands out is the sale of the vehicle from the claimant's front lawn. It is not clear if this is a part of the employment process or something the claimant agreed to do for the \$100.00. It appears that the sale was made and then withdrawn by the buyer. This occurred after the claimant had been paid for selling the vehicle. It appears that the employer recovered the payment by deducting it from wages. If this was not authorized by the claimant, then this practice is outside of the law. The employer is allowed to recoup the \$100.00 but not by just withdrawing it from wages. If there is no written agreement as to how the \$100.00 is to be paid and how it would be paid back incase the deal fell through, then the claimant is owed the \$100.00 to be paid back.

The claimant did not show proof and did not testify credibly about the lunch hours. It is not proven beyond a reasonable doubt that the claimant did not receive a lunch break for four days of every week, for four years. The employer presented credible testimony that the lunches were taken even if the employee was on the road. There were times when the claimant took less time for lunch and left early for personal reasons. This was an acceptable practice.

The commissions were paid weekly based on the submissions by the employee. These were available to be reviewed and when they were questioned the employer would answer the questions. There were times when the paid wages were changed to reflect a mistake. The employer was credible in their presentation that the claimant hardly ever challenged a weekly pay check while employed for over four years. The claimant did not bear his burden to show that there were commissions due.

The Wage Claim is invalid unless there was a \$100.00 illegal deduction for the failure of a sale of a vehicle. If there is no written agreement to deduct a cancelled sale, the employer does owe the claimant \$100.00. This amount can be challenged in a different forum but is not allowable in a Wage Claim to have wages deducted to offset a failed sale.

DECISION AND ORDER

Based on the testimony and evidence presented, as RSA 275:43 I requires that an employer pay all wages due an employee, and as this Department finds the claimant failed to prove by a preponderance of the evidence that he was not paid all wages due, it is hereby ruled that the Wage Claim is invalid.

The issue of the \$100.00 should be reviewed by the employer and if there is no written policy or agreement, it should pay back the deducted wages for the sale of the vehicle.

/s/

Thomas F. Hardiman
Hearing Officer

Date of Decision: July 7, 2014

Original: Claimant
cc: Jodi Champney and Jay Coppo, J & J Auto Body, LLC,
103 South Street, Troy, NH 03465
James Romeyn Davis Esq., Sheldon, Davis, Wells & Hockensmith PC,
28 Middle Street, Keene, NH 03431

TFH/cag