

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



v

Structures Unlimited LLC

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:42 I/II employer/employee relationship
RSA 275:43 I unpaid wages

Employer: Structures Unlimited LLC, 4 Jay Court, Raymond, NH 03077

Date of Hearing: February 19, 2015

Case No.: 49561

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant asserts he is owed \$154.00 in unpaid wages for hours worked on September 14, 2014. He states that he worked eleven hours at a rate of \$14.00 per hour.

He found the job on Craigslist. He worked between September 2 and September 27, 2014. He received payment for two weeks only. He has a claim for additional wages owed in Massachusetts.

He believes he was at all relevant times an employee.

Mr. Croteau denies the claimant was an employee. The claimant represented himself as an independent contractor. Further, the claimant over billed for travel time, to which he was not entitled under the policy.

The claimant filed for monies due in Massachusetts as an independent contractor. Mr. Croteau was unable to locate a copy of the filing at the hearing.

The hearing was left open until 4:30pm on March 5, 2015, to submit a copy of the Massachusetts filing. The Department received the documentation within the required timeframe. The claimant was given the opportunity to provide a response to the documentation. He chose not to do so.

FINDINGS OF FACT

This Department must first to determine whether the claimant was an employee or an independent contractor. RSA 275:42 II defines "employee" as, "means and includes every person who may be permitted, required, or directed by any employer, in consideration of direct or indirect gain or profit, to engage in any employment, but shall not include any person exempted from the definition of employee as stated in RSA 281-A:2, VI(b)(2), (3), or (4), or RSA 281-A:2, VII(b), or a person providing services as part of a residential placement for individuals with developmental, acquired, or emotional disabilities, or any person who meets all of the following criteria:

(a) The person possesses or has applied for a federal employer identification number or social security number, or in the alternative, has agreed in writing to carry out the responsibilities imposed on employers under this chapter.

(b) The person has control and discretion over the means and manner of performance of the work, in that the result of the work, rather than the means or manner by which the work is performed, is the primary element bargained for by the employer.

(c) The person has control over the time when the work is performed, and the time of performance is not dictated by the employer. However, this shall not prohibit the employer from reaching an agreement with the person as to completion schedule, range of work hours, and maximum number of work hours to be provided by the person, and in the case of entertainment, the time such entertainment is to be presented.

(d) The person hires and pays the person's assistants, if any, and to the extent such assistants are employees, supervises the details of the assistants' work.

(e) The person holds himself or herself out to be in business for himself or herself or is registered with the state as a business and the person has continuing or recurring business liabilities or obligations.

(f) The person is responsible for satisfactory completion of work and may be held contractually responsible for failure to complete the work.

(g) The person is not required to work exclusively for the employer.

It is noted that on its face, the appearance of this relationship is one of a prime contractor and subcontractor. The Hearing Officer finds it is more likely than not that the claimant represented himself as an independent contractor during the relationship. The claimant meets all but one of the criteria under RSA 275:42 II to be exempt from the definition of employee. However, the claimant does not meet *all* of the criteria set forth in the statute to be exempted from the definition of employee under this jurisdiction.

The Hearing Officer finds that the claimant was an employee of an employer, not an independent contractor, because the claimant does not meet the criterion in (f). The parties agree the claimant was not responsible for the satisfactory completion of work, and he could not be held contractually responsible for failure to complete the work.

The claimant offered testimony that he never filed "anything (forms) in the State of Massachusetts". The employer provided documentation to show the claimant had filed a claim with the Massachusetts Attorney General's office for non-payment, and had represented himself as an independent contractor to that agency.

The filing in itself is not an issue for this hearing as it is in another jurisdiction, which may have different laws and rules. However, its existence is important as the claimant stated he had not filed "anything with the State of Massachusetts", though he did reference a claim with Massachusetts. The claimant chose not to respond to the documentation.

The claimant provided email documentation, previously submitted, that he had notified the employer that he had worked eleven hours on September 14, 2014, 8:00am to 7:00pm, at 24 Hartwell Brook Rd, Nashua, NH.

The employer argued the claimant had been incorrectly billing for travel time. Travel time is only paid if the job is more than one hour from the claimant's home. None of the jobs he worked were eligible for travel time. He agrees the claimant worked on September 14, 2014, however, as he had been charging for overtime in error, he has been paid all hours worked.

RSA 275:48 Withholding of Wages I (d)(4) allows an employer to make deductions from employee wages for the voluntary payments for the recovery of accidental overpayment of wages when the following conditions are met:

- (A) The recovery is agreed to in writing.
- (B) The deduction for the overpayment begins one pay period following the date the parties execute the written agreement.
- (C) The written agreement specifies:
 - (i) The date the recovery of the overpayment will begin and end.
 - (ii) The amount to be deducted, which shall be agreed upon by the employer and the employee but which shall, in no event, be more than 20 percent of the employee's gross pay in any pay period.
 - (iii) A specific agreement regarding whether the employer is allowed to deduct any amount outstanding from final wages at the termination of employment.

The claimant does not agree any wages have been overpaid.

The Hearing Officer finds that the claimant proved by a preponderance of the evidence that he is due the claimed wages for September 14, 2014, in the amount of \$154.00.

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 that the claimant proved by a preponderance of the evidence that he is owed the claimed wages, it is hereby ruled that the Wage Claim is valid in the amount of \$154.00.

The employer is hereby ordered to send a check to this Department, payable to [REDACTED], in the total of \$154.00, less any applicable taxes, within 20 days of the date of this Order.

Melissa J. Delorey
Hearing Officer

Date of Decision: March 23, 2015

MJD/kdc