

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

v

ROBERTS MARKET

DECISION OF THE HEARING OFFICER

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

Employer: Roberts Market, 2 Hill Rd, Franklin, NH 03235

Date of Hearing: May 12, 2015

Case No. 49588

BACKGROUND AND STATEMENT OF THE ISSUES

A Wage Claim was filed with the Department of Labor on December 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 April 6, 2015.

The issue that first came up was the employer/employee relationship. The employer maintains that the claimant worked for a general contractor and all money due was paid to the contractor. The claimant stated that he was an employee of the owner and did receive a partial payment from the owner.

The claimant testified that he was due \$414.00 for work performed. He did say that he was paid \$50.00 by the employer. He worked for about a month and there was no written hiring agreement. The claimant also stated that there was no set hourly rate.

The employer testified that he had several contractors working for him as the building housing the business was under construction. He said he hired a man named Mark and had an agreement for \$1,300.00 for handyman work. Mark brought the claimant in to work with him and paid the claimant a certain amount every day. Once the claimant stated that he had not been paid by Mark and the employer, as a courtesy gave the claimant \$50.00 so that he would have some cash. The owner testified that he had no way of knowing where the \$414.00 amount came from.

FINDINGS OF FACT

RSA 275:42 I. The term "employer" includes any individual, partnership, association, joint stock company, trust, corporation, the administrator or executor of the estate of a deceased individual, or the receiver, trustee, or successor of any of the same, employing any person, except employers of domestic labor in the home of the employer, or farm labor where less than 5 persons are employed.

II. "Employee" 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.

This part of the law spells out the criteria for a person to be an employee.

It is the finding of the Hearing Officer, based on the written submissions and the testimony of the parties that there is no employer/employee relationship. The claimant has the burden to show that he is an employee and that there are wages due and owing. The claimant did not meet this burden.

The claimant was not clear in describing any working relationship he had with the owner of the business. The claimant was not clear on his hourly rate or how he was hired to work at the business. The claimant also said that he was paid \$50.00 but was not sure if that was to be deducted from the claim of \$414.00. The claimant did testify that he was brought into the project by the person named Mark (Andy). The claimant was also allowed to seek other employment.

The employer/owner was credible in his testimony that he paid the person named Mark (Andy). He did give the claimant \$50.00 as a courtesy because the claimant told him he was not being paid for work performed. The employer did have other contractors working at the

construction and all of these were paid as contractors. The employer/owner said that he did not have any employees during the construction phase.

As the claimant was not found to be an employee of the claimed employer, he retains the right to file a new claim against the proper employer.

DECISION

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 or was an employee of the employer, it is hereby ruled that the Wage Claim is invalid.

Thomas F. Hardiman
Hearing Officer

Date of Decision: May 27, 2015

TFH/kdc