STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

[redacted]

V

Make LLC

DECISION OF THE HEARING OFFICER

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

Employer: Make LLC, 120 S. 6th St. 18th Floor, Minneapolis, MN 55402

Date of Hearing: March 25, 2015

Case No.: 49782

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant asserts he is owed $1,598.49 in unpaid wages for hours worked on December 17 and 18, 2014. He states that he believes was an employee during all relevant times.

The claimant asks to add liquidated damages to the claim less than fourteen days prior to the hearing.

Pursuant to Lab 204.02 Specification of Issue. Hearings before a hearing officer shall be scheduled for the determination of specified issues duly listed for hearing on the hearing notice. The department shall expand the scope of a scheduled hearing if notice of the added issues**,** with necessary documentation is given to all parties at least 14 calendar days prior to the assigned hearing date. Issues may be added at any time without such notice with the consent of all parties.

Make LLC did not agree to hear the issue of liquidated damages. This issue is not included in this hearing or Decision.

The claimant argues that he had a verbal agreement with Make LLC for $700.00 for ten hours of work. He further asserts that pursuant to "industry standard" he should receive time and one half for the first two hours worked over the initial ten hours ($105.00 per hour), and double time for any remaining hours worked ($280.00 per hour). He also asserts "industry standard" dictates he should receive pay for travel time. Lastly, he argues "industry standard" deducts only one half hour for an eating period, even if the eating period is longer than one half hour.

The claimant argues that Make LLC wants to "have it both ways" treating him as an independent contractor or employee as it suits them.

The claimant alleges he performed work for the benefit of Make LLC from 12:00pm on December 17, 2014 through 4:45am the following morning. He billed one hour of travel time each way, for a total of two hours. The time worked is inclusive of the travel time. The eating period lasted forty-five minutes from 8:15pm to 9:00pm, however, he asserts only thirty minutes should be deducted for the eating period.

Make LLC denies the claimant was an employee. The claimant represented himself at all times in correspondence, previously submitted, that he was an independent contractor.

Make LLC testified that he had an agreement with claimant for $700.00 for ten hours of work. Make LLC agreed to $105.00 per hour after the initial ten hours. Though they did not have a specific agreement to pay $140.00 per hour, or double time, after the first twelve hours, he is agreeable to making that payment.

Make LLC only disagrees with the travel time and mileage reimbursement submitted by the claimant. He is agreeable to paying $1,255.00. He asked the claimant several times to remove these amounts and the invoice would be paid immediately. The claimant refused and at that point raised the issue of being an employee for the first time.

FINDINGS OF FACT

This Department must first to determine whether the claimant was an employee or an independent contractor, under the standards of this jurisdiction.

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 subcontractor. The Hearing Officer finds the claimant represented himself as an independent contractor during the relationship, documentation previously submitted, until he did not receive payment. Even though the claimant represented himself as an independent contractor, he 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 criteria in (c), (d), or (f). Make LLC testified credibly that they dictated the time during which the work was to be performed. The claimant did not hire his own assistants. The claimant was responsible for the satisfactory completion of work, and but he could not be held contractually responsible for failure to complete the work.

RSA 275:49 I requires that an employer inform employees of the rate of pay and any fringe benefits at the time of hire. Lab 803.03 (a) requires that an employer inform employees in writing of the rate of pay at the time of hire and prior to any changes; (b) Every employer shall provide his/her employees with a written or posted detailed description of employment practices and policies as they pertain to paid vacations, holidays, sick leave, bonuses, severance pay, personal days, payment of the employees expenses, pension and all other fringe benefits per RSA 275: 49; (c) Pursuant to RSA 275:49, every employer shall inform his/her employees in writing of any change to such employees rate of pay, salary or employment practices or policies as referred to in Lab 803.03 (a) and (b) prior to the effective date of such change. Lab 803.03 (f) (6) requires an employer maintain on file a signed copy of the notification.

The employer failed to properly notify the claimant of his rate of pay and failed to maintain on file a copy of the notification signed by the claimant.

However, the parties understood and agree that the claimant would receive $700.00 for ten hours of work, $105.00 per hour after the initial ten hours, and $140.00 per hour, or double time, after the first twelve hours.

No agreement existed for the payment of travel time. Pursuant to 29 CFR 785.33-41, incorporated by reference at Lab 803.04, discusses travel time. Specifically, "785.35 Home to work; ordinary situation. An employee who travels from home before his regular workday and returns to his home at the end of the workday is engaged in ordinary home to work travel which is a normal incident of employment. This is true whether he works at a fixed location or at different job sites. Normal travel from home to work is not worktime."

The claimant's argument that "industry standard" dictates he is entitled to travel time is not persuasive. There are no statutes or laws incorporated by reference to require the payment of travel time under these circumstances, nor was there any agreement for the payment of travel time by the employer.

The claimant's argument that "industry standard" dictates that eating periods are calculated at one half hour, even if the period lasts longer, is not persuasive. Eating periods are not considered work time and are not compensable.

The claimant performed work for the benefit of the employer, exclusive of travel time between 1:00pm on December 17, 2014 and 3:45am on December 18, 2014. His eating period lasted from 8:15pm to 9:00pm.

The claimant worked a total of fourteen hours. The agreement called for a payment of $700.00 for ten hours, $105.00 for the next two hours, and $140.00 for the remaining two hours. The total amount due, according to the agreement, is $1,190.00 ($700.00 + $210.00 ($105.00*2 hours) + $280.00 ($140.00*2hours)).

The Hearing Officer finds the claimant proved by a preponderance of the evidence that he is due a portion of the claimed wages in the amount of $1,190.00

DISCUSSION

The claimant raised the issue of RSA 275:44 IV, liquidated damages, for the first time at the hearing.

This issue was not noticed for the hearing nor can issues be added without the consent of all parties. However, in the interest of expediency to all parties, the following information is provided.

RSA 275:44 IV holds an employer liable to an employee for liquidated damages if the employer, "willfully and without good cause fails to pay" all wages within the timeframe required by statute. The New Hampshire Supreme Court defined "willfully and without good cause" in Ives v. Manchester Subaru, Inc. 126 NH 796 to mean, "voluntarily, with knowledge of the obligation and despite the financial ability to pay the wages owed". The Court continued, "an employer acts willfully if, having the financial ability to pay wages which he knows he owes, he/she fails to pay them".

The claimant would have the burden to prove by a preponderance of the evidence that the employer voluntarily, with knowledge of the obligation and despite the financial ability to pay the wages owed, fails to pay them.

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 a portion of the claimed wages, it is hereby ruled that the Wage Claim is valid in the amount of $1,190.00.

The employer is hereby ordered to send a check to this Department, payable to [redacted], in the total of $1,190.00, less any applicable taxes, within 20 days of the date of this Order.

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Melissa J. Delorey
Hearing Officer

Date of Decision: April 14, 2015

MJD/kdc