

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

RIVERSIDE AND PICKERING MARINE

DECISION OF THE HEARING OFFICER

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

Employer: Riverside and Pickering Marine, 195 West Road, Portsmouth, NH 03801

Date of Hearing: June 16, 2016

Case No.: 52778

BACKGROUND AND STATEMENT OF THE ISSUES

A Wage Claim was filed with the Department of Labor on May 3, 2016. 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 May 20, 2016.

The Wage Claim had two issues, unpaid wages and the employer/employee relationship. It was explained to both parties that the second area of concern, the employer/employee relationship had to be dealt with first because if there was no relationship established, the Wage Claim process was not the proper forum for resolution concerning payment.

The claimant maintains that he was an employee of the company. The employer maintains that the claimant was a consultant and never an employee.

The records show that the claimant was paid weekly after submitting an invoice for his time and expenses. The employer pointed out that all employees were paid via bi-weekly payroll. The employer also pointed out that all invoices were paid in full without any tax deductions and the checks were made out to Guy Wilson Consulting and not to the individual.

The claimant also stated that he asked to be paid that way and not be an employee because he would have held a salaried position and those positions worked too many hours. When questioned on his use of leave, the claimant said that he took time when needed and he

was not paid for any vacation time. The employer stated that the claimant was working on his own schedule and told the company when he would not be working.

The employer stated that the claimant had received no company benefits and no company phone to track his time. The weekly invoices showed how much time was worked and billed plus any expenses for that week.

The employer stated that the claimant could work for anyone else during the term of his contract. The claimant pointed out that he did not work for anyone else while working for this employer. The employer maintains that all payments were made based on the invoiced amounts. There was a problem with the last two invoices and the payment was withheld as the claimant was responsible for the quality of his work.

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.

RSA 275:42 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.

These are the sections of the law that spell out when an employer is an employer and when an employee is 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 Wage Claim in this situation. The claimant has the burden to show that he is an employee and he did not meet this burden.

The law is very specific as to the criteria a person has to meet in order to be an employee. The claimant in this claim did not prove that he was an employee. The claimant worked for himself. He billed the employer with an invoice system that required the employer to pay the amount of the invoice to the billing company. The claimant was responsible for his own taxes.

The claimant was very clear that he wanted to bill for all hours worked and not be bound by the status of a salaried employee where the principal of the "many or the few" is factored into the salary range.

The claimant also told the employer when he would be on vacation or days off and was not paid and did not bill for these days. The claimant was also responsible for his work product and how many employers he worked for at any given time.

The employer was credible in their testimony that they did not have a personal file for the claimant and paid as invoiced until there was a problem with the work product.

There is no valid Wage Claim in this case for this forum.

DECISION

The Wage Claim is invalid. The Wage Claim process with the New Hampshire Department of Labor concerns wages in the context of an employment relationship. To the extent that there are monies owed, the claim should be in a different forum.

Thomas F. Hardiman
Hearing Officer

Date of Decision: July 8, 2016

Original: Claimant
cc: Employer

TFH/aph