

**STATE OF NEW HAMPSHIRE**  
**DEPARTMENT OF LABOR**  
**CONCORD, NEW HAMPSHIRE**



**V**

**EMPIRE SHEET METAL INC.**

**DECISION OF THE HEARING OFFICER**

**Nature of Dispute:** RSA 275:43 I unpaid wages  
RSA 279:21 VIII unpaid overtime

**Employer:** Empire Sheet Metal, Inc.

**Date of Hearing:** October 13, 2016

**Case No.:** 53337

**BACKGROUND AND STATEMENT OF THE ISSUES**

A Wage Claim was filed with the Department of Labor on July 11, 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 September 13, 2016.

The claimant testified that the Wage Claim was for all overtime hours still on the books. She testified that she worked for the employer for almost ten years and she was the keeper of the time records. The claimant testified that she kept her own time in a personal file because she was the only employee to receive compensatory time in lieu of overtime wages. The claimant further testified that the employer reviewed all recorded time.

The claimant further testified that she was paid at an hourly rate of \$27.00 and so the overtime rate was \$40.50. She would receive time off for the hours beyond the normal work schedule at time and one half. The amount adjusted for the Wage Claim is for straight time for the extra hours on the books. The claimant testified that she is seeking 51.38 hours at the \$27.00 hourly rate. The Wage Claim is for \$1,387.26.

The employer testified that the claimant was a good employee and he never questioned her work ability. The employer testified that the claimant was terminated for creating a hostile work environment; not as a result of ability or lack thereof.

The employer testified that he depended upon the claimant to be the "keeper of the records". The claimant was never required to fill out a time sheet; she kept everything on a personal spread sheet.

A review of the records, after the claimant left the service of the company, leads the employer to believe that the claimant was taking too much compensatory time off. The employer feels that all time has been paid and all benefits paid out.

### **FINDINGS OF FACT**

#### **RSA 275:43 I**

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:

- (a) In lawful money of the United States;
- (b) By electronic fund transfer;
- (c) By direct deposit with written authorization of the employee to banks of the employee's choice;
- (d) By a payroll card provided that the employer shall provide to the employee at least one free means to withdraw up to and including the full amount of the employee balance in the employee's payroll card or payroll card account during each pay period at a financial institution or other location convenient to the place of employment. None of the employer's costs associated with a payroll card or payroll card account shall be passed on to the employee; or
- (e) With checks on a financial institution convenient to the place of employment where suitable arrangements are made for the cashing of such checks by employees for the full amount of the wages due; provided, however, that if an employer elects to pay employees as specified in subparagraphs (b), (c), or (d), the employer shall offer employees the option of being paid as specified in subparagraph (e), and further provided that all wages in the nature of health and welfare fund or pension fund contributions required pursuant to a health and welfare fund trust agreement, pension fund trust agreement, collective bargaining agreement, or other agreement adopted for the benefit of employees and agreed to by the employer shall be paid by every such employer within 30 days of the date of demand for such payment, the payment to be made to the administrator or other designated official of the applicable health and welfare or pension trust fund.

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.

#### **RSA 279:21 VIII**

VIII. Those employees covered by the introductory paragraph of this section, with the following exceptions, shall, in addition to their regular compensation, be paid at the rate of time and one-half for all time worked in excess of 40 hours in any one week:

- (a) Any employee employed by an amusement, seasonal, or recreational establishment if:
  - (1) It does not operate for more than 7 months in any calendar year; or
  - (2) During the preceding calendar year, its average receipts for any 6 months of such year were not more than 33- 1/3 percent of its average receipts for the other 6 months of such year. In order to meet the requirements of this subparagraph, the establishment in the previous year shall have received at least 75 percent of its income within 6 months. The 6 months, however, need not be 6 consecutive months.
- (b) Any employee of employers covered under the provisions of the federal Fair Labor Standards Act of 1938, as amended (29 U.S.C. section 201, et seq.); provided however,

employers that pay any delivery drivers or sales merchandisers an overtime rate of compensation for hours worked in excess of 40 hours in any one week shall not calculate such overtime rate of compensation by the fluctuating workweek method of overtime payment under 29 C.F.R. section 778.114.

This part of the law spells out the rules on the payment of overtime.

It is the finding of the Hearing Officer, based on the written submissions and the testimony of the parties, that this is a valid Wage Claim. The employer had the claimant keeping track of the time records and allowed the claimant to take time off instead of pay for extra hours worked. This responsibility was assigned to the claimant with oversight by the employer.

The testimony shows that the employer challenged the record keeping after the claimant left the job and not before. The employer has the responsibility of keeping records and once recorded, those records are official. In this case the employer allowed the claimant, and only the claimant, to record her extra hours and to take those hours off.

The claimant stated that she was due 51.38 hours upon separation. This was time worked and recorded before she left the employ of the company. The recording of this time was an accepted practice that was authorized by the employer and unique to the claimant.

The Wage Claim is valid in the amount of \$1,387.26.

#### **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 Hearing Officer finds that the claimant proved by a preponderance of the evidence that she was not paid all wages due, it is hereby ruled that the Wage Claim is valid in the amount of \$1,387.26.

The employer is hereby ordered to send a check to this Department, payable to [REDACTED] in the total of \$1,387.26, less any applicable taxes, within 20 days of the date of this Order.

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Thomas F. Hardiman  
Hearing Officer

Date of Decision: October 26, 2016  
Original: Claimant  
cc: Employer  
TFH/das