

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



**V**

**EARLY AND SONS INC.**

**DECISION OF THE HEARING OFFICER**

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

**Employer:** Early & Sons, Inc., 77 Route 125, Kingston, NH 03848

**Date of Hearing:** October 11, 2016

**Case No.:** 53536

**BACKGROUND AND STATEMENT OF THE ISSUES**

A Wage Claim was filed with the Department of Labor on July 29, 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 Wage Claim was filed because the claimant felt that the owner of the car dealership was adding in prices that reduced the claimant's commission. He is seeking a \$300.00 add-on for each car sold over the past three years.

The owner said that the claimant was not an employee but was an independent contractor working for himself on a commission only basis.

The Hearing Officer explained to the parties that the issue of employer/employee relationship had to be ruled on first because if there was no employment relationship it would be inappropriate to proceed with the Wage Claim process.

The claimant testified that he was an employee of the company and was subject to the work hours set by the company. The claimant testified that he was responsible for his own taxes and did not receive any leave benefits from the company.

In his response to the employer's objection letter, the claimant did state that he was a subcontractor paid on a percentage basis. The claimant also testified that if he took any time off, he was doing so without pay because his pay was based on a percentage of the profit on a sold vehicle.

The employer testified that they set the costs to a vehicle and the claimant sold it and receive a 25% commission on the profit arising from the sale of the vehicle. The employer also testified that the claimant received the total amount of the commission and filed his own taxes based on his own earnings. The employer stated that the claimant was given a Federal Tax 1099 form that reflects his recorded earnings so that he can file his income taxes.

The claimant did testify that he questioned the add-on expense many times but continued to work because he had to take care of his family.

The employer's position is that any add-on to the price of a vehicle was the prerogative of management and this one was for a cost of doing business. Also, the claimant was never an employee.

### **FINDINGS OF FACT**

RSA 275:42 I/II Whenever used in this subdivision:

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 is the section of the law that spells out the guidelines for a person to be an employee. It shows the definitions of the employer and the employee and their relationship under the law.

It is the finding of the Hearing Officer, based on the written submissions and the testimony of the parties, that there was no showing of employer/employee relationship in this Wage Claim. This finding does not mean that there is no money owed for time worked or services provided; it just means that the Wage Claim Forum is not the proper direction to take in this claim.

The claimant worked for the employer on a commission only basis. Once the claimant sold a vehicle he was paid 25% of the profit earned. There were no taxes taken out of the commissions because the claimant paid his own taxes. The employer did say that the claimant received a Federal 1099 tax form at the end of the year for the purpose of filing taxes. The 1099 form is issued when a person files their own taxes.

The claimant testified that he was paid commissions and so the more he sold the greater the award. However, if the claimant took time off, for any reason, he was not paid as he controlled his own time and sales.

The claimant said that he questioned the line items assessed on each vehicle by the company. Again this was a cost of doing business by the company and not subject to challenge by the claimant. The claimant contended that he worked because he needed the money. This was the claimant's own doing. He was still covered by the law that said he could leave at any time. He chose not to do so and worked for six years.

There was no evidence or testimony that the claimant had to work exclusively for the owner of the company. He could hold other positions on his own because he was only paid for what he sold and so the more he sold, the more he earned.

The claimant was an independent contractor who basically worked for himself and sold vehicles owned by the company. The price of the vehicle was set by the company based on their investment and overhead. The claimant then sold the vehicle at a 25% commission rate on profit.

### **DECISION**

The Wage Claim is invalid because of a failure to establish an employee/employer relationship.

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Thomas F. Hardiman  
Hearing Officer

Date of Decision: October 21, 2016  
Original: Claimant  
cc: Employer  
TFH/das