

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

The Elly Guitar Co LLC

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages and commissions
RSA 275:43-b unpaid salary

Employer: The Elly Guitar Co LLC, 14 Celina Ave Unit 1, Nashua, NH 03063

Date of Hearing: January 26, 2017

Case No.: 54244

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant asserts she is owed \$2,500 in unpaid salary/wages and commissions for hours worked and sales made between June 2016 and October 2016.

The employer agrees there are two unpaid biweekly checks, because the claimant had control over the record keeping system and destroyed all of their records. They have estimates of time worked only.

They further agree the claimant may be due commissions on four guitar sales, providing the orders are accepted by the customers.

FINDINGS OF FACT

The claimant worked for the employer from June 2016 through October 2016. The employer initially considered her to be a contractor. In August 2016, they extended an offer to her for employment. She refused and continued working in the contractor arrangement.

The claimant does not meet the criteria set forth in RSA 275:42 II to be exempted from the definition of employee, therefore, she is considered an employee for this wage claim.

The claimant argues she is due an invoice of around \$1,000 for time worked between June and August, though she did not know how many hours she had worked or the dates of the work performed; and \$795 for an unpaid biweekly salary in October 2016. She argues she is due four commissions for the sale of four custom guitars. She approximated she is due two commissions for \$130 each and a third commission of \$250. She could not recall the fourth commission she is claiming as due.

The employer agrees the claimant is due wages for the pay period ending September 30, 2016, in an estimated amount of \$790.80 and for the pay period ending October 15, 2016, in an estimated amount of \$390.00. They have not paid these amounts as they are estimates. The claimant destroyed all the company information on her iPad, which contained her actual hours worked.

The employer disagrees she is due any wages for the June through August 2016 time period.

The claimant vehemently argues the destruction of the records was an accident.

The claimant could not state that she performed work on specific days, weeks or months, nor the hours she claims she worked, for the June through August 2016 time period or for the September through October 2016 time period.

The Hearing Officer does not find the claimant's argument she is due wages for the period of June through August 2016 persuasive.

The Hearing Officer finds the employer's calculations for wages owed are more likely than not closer to the accurate amount owed to the claimant for the September through October 2016 time period.

Therefore, the Hearing Officer finds the claimant is owed \$1,180.00 (\$790.80 + \$390.00) in unpaid wages.

The claimant argues she is due \$510 in unpaid commissions, plus an additional amount she could not articulate. She argues she made four sales of custom guitars and is due commissions of \$130.00, \$130.00, \$250.00 and an unspecified amount.

The employer agrees the claimant may be due commissions on four guitars, however, not the amounts she is claiming.

Though the commission policy is not in writing, as required by RSA 275:49, the employer provided credible testimony that the commission practice is that the claimant will receive 10% commission on sales providing that the guitar is shipped and accepted by the customer. As of the date of the hearing, the guitars have not been accepted by the customers. Once they are accepted, the employer will remit payment to the claimant in the following amounts:

\$127.11 for a sale on August 16, 2016
\$60.61 for a sale on September 15, 2016
\$56.31 for a sale on September 15, 2016
\$94.21 for a sale on October 15, 2016

The Hearing Officer finds the commissions are not yet due under the commission practice of the employer. If the conditions of the policy are met, the employer agrees he will remit payment of the commissions to the claimant.

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 she is owed a portion of the claimed wages, it is hereby ruled that the Wage Claim is valid in the amount of \$1,180.00 (\$790.80 + \$390.00).

As this Department finds that the claimant failed to prove by a preponderance of the evidence that she is owed the claimed commissions, it is hereby ruled that the Wage Claim is invalid.

The employer is hereby ordered to send a check to this Department, payable to [REDACTED], in the total of \$1,180.00 (\$790.80 + \$390.00), less any applicable taxes, within 20 days of the date of this Order.

Melissa J. Delorey
Hearing Officer

Date of Decision: February 9, 2017

Original: Claimant
cc: Employer

MJD/das