

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

[REDACTED]

V

Lumens for Less Inc

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages
RSA 275:43 V unpaid employee expenses
RSA 275:43-b unpaid salary
RSA 275:42 I/II employer/employee relationship

Employer: Lumens for Less Inc, 310 Marlboro St, Keene, NH 03031

Date of Hearing: February 21, 2017

Case No.: 54266

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant asserts he is owed \$1,000.00 in unpaid salary for pay periods of September 25, 2016 through October 1, 2016 and October 2, 2016 through October 8, 2016. He also alleges he is due \$435.00 in unpaid employee expenses.

The claimant amended the unpaid employee expenses to approximately \$332.00, at the hearing.

The employer denies the claimant was not paid for all time worked. They assert that the claimant did not perform any work after September 15, 2016. They agreed they would pay employees expenses, if the claimant presented documentation to show he had made sales calls. Further, they argue that the claimant became an independent contractor via email October 10, 2016.

FINDINGS OF FACT

This Department must first to determine whether the claimant was an employee or an independent contractor. 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.

The New Hampshire Supreme Court opined in Caswell v. BCI Geonetics, Inc. 121 N.H. 1048, that RSA ch. 275 is entitled "Protective Legislation," and we should construe it with that purpose in mind. Further, the definition of "employee" pertaining to this section is set forth in RSA 275:42 II:

"The term 'employee' includes any person suffered or permitted to work by an employer. For the purposes of claims for wages under RSA 275:51, any person in the service of another shall be conclusively presumed to be an employee, not an independent contractor, if it shall have been determined to be more likely than not that the relationship can be terminated summarily, with a right to no more than compensation already earned."

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 (d), (e), or (f). The claimant did not hire and pay his own assistants. The claimant did not hold himself out to be in business for himself and did not have any recurring business liabilities or obligations, nor did he register with the state as a business. The claimant was not responsible for the satisfactory completion of work, and he could not be held contractually responsible for failure to complete the work.

The claimant alleges he performed work for the employer between September 25, 2016 and October 8, 2016, for which he is due \$1,000 in salary. He argues he did not feel he had to provide proof to the employer he had worked as the employer knew.

The employer argues they did not have any knowledge of the claimant performing any work between September 25, 2016 and October 8, 2016, even after repeated requests for documentation from the claimant.

The Hearing Officer finds that the claimant testified as credibly, not more credibly, than the employer. The claimant has the burden of proof in this matter to show by a preponderance of the evidence that he performed work and was not paid for all salary due. The Hearing Officer finds that the claimant failed to meet that burden of proof as his story is only as credible as, not more credible than, the employer's. The

claimant, therefore, fails to prove by a preponderance of the evidence that he is owed the claimed salary.

As the claimant failed to prove he performed work during the period of September 25, 2016 and October 8, 2016, he also fails to prove the claimed employee expenses are related to his employment.

DISCUSSION

The burden of proof lies with the claimant in these matters. The claimant has the burden to prove by a preponderance of the evidence that the claimed wages are due. Proof by a preponderance of evidence as defined in Lab 202.05 means a demonstration by admissible evidence that a fact or legal conclusion is more probable than not.

The claimant failed to meet this burden.

DECISION

Based on the testimony and evidence presented, as RSA 275:43 I requires that an employer pay all wages due an employee, and as RSA 275:43-b requires that a salaried employee received their salary, in full, for any pay period in which they perform any work, and as this Department finds that the claimant failed to prove by a preponderance of the evidence that he was not paid all wages/salary due, it is hereby ruled that this portion of the Wage Claim is invalid.

As RSA 275:43 V considers the payment of employee expenses to be wages, when due, if a matter of employment practice or policy, or both, and as this Department finds that the claimant failed to prove by a preponderance of the evidence that he was not paid all employee expenses due, it is hereby ruled that this portion of the Wage Claim is invalid.

Melissa J. Delorey
Hearing Officer

Date of Decision: March 9, 2017

Original: Claimant
cc: Employer

MJD/das