

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

[REDACTED]

V

**Tom Decapo**

**DECISION OF THE HEARING OFFICER**

**Nature of Dispute:** RSA 275:43 I unpaid wages  
RSA 275:44 IV liquidated damages  
Interest

**Employer:** Tom Decapo, 234 Causeway St Apt 1010, Boston, MA 02114

**Date of Hearing:** May 16, 2107

**Case No.:** 55020

**BACKGROUND AND STATEMENT OF THE ISSUES**

The claimant asserts he is owed \$2,465 in unpaid wages for three weeks' pay. He further seeks liquidated damages and interest.

Tom Decapo denies the claimant is an employee as he is an independent contractor, exempt from the definition of employee under RSA 275:42 I as he performed domestic labor and farm labor.

**FINDINGS OF FACT**

This Department must first determine whether the claimant was an employee of an employer. Tom Decapo first alleges the claimant was 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 Hearing Officer finds that the claimant was not an independent contractor, because the claimant does not meet the criteria in (e), or (f). 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.

Mr. Decapo further alleges the claimant is not an employee because he engaged in domestic labor, under RSA 275:42 I.

RSA 275:42 Definitions. – 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.

The testimony provided at the hearing concluded the property on which the claimant performed services was for a tenant of Mr. Decapo, not his home. Therefore, Mr. Decapo is not found to be exempt from the definition of employer as the claimant did not perform domestic labor in the home of the employer.

Mr. Decapo further alleges the claimant is not an employee because he engaged in farm labor, under RSA 275:42 I.

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Lab 802.06 "Farm labor" as used in RSA 279:21, I and RSA 275:42, I means all work performed in agriculture including cultivation and tillage of the soil, dairying, growing and harvesting of any agriculture or horticultural commodities, the raising of livestock, bees, fur bearing animals or poultry and any practices performed by a farmer on a farm. "Farm labor" does not include the retailing of goods other than the products produced by the farm.

The claimant provided much testimony about the work he had performed for the previous two years of his relationship with Mr. Decapo. This wage claim focuses of three weeks of work performed in January and February 2017. The claimant provided specific testimony that the work he performed during this period included working on a barn to house animals, with birthing stalls, shoveled snow, installed and reinstalled a new roof on the barn, worked on an issue within the wine cellar on the property (for private use, not commercial) and changed a light bulb.

The claimant provided credible testimony that there were less than five persons working at Mr. Decapo's property.

The Hearing Officer finds the claimant engaged in farm labor as defined under RSA 275:42 I and Lab 802.06. Therefore, the claimant cannot be an employee of an employer as Mr. Decapo is not an employer as defined as employer.

As the claimant is not an employee, wages cannot be awarded and liquidated damages and interest cannot be assessed.

### **DECISION**

Based on the testimony and evidence presented, as RSA 275:51 V affords the Wage Claim process to employees of employers only, it is hereby ruled that the Wage Claim is invalid due to a lack of jurisdiction by this Department.

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Melissa J. Delorey  
Hearing Officer

Date of Decision: June 1, 2017

Original: Claimant  
cc: Employer

MJD/das