

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

Carlton Industries Corp

DECISION OF THE HEARING OFFICER

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

Employer: Carlton Industries Corp, 33 Rossotto Dr, Hamden CT 06514

Date of Hearing: November 7, 2017

Case No.: 55690

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant originally filed a wage claim with the Connecticut Department of Labor on October 28, 2016, asserting wages due. He then filed with this Department August 2, 2017. He asserts he is owed \$63,562 in unpaid commissions.

Carlton Industries Corp denies the claimant was an employee or that he is due any further monies.

FINDINGS OF FACT

This Department must first to determine whether or not the claimant was an employee to an employer.

RSA 275:42 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.

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 claimant solicited Carlton Industries Corp by letter in 2004 and they began a relationship based on a verbal agreement. Many changes were made to the agreement over the years regarding payment and commissions. None were reduced to writing.

Carlton Industries Corp issued a 1099 to David Guion Jr for the years 2004 through 2009. 2010 to through 2014 they issued 1099's to David Guion Jr Montage Marketing Assoc. The claimant also had a website for Montage Manufacturing Associates.

The claimant lists his work history on his LinkedIn page as Owner, Montage Marketing Associates from Sep 2001 – present, and the page was printed August 9, 2017.

The claimant argued multiple times throughout his testimony that it does not matter if you consider his to be David Guion Jr the individual or Montage Marketing Associates, as they are one in the same. He then alternatively argued that it was either David Guion Jr the individual or Montage Marketing Associates (also known as Montage Manufacturing Associates), that he was not both.

Both sides made multiple arguments regarding the claimant's status as an independent contractor. However, this is not the determining issue.

The defining issue is whether or not the Carlton Industries Corp is an employer to David Guion Jr as an employee.

RSA 275:42 I defines an employer as any [corporation] ... employing any person.

RSA 275:42 II defines an 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.

The claimant cannot pick and choose when he would like to be an individual or a company or to be considered as both. He created a company, Montage Marketing

Associates, which he used and continues to use to do business. For the relevant period inside the statute of limitations for this claim, August 3, 2014 through August 2, 2017, the claimant did indeed consider himself the owner of this business and received 1099's in the name of the business.

The claimant consistently and continuously represents himself as a business. As such, Carlton Industries Corp could not be "employing any person" as it relates to the claimant. Further, the claimant was not in the category of "every person who may be permitted, required or directed by any employer", as the relationship existed between Carlton Industries Corp and Montage Marketing Associates.

Therefore, the Hearing Officer finds that the claimant failed to prove he was an employee of an employer.

Because the claimant was not an employee of an employer, this Department does not have jurisdiction over his claim. The claimant may have a cause of action in another legal venue.

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.

Melissa J. Delorey
Hearing Officer

Date of Decision: November 27, 2017

Original: Claimant
cc: Employer
Employer Attorney

MJD/nm