

STATE OF NEW HAMPSHIRE  
DEPARTMENT OF LABOR  
CONCORD, NEW HAMPSHIRE

█  
v.

Pleasant North, LLC

DECISION OF THE HEARING OFFICER

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

Employer: Pleasant North, LLC █

Date of Hearing: June 12, 2018

Case No.: 57096

**BACKGROUND AND STATEMENT OF THE ISSUES**

The current issue concerns alleged unpaid wages, unpaid expenses and the question of employer /employee relationship.

The claimant contends the employer owes him a balance of \$2,033.00, in unpaid wages and unpaid expenses related to snow removal performed for him during the 2017 to 2018 season. He holds he was an employee of the employer

The employer argues the claimant was not his employee; rather he was a subcontractor, in business for himself. The employer states he will pay the claimant what he is owed once he has completed "his agreement."

On the basis of the claimant's assertions he is owed unpaid wages and expenses he filed a Wage Claim with the Department on April 26, 2018; a Notice of Wage Claim was forwarded to the employer on the same date. The employer's objection was received on May 10, 2018; a Notice of Employer's Objection was forwarded to the employee on the same date. The claimant requested a Hearing on May 15, 2018 with Notices of Hearing forwarded to the parties on May 24, 2018. Accordingly a Hearing was held at the Department on June 12, 2018.

The employer appeared for the Hearing telephonically.

The claimant adjusted his claim amount at the Hearing to \$1,823.72.

### **FINDINGS OF FACT**

The claimant performed snow clearing for the employer during the 2017 to 2018 season, his second consecutive season doing so.

The claimant testified he was paid \$25.00 per hour.

The claimant owns a business [REDACTED] it advertises framing, interior trim, remodeling and sheet rocking services.

The employer submitted claimant-signed documents. The claimant concedes he signed them but testified he did not know what they meant.

The employer submitted an undated "Subcontractor Agreement" boilerplate with the claimant's and employer's signatures; lines are redacted without acknowledgement. The document speaks to indemnity, required insurance and liability.

A "Sub-Contractor-Contract for Work" was also submitted, with only the claimant's signature. The document is dated 11/28/16 presumably for the 2016 -2017 snow season. The document specifies snow plowing and shoveling as a contracted service. The document indicates a price of \$150.00 per storm. Under "Other Provisions" is written: "Subcontractor warrants that they are not an employee of the owner, manager or company. Sub-contractor is an independent contractor working solely for themselves. Further Sub-contractor agrees service to hold contractor harmless for loss of any kind, whatsoever."

On January 23, 2018 the claimant backed into a tree while plowing causing damage to the rear of the vehicle. The claimant purchased replacement parts for a damaged tail light, repaired the damage and submitted a receipt to the employer. The employer has not reimbursed the claimant.

### **DISCUSSION AND CONCLUSIONS**

The claimant has the burden of proof in these matters to show by a preponderance of the evidence that he is owed any additional wages. 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.

Prior to determining whether or not wages are owed to the claimant, the issue of employee/ employer relationship must be determined. The claimant holds he was an employee of the employer. The employer insists the claimant is an independent contractor, he operates his own business and he signed documents that demonstrate his role to have been a subcontractor.

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.

It is the claimant's testimony that he didn't consider himself to be an independent contractor for the employer.

The claimant either owned or currently owns and operates his own business known as [REDACTED]. The issue at hand is not carpentry or other related construction work billed to the employer. In the current context, the work the claimant provided the employer, snow removal, is not a service the claimant holds himself out to be in business for. Further, the claimant lacks the tools of the trade that are customarily used in the business; *the claimant doesn't possess a plow truck*. The claimant is not in the business of snow removal.

By way of analogy, with respect to RSA 275:42 II, the individual who owns a retail business selling auto tires does not necessarily make himself eligible to subcontract as an auto mechanic.

The documents submitted by the employer and partially labeled "agreement" and "contract" do not relieve the employer of his statutory obligations under RSA 275:42 II, nor can the claimant waive his statutory rights by signing the documents.

This Hearing Officer finds the employer failed to demonstrate that the claimant meets criteria (e) under RSA 275:42 II. Thus, the claimant cannot be considered to be exempt from the definition of employee. Therefore, for the purposes of this Decision, this Hearing Officer finds the claimant to be an employee.

RSA 275 43 I requires employers to pay all wages due an employee at regular intervals not to exceed fourteen (14) days except when permitted to pay wages less frequently as authorized by the commissioner.

Neither party submitted a document for the 2017 – 2018 snow season outlining payment details as required by RSA 275:49 and Lab 803.03. The employer's document "Sub-Contractor-Contract for Work" and dated 11/28/16 wherein the employer agreed to

pay the claimant \$150.00 per storm during the 2016-2017 snow season does not suffice to satisfy the requirements of the statute.

The claimant submitted documents detailing hours worked and jobs performed as well as payments made by the employer. The claimant alleges the employer owes him wages calculated at \$25.00 per hours worked. This dollar amount is consistent throughout the claimant's testimony and submitted documents. The claimant holds he worked 112 (one hundred twelve) hours at \$25.00 per hour for a total (112 x \$25.00) \$2,800.00. The claimant testified the employer has paid him \$1,260.00 to-date, leaving a balance owed (\$2,800.00 - \$1,260.00) \$1,540.00.

This Hearing Officer finds the claimant's exhibits and testimony credible, thus this Hearing Officer finds the claimant met his burden to prove by a preponderance of evidence he is owed \$1,540.00 in wages.

The claimant argues he is owed \$283.72 in expenses in the form of gas and oil purchases as well as for a replacement lamp for the damage caused to the rear of the employer's snow plow truck when the claimant backed into a tree while plowing on January 23, 2018.

RSA 275:48 states in-part that no employer may withhold or divert any portion of an employee's wages unless the employer is required or empowered to do so by state or federal law, including payroll taxes or the employer has a written authorization by the employee for deductions for a lawful purpose accruing to the benefit of the employee as provided in regulations issued by the commissioner. Forcing an employee to pay for damage to employer property while the employee is working for employer contradicts the provision of the statute.

RSA 275:43 V considers the payment of employee expenses, to be wages pursuant to RSA 275:42, III, when due. This Hearing Officer finds the employer's withholding of wages for the cost of gas and oil for his snowplow truck as well as withholding wages for the cost of a rear replacement bulb for the same vehicle to be prohibited under RSA 275:48, this Hearing Officer finds the \$283.72 in expenses claimed to be wages consistent with RSA 275:43 V.

This Hearing Officer finds the claimant met his burden to prove by a preponderance of evidence he is owed \$1,540.00 in past due wages and this Hearing Officer finds the claimant met his burden to prove by a preponderance of evidence he is owed past due expenses in the amount of \$283.72.

## **DECISION**

Based on the testimony and evidence presented and as his Hearing Officer finds the employer failed to demonstrate that the claimant meets criteria (e) under RSA 275:42 II this Department finds the claimant to be an employee for the purposes of this Decision.

Based on the testimony and evidence presented and as RSA 275:43 I requires that an employer pay all wages due an employee, and as the Department finds the claimant proved by a preponderance of evidence he is owed \$1,540.00 in wages it is hereby ruled that this portion of the Wage Claim is valid.

Based on the testimony and evidence presented, and as RSA 275:48 prohibits the withholding of wages except in specific circumstances, and as RSA 275:43 V considers expenses to be wages when due and as the Department finds the claimant proved by a preponderance of evidence he is owed expenses in the amount of \$283.72 it is hereby ruled that this portion of the Wage Claim is valid.

The employer is hereby ordered to send a check to this Department, payable to [REDACTED], in the amount of \$1,823.72 (\$1,540.00 + \$283.72).

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Hearing Officer

Date of Decision: July 16, 2018

Original: Claimant

CC: Pleasant North, LLC