

STATE OF NEW HAMPSHIRE  
DEPARTMENT OF LABOR  
CONCORD, NEW HAMPSHIRE

[REDACTED]

v.

NEOSCOPE

CASE NO. 100604

AMENDED DECISION OF THE HEARING OFFICER

**Appearances:** [REDACTED] the claimant appeared Pro Se.  
Attorney Kathleen M. Mahan, on behalf of Neoscope

**Nature of Dispute:** RSA 275:43 I - Weekly, Unpaid Wages/Bonuses

**Claimant:** [REDACTED]

**Employer:** Neoscope

**Witnesses:** [REDACTED] Claimant  
Timothy Martin, Chief Executive Officer and Former Owner of  
Neoscope  
[REDACTED] former employee of Neoscope

**Date of Hearing:** February 16, 2022

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant filed a wage claim on December 25, 2021, asserting that he is due unpaid wages in the amount of \$53,999 for commission earned.

The employer was notified by the Department of Labor (DOL) via mailing dated December 28, 2021. There was no response from the employer within the ten-day period provided by statute. This hearing was then scheduled accordingly for review of the claimant's claim for unpaid wages. Formal hearing was held at the DOL in Concord, New Hampshire on February 16, 2022 with all parties appearing in person.

FINDINGS OF FACT

Mr. [REDACTED] is a [REDACTED] man who was employed by Neoscope from April 5, 2021 through December 9, 2021. He was hired as a systems engineer and was promoted to Chief Technology Officer (CTO) on April 25, 2021. He was terminated for

cause on December 9, 2021. The claimant was hired in tandem with ██████████ and they negotiated their contracts as a unit.

When the claimant began his employment he signed a contract which contained a page labelled "Schedule 5 Employee's Compensation". This stated the claimant was entitled to: "10% commission on any net-new business with regards to MSA's and projects. 5% commission on cataloged items, with regards to MSA's and projects. 5% commission on projects generated from the existing client base Neoscope already has under contract." See *claimant's E3*. There is no mention of the claimant needing to be the source of any of this income. There is also no mention of the claimant being responsible for tracking his own commission numbers. It was also noted that Mr. Bergman's contract from April 5 contained the same language. Timothy Martin initially disputed the validity of the April 5 agreement, but on cross examination did eventually concede that the electronic copy presented at hearing was correct.

The claimant and Mr. ██████████ indicated that they accepted their positions at lower salaries than average with the understanding that their commissions would make up this difference. The two employees were also enticed to Neoscope with promises of pending expansion via acquisition. They were told that they would likely be "stakeholders" in the expanded business with profit sharing and other increased earning opportunities available.

Once hired the claimant and Mr. ██████████ found themselves in charge of the day-to-day operations of the company. They also discovered that Mr. Martin was very rarely present at the Neoscope offices.

The employer submitted supplemental material which included e-mail exchanges between Mr. Martin and a Brandi Bonds (Neoscope's outsourced Chief Financial officer). One particular e-mail from Mr. Martin time stamped at 1:21 pm on August 28, 2021 stated the following: "Was just going to update our comp plan change form paperwork individually with: ██████████ 130k, ██████████ 150k. Both are now eligible for Neoscope bonus plan tied to project revenue goals defined by Tim. Total comp plans to be reviewed Jan 2021 to formalize annual compensation package." (emphasis from original). See *employer's exhibit Q*.

The claimant's promotion to CTO did not result in a formal pay raise until September 23, 2021, at which time a new contract was signed. At this time the claimant's salary was noted to be \$150,000 annually with the same commission language as the April 5, 2021 agreement. See *employer's page 10*. This contract contained a page titled: "SCHEDULE 4 1) DUTIES AND RESPONSIBILITIES OF EMPLOYEE'S POSITION". This page states the claimant's responsibilities and required skill sets for the claimant's position. It does not mention any "project revenue goals". See *employer's page 9*.

The claimant and Mr. ██████████ were never paid their commissions under the schedule 5 portion of their contracts. Whenever the topic of these payments came up, with Mr. Martin he would explain that he was holding off on payments to "look good to the banks" in order to obtain the necessary capital to complete the expansion that had

been discussed. Additionally at one point Mr. Martin asked the claimant if he could possibly get \$500,000 to contribute to the funding of an acquisition Mr. Martin was allegedly close to finalizing. However, Mr. Martin eventually held a meeting in November where he told his employees that Neoscope had been the purchasee in a deal and would soon be a part of Nessit, LLC. out of Somerset, New Hampshire. Following this announcement, the claimant and ██████████ sought out Mr. Martin for assurances about their commissions. Both testified that Mr. Martin assured them that once he was paid, they would be paid.

The claimant emailed Mr. Martin on November 25, 2021, making a request for payment of his owed commissions. This email indicated that he would like the matter settled by November 30, 2021, given the recent acquisition of Neoscope. This email indicated the claimant believed he was owed \$53,099. Mr. Martin responded on December 1, 2021, inviting the claimant to submit documentation of any commissions he felt he was owed. This email also mentions that Mr. Martin only considered items worthy of commission to be those the claimant himself brought into the company. This email also mentioned a lack of project income for five months with the company running at a "200k+ deficit" as a result. However, the submitted profit and loss report does not support this contention. *See employer exhibit H.*

Mr. Martin founded Neoscope in 2006 and was its sole owner until it was sold to Nessit in November of 2021. Mr. Martin initially testified that 99% of new business for Neoscope came directly from him, he then reduced this number to 97%. However, when questioned further about this he reduced the number to 33% with a marketing firm and lead generation services responsible for the remaining 67%. Mr. Martin further testified that in the 16 years he had been running the company he had never had more than seven people on commission. He further testified that all these people were required to track their own sales and submit for payment every month which the claimant never did.

Mr. Martin also testified to a lack of documentation of task time by the claimant in general via the use of the AutoTask Computer Program. However, when pressed on this Mr. Martin conceded that the "C" level employees at Neoscope ("C" standing for "Chief") did not utilize this program to track their work as their work was not typically billed to the clients.

### **DISCUSSION AND CONCLUSIONS**

The claimant has the burden of proof in this matter to show by a preponderance of the evidence that he is owed unpaid 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. The issue in this case is whether the commission payments are wages, if so, were wages owed and due to the claimant.

The claimant argued that the plain language of his contract supports his claim for the owed commission. The claimant further argued that his commission eligibility began on April 5, 2021, when he signed the first contract with Neoscope. The claimant also argued that his commission amount should not be reduced due to expenses such as rent or marketing. The claimant also argued that he only accepted the position based on

the promise of the additional compensation as the base salary was at or slightly below industry average.

The employer argued that while the contract language does not specify that commissions were to be paid only on revenue generated by Mr. ██████████ that is the plain meaning of the word commission. Additionally, the employer argued Mr. ██████████ did not make reasonable requests to be paid in writing for several months, and once he did, he offered no record of business he generated. The employer further argued that the commission agreement was only present on his contract from September 23, 2021. Building upon this argument the employer argued that if Mr. ██████████ were to be found entitled to a commission payment it should only be for September 23, 2021 through his termination on December 9, 2021. Finally, the employer argued that the claimant's calculations for his owed commissions are unreasonable given that his number would account for essentially a 33% addition to his salary.

The employer's argument for any interpretation of the contract other than the plain language which entitles the claimant to payment here is not persuasive. It is well established that disputes over contract language are resolved in favor of the non-drafting party. In this case Neoscope drafted the contracts signed by the claimant and Mr. Martin. However, most importantly there were two distinct contracts here. As such, the employer had every opportunity to correct any terms of the April contract that were unsatisfactory with the new terms of the September contract. The employer did submit e-mails which indicated that the September contracts were to include language about sales goals and tracking required to qualify for the commissions specified. Ultimately this language was not included and Mr. Martin signed the document as representative of Neoscope. It was Mr. Martin's responsibility to ensure that the terms of the contract were to his satisfaction before signing his agreement. Given Mr. Martin's extensive business experience (he had founded Neoscope and ran it for 16 years) there is no reasonable excuse he can provide as to why he did not complete his due diligence before signing the contracts.

The claimant presented an email with a contract attached from April 5, 2021, which contained the same schedule 5 commission description as his September 23, 2021 contract. The employer objected to this email first on the grounds that the attached contract was not signed, and secondly on the grounds that they were not presented with the email with sufficient time to perform a forensic analysis of the document. These objections were overruled. First, Mr. Martin confirmed that the email was from the former COO of Neoscope. Additionally, Neoscope would have access to the signed copy of this document and could have submitted their own copy to show any differences but chose not to, even with the record being held open an extra week. Given this information the claimant's argument that his eligibility for commission began with his April contract is found persuasive.

The claimant conceded in his written closing that, based on the information provided, he cannot effectively prorate April 5-30, 2021 and December 1-9, 2021. Given this, it is reasonable to utilize only figures from May 1, 2021 through November 30, 2021. Additionally, the claimant's contract specified that his commission was to be based on net profits. Based on the submitted profit and loss report the company had a


net profit of \$82,210.98 during these months. Mr. Martin testified that 60% of the company's earnings are from managed services for existing customers, 30% are from projects and 10% from time and materials or catalog items. Based upon this testimony and the profit numbers the claimant is entitled to a 5% commission on 60% of the profits (\$2,466.33) 10% on 30% of the profits (\$2,466.33) and 5% on 10% of the profits (\$411.05). This would be a total of \$5,343.71 roughly 10% of what the claimant is asking for.

Based upon a preponderance of the evidence, it is determined the claimant has met his burden and his commission should be paid. However, based on the plain language terms of the contract the requested amount of \$53,099 is not supported.

### DECISION

Based on the evidence and testimony presented, and as RSA 275:43 I requires that an employer pay all wages due an employee and as RSA 275:43 considers commissions to be wages when earned and due. The claimant has showed by a preponderance of the evidence that wages were due for commission in the amount of \$5,343.71. The claimant's request for payment of unpaid wages is approved.

The employer is ordered to send a check in the amount of \$5,343.71 to this Department payable to ██████████ less any applicable taxes, for the unpaid wages to this Department within 30 days of the date of this order.

  
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Timothy G. Fischer  
Hearing Officer

Date of Amended Decision: April 8, 2022

TGF/nd