

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

█ █
v.

NEOSCOPE TECHNOLOGY

CASE NO. 100606

DECISION OF THE HEARING OFFICER

Appearances: █ █ the claimant appeared Pro Se with █ █ as an advisor.
Attorney Kathleen M. Mahan, on behalf of Neoscope Technology

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

Claimant: █ █

Employer: Neoscope Technology

Witnesses: █ █ Claimant
Timothy Martin, Chief Executive Officer and Former Owner of Neoscope Technology

Date of Hearing: April 13, 2022 (Record held open until April 22, 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 \$53,099 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 April 13, 2022, with all parties appearing in person. At the beginning of the hearing Mr. █ raised the issue of liquidated damages under RSA 275:39. This was not allowed as RSA 275:39 requires that there must be some showing of discrimination under RSA 275:37 which Mr. █ conceded was not the case. Mr. █ then raised the issue of liquidated damages under RSA 275:44 IV which states in part: "If an employer willfully and without good cause fails to pay an employee wages as required under paragraphs I, II or III of this section, such employer shall be additionally liable to the employee for liquidated damages..." Attorney Mahan objected

to this as this issue was not noticed for hearing prior to the date of hearing. Attorney Mahan's objection to the addition of this issue was sustained.

FINDINGS OF FACT

Mr. ██████████ is a ██████████ man who was employed by Neoscope Technology from April 5, 2021 through December 22, 2021. He was hired as a network/systems engineer which was a step down from his previous employment. This was also a hybrid position which would normally have been filled by two different people one on the network side and one on the system side. Mr. Bergman's salary was noted to be \$110,000.00 annually.

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 Technology already has under contract." See *claimant's E6*. 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. ██████████ contract from April 5 contained the same language. See *claimant's E3*. Mr. ██████████ indicated that he accepted this step back in his title and salary with the understanding that things would be fixed soon.

Mr. ██████████ indicated that he accepted the position at a lower-than-average salary with the understanding that the commission in schedule 5 would make up this difference. Mr. ██████████ was further enticed to Neoscope Technology with promises of pending expansion via acquisition. Mr. ██████████ was told he and Mr. ██████████ would likely be "stakeholders" in the expanded business with profit sharing and other increased earning opportunities available.

Once hired Mr. ██████████ found himself to be far more in charge of the day-to-day operations of the company than he expected. He also discovered that Mr. Martin was very rarely present at the Neoscope Technology offices. Mr. ██████████ stated that he was essentially performing the duties of a CIO from day one of his employment.

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 Technology 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 F*.

The claimant was promoted to Solutions Architect/Account Manager in September of 2021. At this time, the claimant's salary was noted to be \$130,000 annually with the same commission language as the April 5, 2021 agreement. See

employer's exhibit B. 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 exhibit B.*

Mr. ██████████ was never paid his 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. However, Mr. Martin eventually held a meeting in November where he told his employees that Neoscope Technology had been the purchasee in a deal and would soon be a part of Nessit, LLC. out of Somersworth, New Hampshire. Following this announcement, the claimant and Mr. ██████████ 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 evidence submitted showed that Mr. ██████████ emailed Mr. Martin on November 25, 2021, making a request for payment of his and Mr. Bergman's owed commissions. This email indicated that he would like the matter settled by November 30, 2021, given the recent acquisition of Neoscope Technology. This email indicated the claimant believed he was owed \$53,099. Mr. Martin responded on December 1, 2021, inviting the Mr. ██████████ and Mr. ██████████ 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 showed project income for every month except October in the five months leading up to November. See *employer exhibit J.*

Mr. Martin founded Neoscope Technology in 2006 and was its sole owner until it was sold to Nessit in November of 2021. Mr. Martin testified that about 33% of new business for Neoscope Technology came directly from him, 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 was cross examined on a list of employees that had reportedly worked on commission. Mr. Martin acknowledged about eight of these employees were paid via commission, however many of those paid on commission were 1099 sub-contractors, and not W-2 employees. As such Mr. Martin did not consider them to be employees of Neoscope Technology.

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, Mr. Martin admitted that he did not have full access to Neoscope's systems including AutoTask since he sold the company. He further explained that he was able to produce items such as the profit and loss report by receiving special limited access. Mr. Martin further testified that he disagrees with Mr. ██████████ contention that he performed the duties of a CIO from

day one. Specifically, Mr. Martin indicated that Mr. ██████████ had no direct reports and was responsible for managing the accounts of three out of the 40 ongoing clients. Mr. Martin denied that he deflected payment to make the company look good, but that he did not make the payments as he did not feel they were owed. Mr. Martin began looking to sell Neoscope Technology in 2017. The final sale of Neoscope Technology to Nessit, LLC. in August of 2017.

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 Tehnology. 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 below industry average and a large pay cut from his previous position.

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 22, 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 50% 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 Technology. 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 Technology 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 a contract dated 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. Neoscope Technology 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. Given this information the claimant's argument that his eligibility for commission began with his April contract is found persuasive.

Based on the information provided, neither the claimant, nor the DOL can effectively prorate profits and expenses for April 5-30, 2021 and December 1-22, 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. Net profits, are the company's gross profits less expenses such as rent, labor, utilities, marketing etc. 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. It is found that the wage claim for unpaid commissions is **valid in part**.

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.



Timothy G. Fischer
Hearing Officer

May 19, 2022

TGF/nd