

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

██████████
v.

TCH Construction Group

Case No. 101080

DECISION OF THE HEARING OFFICER

Appearances: ██████████ the claimant, telephonically
Tammy Riggall, for the employer, telephonically
Attorney Matthew Wahrer, for the employer, telephonically
Attorney Brendan O'Rourke, for the employer, telephonically

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

Employer: TCH Construction Group

Date of Hearing: May 2, 2022

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant alleges that the employer failed to pay his wages for his employment from August 30, 2021 to September 24, 2021. The claimant asserts that he is owed a total of \$14,199.73 in unpaid wages. The claimant filed a Wage Claim at the Department of Labor on February 13, 2022. The Notice of Wage Claim was issued on February 15, 2022. The employer responded to the Notice of Wage Claim on February 24, 2022. The Hearing Notice was issued March 30, 2022.

The formal hearing was scheduled at the New Hampshire Department of Labor for May 2, 2022. Prior to the hearing, the claimant and the employer requested and received permission to appear telephonically.

FINDINGS OF FACT

The following findings of fact are based upon the parties' submissions, the testimony of the witnesses and matters of record in the Department file.

The claimant resides in Mobile, Alabama. The employer is based in Lumberton, North Carolina. The claimant worked as a quality control/turnaround supervisor for the employer in Springfield, New Hampshire. The employer testified the TCH Construction Group (TCH) is a subcontractor to Stored Solar, LLC., a New Hampshire corporation.

The claimant testified he was hired by Erik Robinson, a project manager for TCH. The employer acknowledged that Erik Robinson was a TCH employee.

The claimant's wage claim and testimony show that he believed he was being paid \$45.00 per hour, overtime, and a per diem stipend of \$150.00 per day. The total claim is for \$14,199.73.

The employer testified that Erik Robinson was hired by TCH as a project manager. The claimant testified that Mr. Robinson hired him and told him what the rate of pay would be. The claimant testified that he used TCH tools at the job site. The claimant testified that Mr. Robinson was the project manager and that Mr. Robinson told him when to report to work, how long to work and gave him his work assignments. The claimant testified that he also reported to Tim Monroe, the owner of TCH, and was directed by him to estimate man hours for certain projects.

The claimant testified that he was asked to stay in New Hampshire by the employer in anticipation of more work but was told by TCH on September 23 that more work was not forthcoming. The claimant testified that Ms. Riggall told him there was no money for TCH to pay him.

The employer testified that TCH hired Mr. ██████████ and Mr. Robinson as independent contractors. The employer cited a W-9 form the claimant signed as evidence that the claimant was an independent contractor. The employer testified that TCH was a subcontractor to a New Hampshire company called Stored Solar, LLC. based in Tamworth, New Hampshire and that that Stored Solar was supposed to pay the claimant. Although the subcontract between TCH and Stored Solar was not in evidence the employer's attorney argued that he understood the subcontract had been referenced in other cases before the Department.

The claimant testified that he signed a W-9 form. The claimant testified that he signed a TCH employee handbook. *The claimant testified that he and several other employees were threatened by TCH that if they went to Stored Solar to receive their wages they would be in violation of a non-compete clause and would be sued by TCH.* The claimant testified that he informed the employer that he could not afford to stay in New Hampshire without pay and then returned to Alabama.

The employer submitted an exhibit that the employer claims proves that Stored Solar was responsible for paying the claimant. The heading of the document reads "TCH staff that was assigned to Stored Solar and note paid directly by SSS". The document lists the claimant's name and wages owed.

The document shows that the claimant is owed \$4,635.00 in wages and \$1,050.00 in per diem for the week ending September 5, 2022. The wage total for that week represents 103 hours at \$45.00 per hour. The document shows \$3,555.00 in wages and \$945.00 in per diem for the week ending September 12, 2022. The wage total for that week represents 79 hours at \$45.00 per hour. The document shows \$1,035.00 in wages and \$270.00 in per diem for the week ending September 19, 2021. The wage total for that week represents 23 hours at \$45.00 per hour. This equates to 206 hours at \$45.00 per hour, seven days' per diem at \$150.00 per day and nine days' per diem at \$135.00 per day.

The total wages listed equal \$9,225.00 and the total per diem is \$2,265.00. The total wages and per diem listed are \$11,490.00. However, that figure does not account for overtime.

The employer testified that there is no TCH handbook.

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 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.

RSA 275:43 I requires that an employer pay all wages due an employee, on time, on paydays designated in advance. RSA 279:21 VIII requires that an employee be paid time and one-half for all hours worked in excess of 40 in a given week.

The undisputed evidence depicts that the claimant was employed by TCH from August 30, 2021 to September 24, 2021 and appears not to have been paid at all. The employer testified that Erik Robinson was hired by TCH as a project manager. The claimant testified that Mr. Robinson hired him and told him what the rate of pay would be. The claimant testified that Mr. Robinson was the project manager and that Mr. Robinson told him when to report to work, how long to work and gave him his work assignments. The claimant testified that he used TCH tools at the job site. There was no testimony that the claimant had performed any work for Stored Solar, LLC. These facts indicate that the claimant was not an independent contractor under New Hampshire law.

The employer submitted an exhibit titled "TCH staff that was assigned to Stored Solar and note paid directly by SSS". The document title is instructive. The operative words are "TCH staff". The document in no way proves that Stored Solar was responsible for paying the claimant. Nor does it prove that the claimant was an independent contractor. This document supports the position that the claimant is an unpaid employee of the employer.

These facts in evidence support the claimant's position that he is owed wages by the employer. The employer acknowledges not paying the claimant in a timely fashion as required by New Hampshire law. If TCH was not responsible for paying the claimant, that was never communicated to the claimant. Instead, the employer told the claimant there was no money to pay him. A contractual dispute with a third party does not relieve the employer of the obligation to pay full wages when owed.

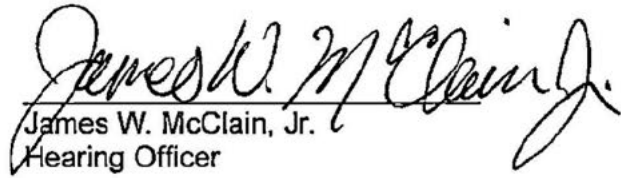
Given the testimony, as supported by the documentation provided, it is found that uncontradicted evidence and testimony was presented to meet the claimant's burden to prove by a preponderance of evidence that he is entitled to wages in the amount of \$14,199.73. The claimant's testimony is adopted.

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 at no cost to the employee and as the Department finds that it was proved by a preponderance of evidence, he is owed wages in the amount of \$14,199.73, it is hereby ruled that this Wage Claim is **valid**.

The employer is hereby ordered to send a check to this Department, payable to ██████████ in the amount of \$14,199.73, less any applicable taxes, within 30 days of the date of this Order.

Date of Decision: May 17, 2022


James W. McClain, Jr.
Hearing Officer

Original: · Claimant
cc: · Employer's attorney

JWM/nd