

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

██████████
v.

TCH Construction Group
CASE #101118

██████████
v.

TCH Construction Group
CASE #101119

DECISION OF THE HEARING OFFICER

APPEARANCES: Claimants ██████████ and ██████████
self-represented

Matthew Wahrer, Esq., representing the employer

NATURE OF DISPUTE: RSA 275:43, I — Weekly (unpaid wages)
RSA 275:43, V — Weekly (expenses)

DATE OF HEARING: May 17, 2022

BACKGROUND AND STATEMENT OF THE ISSUES

The claimants filed separate but almost identical wage claims on February 15, 2022, alleging that the employer owed them hourly wages plus per diem for work they did at a site in Springfield. They also claimed that they were owed travel expenses.

Notice of claim was sent to the employer on February 17, 2022. The employer filed an objection on February 24. The claimants requested a hearing on March 1. Notice of the hearing was sent on May 3.

At the start of the hearing, all parties agreed that the two cases could be consolidated. Mr. ██████████ who speaks limited English, agreed that Mr. ██████████ would provide the primary testimony in support of their claims, supplemented by his own written statement in Spanish, emailed to the Department on March 1 and cc'd to the employer by the Department, along with an English translation provided by the Department. The employer agreed to this procedure.

FINDINGS OF FACT

The following findings are based on the testimony of the claimants and the employer's representative Tammy Riggall and matters of record in the file. The witnesses acknowledged under oath that their written submissions to the Department were true and accurate to the best of their knowledge and belief, and those statements are treated herein as part of the testimony in the case.

The claimants are pipefitters by trade. Mr. ██████████ is 40 and lives in Corpus Christi, Texas. Mr. ██████████ is 36 and lives in Brownsville, Texas. Some time in mid-August 2021, Mr. ██████████ met with an individual named Eric Robinson, who told him that the employer was hiring for a job at a power plant in Springfield. The rate of pay was \$35.00 per hour plus a per diem allowance of \$135.00. Claimant testified that he was later told by an unnamed co-worker that the employer would also pay for travel to and from the site.

The claimants drove to New Hampshire from their respective homes to a hotel near the Springfield job site. Mr. Lozano's drive from Brownsville, Texas was 35 hours; Mr. Hernandez's drive from Corpus Christi, Texas was 32 hours.

Shortly before August 24, 2021, claimants arrived at the hotel as instructed by Mr. Robinson. They completed W4 forms. Mr. ██████████ testified that the W4 forms were given to him not by Mr. Robinson but by a relative of the owner of the employer.¹ Mr. ██████████ said the W4 forms had the name TCH Construction Group at the top.

The claimants started work on Tuesday, August 24. Some time during the following next week, they received payment by check for their work from August 24 through August 29. They were also paid for their travel time from Texas to New Hampshire. Mr. ██████████ testified that the paycheck had the name TCH Construction Group on it. He said that he was not surprised by this because it was his understanding that TCH was his employer and not Mr. Robinson; Mr. Robinson was the boss at the job site.

The claimants testified that they received no payments after that.

Mr. ██████████ testified that they worked 12-hour days, seven days a week, from August 30 through September 14. They did a variety of jobs at the direction of various people on the site. They were not hired to complete a project; they were hired to do the jobs they were instructed to do. Mr. ██████████ in his

¹ Both written claims identify Tim Monroy (sic) as the owner of TCH Construction Group. Correspondence from the employer includes a cc: to Tim Monroe [sic] at TCH Construction Group.

complaint stated that he did more than what he was hired to do: he did welding, fixed a boiler, cut the grass, and performed maintenance.

The claimants were uncertain as to why they were not being paid and when they would be paid. They became discouraged and decided to quit. When they came to pick up their tools on September 14, they were told that, if they agreed to become employees of the power-plant operator Stored Solar Services and continued working, they would be paid for the money they were owed. The claimants did not accept this offer and quit the job.

Tammy Riggall, 57, of Lumberton, North Carolina is the bookkeeper for TCH Construction Group. She has worked there for about one year. She testified that the employer had a time and materials contract with Stored Solar Services (SSS) to provide labor and materials for work at the Springfield, New Hampshire plant from July 12, 2021 through September 19, 2021. She testified that the claimants' first checks included travel pay from home to the job site. She also said that the company did not agree to pay for their return travel.

She testified that the claimants were not employees but independent subcontractor hired by Mr. Robinson, who was also an independent contractor. All the company's independent contractors were required to furnish their own insurance. She testified that the company had no written agreement with Mr. Robinson. The company did have a "time and materials" contract with SSS to provide labor for the power plant operator.

She further testified that commencing August 30, 2021, the employer's obligation to pay the claimants was transferred to SSS and that as far as she knew, SSS had paid the claimants for their work from August 30 through September 14, 2022.

She submitted a report titled, "TCH staff that was assigned to SSS plants and note [sic] paid directly by SSS." This report listed claimants' names along with the names of other workers; it purported to show hourly and per diem totals paid for three weekly (Monday-Sunday) pay periods, starting August 30 and ending September 19, 2021. The report was followed by pay stub summaries for Mr. ██████████ and Mr. ██████████. The pay stub summaries recited the hourly rate as \$35.00, OT \$52.50, and per diem \$135.00. The summaries provided the following payment detail, which was the same for both claimants:

Pay Period	Reg	Hours		Days Worked	Total Per diem	Gross Pay
		OT	Total			
8-30 to 9-5	40	42	82	7	\$945	\$4,550.00
9-6 to 9-12	40	20	60	7	\$945	\$3,395.00
9-13 to 9-19	24	0	24	2	\$270	\$1,110.00

DISCUSSION AND CONCLUSIONS

Each claimant had the burden of proving by a preponderance of the evidence that he was owed unpaid wages. Proof by a preponderance as defined in Lab 202.05 is a demonstration by admissible evidence that a fact or legal conclusion is more probable than not. The hearing officer is charged with evaluating the testimony and exhibits in the case and deciding the issues presented, based upon "reliable, probative, and substantial evidence," Department Rule Lab 204.07(n).

The employer argued that the claimants were independent contractors and, as such, their claims were not properly before the Department as wage claims. Mr. ██████████ argued that he and Mr. Rodriguez were hired as employees of TCH and were not independent contractors.

Employer-Employee Relationship. On the issue of RSA 275:42, I, II, incorporating provisions of RSA 281-A:2, it was each claimant's burden to prove that he was an employee and not an independent contractor as the employer contended. It was not contested that the claimants were paid to perform services for the TCH. Therefore, pursuant to RSA 281-A:6(b)(1), claimants were presumed to be employees. To rebut this presumption, it had to be shown that each claimant met each of seven statutory criteria set forth in RSA 281-A:2, VI(b)(1)(A)-(G). That the claimants completed W4 forms is not dispositive of the issue. Also not dispositive is the employer's opinion that the claimants were independent contractors and not employees.

Arguably, it was the employer's burden to rebut the presumption as to each criterion. Regardless of whether it was the employer's burden to rebut the presumption, or each claimant's burden to show the rebutting criteria were not satisfied, based on the claimants' testimony, which is credited, it is found that at least two of the independent-contractor criteria were not met.

RSA 281-A:6(b)(1)(B): There was no evidence that the claimants could choose the hours they worked or that they had control and discretion over the means and manner of performance of the work. They were directed in what to do by the boss Eric Robinson and others on the site. The evidence that they brought their own tools to the job is insufficient in itself to satisfy this condition.

RSA 281-A:6(b)(1) (F): The relationship appeared to be at-will and there was no evidence to show that the claimants would be contractually liable to the employer should they fail to complete their assigned work or for deficiencies in such work.

Based on the foregoing, it is found that the claimants met their burden of proving the employer-employee relationship.

Claim for unpaid wages. It was uncontested that the claimants worked from August 30 through September 14, 2021, a total of 16 days, and that they worked 12-hour days at \$35.00 an hour regular time and \$52.50 OT. It was also uncontested that they were entitled to a per diem of \$135.00.

In his written statement, Mr. ██████████ claimed he worked a total of 80 hours regular time (40 plus 40) and 86 hours overtime (42 plus 44). However, he did not appear to account for the fact that the 16 work days spanned three pay periods, thus reducing the hours attributable to overtime. The employer's accounting of 104 hours regular time (40 plus 40 plus 24) and 62 hours overtime (42 plus 20) is found to be more accurate and is accepted as the correct accounting of the amount of wages earned from August 30 through September 14, 2021. The employer's calculation of the per diem of \$1,215.00 (9 days @ \$135.00 per day) is also found to be correct.

Ms. Riggall admitted that the employer had not paid the claimants for their work on and after August 30, 2021. She testified that she believed the claimants had been paid by SSS, but she admitted that, beyond what was allegedly represented to her by SSS, she had no evidence that payment was actually made. In her written objection, she stated that TCH Construction Group had contracted to provide labor and materials to SSS at the Springfield plant from July 12, 2021 through September 19, 2021. It follows from that commitment that TCH Construction would be responsible for paying the claimants through September 14, 2021.

The claimants testified unequivocally that they received no payment at all for their work from August 30 to September 14, 2021, and their testimony is found to be credible and is accepted.

Claim for travel expenses. RSA 275:43, V provides that

Vacation pay, severance pay, personal days, holiday pay, sick pay, and payment of employee expenses, when such benefits are a matter of employment practice or policy, or both, shall be considered wages pursuant to RSA 275:42, III, when due.

"[W]hen due" is a reference to specified contingencies the employee needs to meet in order to be eligible to receive the benefit in question. Mr. ██████████ testified that he was told by unnamed co-workers that the company would pay travel expenses to and from the job site. He admitted that no one from the company made this promise. Ms. Riggall stated that the employer only paid travel expenses to the job. On this point, it is found that the claimant failed to meet his burden of proving that the return travel expense were promised as a benefit.

DECISION

Each claimant's claim for unpaid wages (hourly plus per diem), is found **valid** to the following extent:

8-30 to 9-5	\$4,550.00
9-6 to 9-12	\$3,395.00
9-13 to 9-19	<u>\$1,110.00</u>
Total	\$9,055.00

Each claimant's claim for unpaid travel expenses is found to be **invalid**.

The employer is hereby ordered to send a check to the Labor Department, payable to ██████████ in the amount of \$9,055.00, within 30 days of the date of this Order.

The employer is hereby ordered to send a check to the Labor Department, payable to ██████████ in the amount of \$9,055.00, within 30 days of the date of this Order.

June 6, 2022
Date of Decision


George A. Stewart, Hearing Officer

GAS/nd