

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

██████████

v.

TCH Mechanical, LLC.

Case No. 101218

DECISION OF THE HEARING OFFICER

Appearances: ██████████ the claimant, telephonically
Tammy Riggall, bookkeeper 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
RSA 275:43 II / 279:21 VIII - Weekly, Unpaid Wages/Overtime
RSA 275:43 V - Weekly, Unpaid Employee Expenses

Employer: TCH Mechanical, LLC.

Date of Hearing: April 28, 2022

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant alleges that the employer failed to pay his wages for his employment from September 7, 2021 to September 23, 2021. The claimant asserts that he is owed a total of \$8,292.50 in unpaid wages. The claimant filed a Wage Claim at the Department of Labor on February 23, 2022. The Notice of Wage Claim was issued on February 25, 2022. The Hearing Notice was issued March 30, 2022. The employer responded to the Notice of Wage Claim on March 31, 2022.

The formal hearing was scheduled at the New Hampshire Department of Labor for April 28, 2022. Prior to the hearing, the claimant and the employer requested and received permission to appear telephonically.

FINDINGS OF FACT

The claimant resides in Hillister, Texas. The employer is based in Lumberton, North Carolina. The claimant worked as a pipefitter for the employer in Springfield, New Hampshire. The employer testified the TCH Mechanical, LLC. (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. An e-mail from Mr. Robinson was included in the claimant's exhibits. The e-mail reads as follows:

"To whom it may concern this letter is to verify that ██████████ was employed by TCH construction in Springfield New Hampshire starting on September 7, 2021 with pay at

34.00 an hour and 135 dollars a day per diem (sic) (living expense) he had a travel in pay to the job at 27 hours at 34.00 an hour. Total time worked was September 7 through September 14 at 12 hours per day plus per diem (sic). September 15 through September 23 he was asked to stay to return to work and was told he would be getting per diem (sic) for those days, but was sent home due to contract issues not being worked out. If you have any questions feel free to contact me Erik Robinson ██████████

The claimant's wage claim and testimony show that he believed he was being paid \$35.00 per hour, overtime, and a per diem stipend of \$135.00 per day. The claimant's wage claim seeks 64 hours at \$35.00 per hour or \$2,240.00, 51 hours at \$52.50 per hour or \$2,677.50, which includes travel time from Texas to New Hampshire, 18 days of per diem pay at \$135.00 per day or \$2,430.00 and 27 hours for travel time back to Texas at \$35.00 per hour or \$945.00. The claimant testified that he was unsure if he was told the travel time back to Texas would be paid. The total claim is for \$8,292.50.

The employer testified that Erik Robinson was hired by TCH as a project manager. The claimant testified that Mr. Robinson hired him in Texas and told him what the rate of pay would be. The claimant testified that he drove from Texas with Mr. Robinson. 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 after September 14 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 their only exhibit, 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 TCH was dismayed to learn that Stored Solar had not paid the claimant. Although the subcontract between TCH and Stored Solar was not in evidence the employer's attorney testified that he understood the subcontract had been referenced in other cases before the Department.

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 September 7 to September 14, 2021. The employer testified that Erik Robinson was hired by TCH as a project manager. The claimant testified that Mr. Robinson hired him in Texas and told him what the rate of pay would be. The claimant testified that he drove from Texas with Mr. Robinson. 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. There was no testimony that the claimant was aware of Stored Solar, LLC.

or had performed any work for Stored Solar, LLC. These facts indicate that the claimant was not an independent contractor under New Hampshire law.

Although Mr. Robinson's e-mail indicated the claimant was to be paid \$34.00 per hour, the claimant credibly testified he believed he was being paid \$35.00 per hour with overtime, travel time and a per diem of \$135.00. The claimant testified that Ms. Riggall told him there was no money for TCH to pay him. The employer did not dispute that testimony.

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.

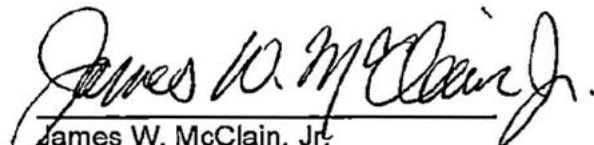
Given the testimony, as supported by the documentation provided, it is found that evidence and testimony was presented to meet the claimant's burden to prove by a preponderance of evidence that he is entitled to 64 hours at \$35.00 per hour or \$2,240.00, 51 hours at \$52.50 per hour or \$2,677.50, which includes travel time from Texas to New Hampshire, 18 days of per diem pay at \$135.00 per day or \$2,430.00 and 27 hours for travel time back to Texas at \$35.00 per hour or \$945.00. The total award is \$8,292.50.

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 \$8,292.50, 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 \$8,292.50, 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