

STATE OF NEW HAMPSHIRE  
DEPARTMENT OF LABOR  
CONCORD, NEW HAMPSHIRE

██████████  
v.

US CELLULAR

CASE #101349

DECISION OF THE HEARING OFFICER

**APPEARANCES:** ██████████ the Claimant Appeared Pro Se  
Izik Youker, appeared on behalf of the Employer

**NATURE OF DISPUTE:** RSA 275:44 IV — Employees Separated From Payroll  
Before Pay Days. Liquidated damages.

**DATE OF HEARING:** June 6, 2022

**BACKGROUND AND STATEMENT OF THE ISSUES**

The claimant filed a previous wage claim on January 1, 2022, for which a hearing was conducted on February 17, 2022 by Hearing Officer James W. McClain, Jr. A decision for the claimant was issued on March 3, 2022. The claimant filed a new hearing request solely on the issue of liquidated damages under RSA 275:44 IV on March 25, 2022. The hearing on this issue was held on June 6, 2022 with the parties appearing via Microsoft Teams Video Conferencing. At the close of the hearing the record was held open through June 13, 2022 for the submission of additional documentation by the employer.

**FINDINGS OF FACT**

The claimant was employed for less than 90 days. The claimant was paid hourly plus commission during his employment. The pay structure guaranteed a commission of \$780.00 per month, but he could also surpass this figure based on performance. The claimant was also paid hourly wages every other week. The claimant's last day of work was December 22, 2021. The claimant was paid most of the owed wages before the last hearing, and the remainder of owed wages shortly after.

Mr. Youker testified that commissions are paid roughly the third week of the month following the month they are earned. The employer has a calendar employees can access to see when they will be paid their commissions. Mr. Youker confirmed via

email on June 7, 2022 that the December commissions were paid on January 28, 2022 for active associates.

Per the testimony of Mr. Youker, the claimant was paid \$993.76 on December 28, 2021 which included \$867.01 for November Commission and \$126.75 of the December Commission. On December 30, 2021 the claimant spoke with Will Rowell who worked in the department that calculates commission payments. Mr. Rowell advised the claimant that another payment would be made on December 31, 2021 for the remaining balance owed. There was a payment made on December 31, 2021, however it was for \$23.48 that had been shorted from the claimant's October commission check. The claimant was paid \$427.11 on January 5, 2022 which he was told should have been the remainder of his commission. However, the claimant was paid \$18.41 on February 14, 2022 and was told this was the final commission owed.

The claimant was paid his final hourly check in the amount of \$591.03 on December 28, 2021. This was confirmed via email on June 7, 2022. Following Hearing Officer McClain's decision on March 3, 2022, the claimant was paid the remaining \$18.45 owed. This was the final payment made to the claimant.

### DISCUSSION AND CONCLUSIONS

Under RSA 275:44 IV, "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 in the amount of 10 percent of the unpaid wages for each day except Sunday and legal holidays upon which such failure continues after the day upon which payment is required or in an amount equal to the unpaid wages, whichever is smaller;" (emphasis added).

In this case, the employer argued that they did not withhold the owed payments without good cause. Specifically, the employer argued that they needed time to calculate the claimant's owed commissions. Finally, the employer argued that the delay in the final payment of the claimant's hourly wages was solely due to the Christmas Holidays.

The claimant argued that he should receive liquidated damages because the employer did not have good cause to withhold his pay. Specifically, the claimant argued that the employer set a minimum commission he was to be paid and as such they did not need the extra time to determine his pay. Finally, the claimant argued that the employer operated for all but one of the days between when he was terminated on December 22, 2021 and when he was paid his last hourly check on December 28, 2021.

The claimant's argument that the employer set a minimum commission he was to be paid and as such they did not need the extra time to determine his pay is found persuasive. While the employer did allow new employees to earn more than the

\$780.00 during their first 90 days, this was the minimum commission to be paid. Given that the claimant was terminated, it can reasonably be concluded that he was not earning more than the minimum. Given this reasonable conclusion there is no good cause for withholding the claimant's final commission payments. Therefore, the claimant has met his burden that his commission payment was withheld without good cause.

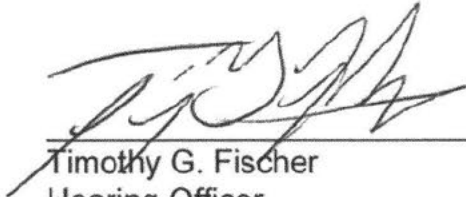
Additionally, the employer's argument that the delay in the final payment of the claimant's hourly wages was solely due to the Christmas Holidays is not found persuasive. The employer was only closed for business on December 25, 2021 which would have been the last day for the claimant to receive his pay. However, the employer could very reasonably have issued the final paycheck for the claimant on the date of termination or the next day.

Based upon a preponderance of the evidence, it is determined the claimant has met his burden that his employer withheld wages without good cause, and he is owed liquidated damages. Regarding his hourly wages paid on December 28, 2021, the claimant has shown by a preponderance of the evidence that he was paid three days late and is entitled to \$177.31 ( $\$591.03 \times 10\% \times 3$  days). Regarding the commissions paid on December 28, 2021, the claimant has shown by a preponderance of the evidence that he was paid three days late and is owed \$298.12 ( $\$993.73 \times 10\% \times 3$  days). Regarding the payment of his underpaid October commission on December 31, 2021, the claimant has proved by a preponderance of the evidence that he was paid over one month late and is entitled to the maximum allowed double damages in the amount of \$23.48. Regarding the payment of his December commission on January 5, 2022, the claimant has proved by a preponderance of the evidence that he was paid over eleven days late and is entitled to the maximum allowed double damages in the amount of \$427.11. Regarding the payment of his remaining December commission on February 14, 2022, the claimant has proved by a preponderance of the evidence that he was paid over one month late and is entitled to the maximum allowed double damages in the amount of \$18.14. Finally, the payment on March 9, 2022 based on Hearing Officer McClain's decision on March 3, 2022, the claimant was paid the remaining \$18.45 owed, which was more than two months late, and the claimant is entitled to the maximum allowed double damages in the amount of \$18.45. The total amount owed to the claimant is \$962.61.

### DECISION

Based on the evidence and testimony presented, the claimant has shown by a preponderance of the evidence that his employer withheld wages without good cause, and he is owed liquidated damages in the amount of 30% on payments for commission and hourly wages received on December 28, 2021. The claimant has shown by a preponderance of the evidence that his employer withheld wages without good cause, and he is owed liquidated damages in the amount of 100% on payments for commission payments made on December 31, 2021, January 5, 2022, February 14, 2022, and March 9, 2022.

The employer is ordered to send a check in the amount of \$962.61 to this Department payable to ██████████ for the liquidated damages to this Department within 30 days of the date of this order.



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Timothy G. Fischer  
Hearing Officer

Date of Decision: June 29, 2022

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