

STATE OF NEW HAMPSHIRE  
DEPARTMENT OF LABOR  
CONCORD, NEW HAMPSHIRE

██████████

v.

PATRIOT MEDICAL

CASE NO. 101692

DECISION OF THE HEARING OFFICER

**Appearances:** Attorney John Wolkowski represented ██████████ ██████████ the claimant.

John Buck, the owner, appeared on behalf of the employer

**Nature of Dispute:** RSA 275:43 I - Unpaid Commissions

**Witnesses:** Mr. ██████████ the claimant  
Mr. Buck, owner of Patriot Medical

**Employer:** Patriot Medical

**Date of Hearing:** August 3, 2022 ( Record held open until August 15, 2022)

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant filed a wage claim on April 3, 2022, asserting that he is due wages in the amount of \$3066.29 for unpaid commission for sales in August of 2021.

The employer was notified by the Department of Labor (DOL) via a letter dated April 5, 2022. The employer filed an objection to the claim on April 13, 2022. A hearing was then scheduled accordingly for review of the claimant's claim for unpaid wages on May 24, 2022 at 9:45 am. The claimant retained counsel who then filed a motion to continue based on the claimant's unavailability which was granted on May 23, 2022. The hearing was then rescheduled for June 21, 2022. On June 17, 2022 the employer reached out to the DOL and explained that he was unavailable for the scheduled hearing and had received late notice of the hearing. The hearing was again continued and rescheduled for August 3, 2022. The hearing was held with all parties present at the DOL offices on this date. Due to time constraints, the record was held open until August 15, 2022 to allow for written closing arguments.

FINDINGS OF FACT

██████████ ██████████ is a 50-year-old male who was employed by Patriot Medical (Patriot) as a sales representative. He was hired as a 1099 employee with a contract that

indicated he would be paid a 17% commission on his sales. The payments were made on the 25<sup>th</sup> of each month for the previous month (i.e. January Commissions are paid February 25<sup>th</sup>). The claimant's agreed territory included all counties in Vermont, as well as Belknap, Carroll, Cheshire, Coos, Grafton, Hillsborough, Merrimack, and Sullivan counties in New Hampshire. *See employer's page 14.* The page of the claimant's contract which identifies his territory also stated: "The parties agree that the Company, at its sole discretion, may alter or amend the Territory described in this Exhibit B upon prior written notice to Representative of not less than thirty (30) days." *See employer's page 14.*

Patriot had an agreement with a company called Paragon28 which produced prepackaged trays of surgical equipment for bunionectomies. Mr. ██████████ would deliver the tray of equipment to the surgeon and it would then be returned to him. Once it was returned the items in the kit that had been used would be invoiced and billed to the medical facility. Once the facility paid the bill, the commission would then be paid to the salesperson.

During the month of August, the claimant completed and submitted purchase orders on four surgeries. There is a fifth surgery noted on the print out, but the sales representative is listed as Bradley Theodoulou. The total amount of these sales was \$20,491. *See claimant's page 9.* The claimant was to receive a 17% commission payment on this amount or \$3,483.47.

#### Testimony of ██████████ ██████████

Mr. ██████████ testified that he began working for Patriot in August of 2020. He further testified that he had very little direct contact with Paragon28 as Mr. Buck handled that portion of the business. Mr. ██████████ further testified that he received only minimal training on the Paragon28 products and systems. However, the record of his training indicated that he was part of a training class and was ranked last. *See employer's page 49, 51.*

Mr. ██████████ testified that he had a good working relationship with many of the physicians in the territory he covered for Patriot. However, by the time his contract with Patriot was terminated, several of these relationships had soured.

Mr. ██████████ further testified that he believed some of the purchase orders he submitted were held back by Mr. Buck to make commission payments more affordable for the business during down months. However, when asked on cross examination to provide proof of this allegation, Mr. ██████████ could not.

Mr. ██████████ further testified that two additional sales representatives were hired by his employer to cover what had been his territory alone. He was asked to train these two employees without additional compensation. Mr. ██████████ also testified that he and Mr. Buck had an agreement that no additional sales representatives would be added to the territory until sales reached \$100,000.00 per month, which did not happen before the new employees were added. Mr. ██████████ further testified that one of the two new employees was a good salesman, but the other was not. Mr. ██████████ also testified that

the poor salesman, (who was a physician's son), had also caused problems in the Vermont Territory.

Furthermore, Mr. ██████████ testified that he found the Paragon28 application for submitting purchase orders unusually complicated compared to others he had used. During his testimony, Mr. ██████████ indicated he did not have a clear understanding of how the purchase orders he generated were submitted.

On cross-examination, Mr. ██████████ acknowledged selling a product not produced by Paragon28 or sold by Patriot to one of his contacts. *See employer's page 74.* He also denied that the signature noted on the non-compete and non-solicitation agreement portion of his employment contract was his. *See employer's page 19.*

On cross examination, Mr. ██████████ conceded that he had received emails from Mr. ██████████ requesting that he submit missing purchase orders. *See employer's page 88, 93.* He also conceded that he had received e-mails about not paying one of the other sales representatives who he had asked to cover some surgeries for him. *See employer's page 27, 38.* He also received e-mails from Mr. Buck questioning who had actually completed and submitted purchase orders between Mr. ██████████ or the trainee sales representative. *See employer's page 40-41, 46.*

#### Testimony of John Buck:

Mr. Buck testified, that Mr. ██████████ was not paid the claimant amount as he had not submitted purchase orders for the sales he was allegedly not paid for. Mr. Buck further testified that when Mr. ██████████ first started he was advance approximately \$3000.00 which was supposed to be paid back to the company but never was.

### 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.

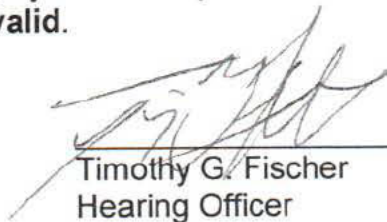
The claimant argued that he was not paid commissions he earned for sales in August totaling \$28,947. The claimant further argued that he submitted all required purchase orders on these sales. Finally, the claimant argued that the employer did not pay him due to personal disputes between them and not for any legitimate business reasons.

The employer argued that the claimant had never submitted the completed purchase orders. Building on this, the employer argued that Mr. ██████████ was counseled on at least two occasions about not properly submitting his purchase orders. The employer further argued that the claimant was advanced a commission payment of approximately \$3,000 at the beginning of his employment which he never paid back. The employer further argued that the claimant had breached his contract by representing other medical equipment suppliers at the same time as Patriot.

The employer's argument that claimant had never submitted the completed purchase orders is persuasive. The claimant testified that he submitted all of his purchase orders. However, the claimant also testified that he found the submission software unnecessarily complex and confusing. He also testified that he was not entirely sure how purchase orders were submitted. Additionally, while the supplied print out of a screen shot does include billing order numbers, it did not include any purchase order numbers. *See claimant's page 9.* No other proof of submission of the purchase orders was submitted. Without definitive evidence that the purchase orders were submitted, the claimant cannot meet his burden.

**DECISION**

Based on the evidence and testimony presented, the claimant has not met his burden. The claimant's request for payment of unpaid commissions is denied. The wage claim for unpaid commissions is **invalid**.



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Timothy G. Fischer  
Hearing Officer

Date of Decision: September 12, 2022

TGF/nd