

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

█
v.

Exceptional Exteriors, L.L.C. d/b/a
Universal Windows Direct of Manchester
CASE #102655

DECISION OF THE HEARING OFFICER

APPEARANCES: Claimant, self-represented
Brittany Stacey, Esq., representing the employer

NATURE OF DISPUTE: RSA 275:43, I — Weekly (unpaid commissions)

DATE OF HEARING: September 19, 2022 (record held open until October 3, 2022)

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant filed a wage complaint on June 8, 2022, alleging that he is owed commissions totaling \$72,000 for sales made while employed from 2020 to 2022. Notice of claim was sent to the employer on June 10. The employer filed an objection to the claim on June 23. The claimant requested a hearing on June 23. The hearing notice was sent on August 31.

FINDINGS OF FACT

The following findings are based on the testimony of the claimant, employer's representative Sean Dodge, exhibits offered by both parties, and matters of record in the Department file. During the course of the hearing, the witnesses acknowledged under oath that their written submissions to the Department were true, and the factual allegations included therein are treated as part of the testimony in the case.

The claimant is 41 years old and lives in Exeter. He studied golf careers and sports management in college. Prior to his working for the employer, he was a golf pro and worked at golf clubs. He started working for the employer in March 2020. He was hired to do outside sales of the employer's home-improvement products based on company-provided leads. After a training

period, he was paid by commissions. He was paid on a semi-monthly basis, at the middle and end of the month. He received 50 percent of commissions earned at the end of each pay period, with the balance paid when the home-improvement work was completed and final balance paid by the customer.

Claimant testified that at some point in 2020, not long after he was hired, the commission scale was explained to him verbally. He said he was never shown or given a written commission scale until November 2021. Based on the verbal description, he understood that his commissions were to be based on gross sales, with a three-tiered schedule: 12 percent on self-generated sales at full retail, 10 percent on sales discounted by up to 15 percent below retail, and 8 percent on sales discounted more than 15 percent below retail.

He testified that almost all his sales were in the second tier (10 percent). His total earnings in 2020, as reflected on his W-2 for that year, were roughly 10 percent of his gross sales in 2020, as he expected based on the verbal agreement. Claimant said he was not claiming unpaid commissions for 2020.

Starting in 2021, claimant's sales increased dramatically but his commissions dropped way below what he expected. Given the effects of the pandemic on lead times and sale prices, he thought the drop-off may be due to delays in job completion and late payment by customers. He said that in regular weekly meetings with the employer, he and another salesman began continually asking for an explanation of what jobs were paid out and what jobs were still in the pipeline, etc. He said he was never provided with this information.

Claimant testified that in November of 2021, the employer presented him with a chart describing a commission schedule based not on gross sales but on gross profit. It was not described as a new commission structure, but rather, as the one that had been in effect all along. He said he had never seen the chart before. He was very upset by this information, but he continued working for the company anyway.

Claimant testified that his sales in 2021 totaled about \$1.8 million, which would yield a commission of around \$190 thousand under the commission agreement provided him verbally when he was hired. However, he said he was paid only \$126,445 in commissions for 2021. By agreement with the employer, he took a leave of absence from late December 2021 until March of 2022. From March until May, he testified that his sales totaled \$431,413.00. He said he received a check that barely covered his expenses.

On May 26, 2022, following a dispute with the employer over the commissions issue, claimant was terminated. He filed the instant claim on June 10, 2022, claiming that, after allowing for the commissions paid, he was still owed a total of \$72,000.

Sean Dodge, 54, of Manchester, has a degree in business. He is the owner of the home improvements company, which he started about seven years ago. He currently has about ten employees. The business is a limited liability corporation doing business under the Universal Windows Direct of Manchester trade name. It uses sales, advertising, and training materials and products licensed from Universal Windows Direct, a national firm.

Mr. Dodge testified that the commission structure based on gross profits was shown to the claimant within the first three months after he was hired and then on at least three other occasions afterwards in 2021. The employer's exhibits included a copy of the chart. Er-Exh. 2. The chart had a place for the employee's signature but the signature line was blank. Mr. Dodge said that the employer did not require the claimant to sign and acknowledge receipt of the commission sheet; claimant was given the opportunity to sign it but never did.

Mr. Dodge said that the COVID pandemic resulted in supply chain and price increases which were responsible for delays in job completion and a reduction of net commissions in 2021. He said the claimant had been paid all commissions currently due and in fact had been overpaid to the extent of \$78,175.00, because the company elected not charge back to the claimant all of the reductions in profit that resulted from price increases and other effects of the pandemic.

DISCUSSION AND CONCLUSIONS

The 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).

Claim for unpaid commissions. Wages include commissions. RSA 275:42, III. RSA 275:43, I requires that an employer pay all wages when due. "When due" is a reference to contingencies specified in the commission agreement that the employee needs to meet in order to be eligible for the commission. It was the claimant's burden to prove the terms of the commission agreement and that he made the sales and satisfied all other contingencies entitling him to receive the claimed commission.

The claimant testified that he was told upon hiring that his commissions would be a set percent of gross sales depending on the amount by which the sale was discounted below list price, and that he did not receive contrary information until November 2021, when the employer showed him a chart with commissions pegged to gross profit. The employer contradicted this testimony,

and stated that the claimant was shown the gross-profit chart within the first three months and several times thereafter.

Pursuant to Lab 803.03 (a),

(a) Every employer shall at the time of hiring and prior to any changes notify his or her employees in writing as to the rate of pay or salary, whether by daily, weekly, biweekly, semi-monthly, or yearly, or by commissions, as well as the day and place of payment and the specific methods used to determine wages due pursuant to RSA 275: 49.

Pursuant to subparagraph (f) of the same rule,

Pursuant to RSA 279:27 and RSA 275:49, VI, relative to record keeping requirements, every employer shall:

(6) Maintain on file a signed copy of the written notifications, signed by the employee and provided to each employee as required by Lab 803.03 (a), (b), and (c) above.

Based on the Mr. Dodge's own testimony as well as the claimant's, it does not appear that the employer complied with either of the above rules. Compliance with these rule gives an employer a ready means of resolving disputes such as the present one. But an employer's failure to follow these rules does not relieve the claimant of his burden of proving his claim. In particular, non-compliance (or absence of evidence of compliance) does not give a claimant carte blanche in a claim for unpaid wages.

However, based on the claimant's testimony and the documentary evidence, it is found that the claimant sustained his burden of proving that the commission agreement was based on gross sales and not gross profit. The claimant's testimony about the commission agreement was corroborated by documents showing that in 2020 his paid commissions were a function of gross sales (generally 10 percent). Er-Exh. 5. The employer's testimony that claimant was shown not long after he was hired that his commissions would be based on gross profit was not corroborated by a written agreement signed by the claimant.

Employer's evidence included a report of commissions paid by job, Er-Exh. 5. The amounts actually paid were listed in a column labeled "Payment Total." According to this report, in 2020, the claimant was paid a commission equal to ten percent of the product total, at least for middle-tier sales (sales discounted by no more than 15 percent). However, commencing in 2021, the report showed a number of instances where the commission paid was significantly lower, e.g., a sale of \$29,960.00 resulted in a commission of \$1,498.00, and a sale of \$21,000 resulted in a commission paid of \$1,050.00, Er-Exh. 5 at 37.

Mr. Dodge pointed out that the same report also showed, in a separate column labeled "Earned commission," the commissions that the claimant should have been paid according to the schedule that had been in force since the beginning, Er-Exh. 2. He said he had spent several hours producing the exhibit

for the hearing and acknowledged that the claimant had never seen it before. He also agreed that it contained a few errors due to typing mistakes. To whatever extent the chart may demonstrate what the employer believed claimant should have been paid according to the gross-profit chart, it does not undercut the finding that the claimant was led to believe his commissions would be paid on gross sales and not gross profit.,

The claimant's testimony as to the applicable commission agreement is credited and the employer's contradictory testimony is not.

It is further found that the claimant was first shown the gross-profit chart in November of 2021 and that he continued working for the employer after receiving that information. Accordingly, he was entitled to be paid commissions on gross sales only until that point in time, after which he was free to leave the job or accept the commission rate going forward. It is therefore found that for sales after November 2021, the commissions could be based on the chart shown in Er-Exh. 2. Therefore his claim for underpaid commissions is limited to sales made in 2021 up through the end of November 2021. (Claimant agreed that he was paid his commissions due for 2020.)

Claimant's evidence included summaries of net sales by salesperson. According to these printouts, claimant's sales for 2020 through 2022 were as follows:

Year	Sales
2020	\$ 805,374.00
2021	\$1,795,238.00
2022	<u>\$ 431,315.00</u>
Total	\$3,031,235.00

According to the employer's sales report, claimant finalized four sales in December 2021, totaling \$65,070.00. Er-Exh. 4 at 24. Subtracting the December sales from claimant's 2021 total sales gives \$1,730,168.00 in sales that should have been paid at the 10 percent commission rate. Ten percent of that total is \$173,016.80 is the amount of commissions that should have been paid on sales through November 2021.

Employer's evidence also included payroll records for the claimant covering his entire period of employment, Er-Exh. 1. According to these records and the Department's calculation, claimant was paid commissions as follows:

Pay dates	Commission
3-27-2020 to 1-1-2021	\$ 83,756.75
1-8-2021 to 11-26-2021	\$ 119,809.37
12-10-2021 to 9-2-2022	<u>\$ 51,753.98</u>
Total	\$ 255,320.10

The payments made from January 8, 2021 through November 26, 2021 are taken as corresponding to the claimant's 2021 sales through November of

2021. Comparison of commissions earned from January 8, 2021 to November 26, 2021 with sales completed in the first 11 months of 2021 shows that commissions were underpaid to the following extent:

Commissions earned based on sales price	\$173,016.80
Commissions paid	<u>\$119,809.37</u>
Net balance of unpaid commissions	\$ 53,207.43

DECISION

Based on the testimony and evidence presented, and as RSA 275:43, I requires employers to pay employees for commissions at the agreed rate, it is found that the employer underpaid the claimant for commissions earned in the first 11 months of 2021. His claim is therefore found to be **valid in part**. The amount owing is \$53,207.43.

The employer is hereby ordered to send a check to the Department of Labor, payable to ██████████ in the amount of \$53,207.43, less any applicable taxes, within 30 days of the date of this Order

October 20, 2022
Date of Decision


George A. Stewart, Hearing Officer

GAS/js