

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

Stonehouse Surface Specialists Corp DBA Miracle Method

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages
RSA 275:43-b unpaid salary
RSA 275:44 IV liquidated damages

Date of Hearing: January 28, 2019

Case No.: 58195

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant asserts he is owed \$81,462.86 in unpaid commissions for sales he made for the company during his employ; \$384.62 in unpaid salary that the employer deducted from his salary for two sick days he took during the course of 2017; and \$441.92 in unpaid salary the employer deducted from his final pay period's wages. He further seeks liquidated damages on these wages.

The employer denies the claimant is due any further commissions, as they pay commissions on closed sales, not proposals.

FINDINGS OF FACT

The claimant worked for the employer as a sales person from June 2017 through October 24, 2018, when he resigned via email, effective immediately.

The parties disagree as to actual numbers, but the claimant was paid a base salary and commission. The claimant argues he originally received a base salary of \$40,000 with commissions and then on April 8, 2018, his base salary increased to \$50,000 with commissions. The employer argues the claimant received a base salary of \$40,000 at all times during his employment and commissions.

The parties do agree that commissions were paid at 1% of the total sale for sales made on leads from the office and 2% of the total sale for sales made on leads the sales person generated themselves.

The employer had advanced a \$10,000 annual draw, paid on a weekly basis, to the claimant during his first year. He only generated \$6,832.82 in commissions during that year, which did not cover the full \$10,000 draw, and accordingly no commission payments were made to the claimant. No recovery of the negative balance was made from the claimant's wages.

No documentation exists to memorialize the salary or commission pay arrangement between the parties.

The claimant submitted Job Estimate Sheets which provide a description of the potential work to be performed. The document provides a statement at the bottom which reads, "The prices, specifications and conditions set forth above and on the reverse of this estimate are satisfactory and hereby accepted. Miracle Method is authorized to do the work as specified. Full payment will be made upon job completion. I understand that cancellation within TWO WORKING DAYS of schedule work will result in a cancellation fee. I understand that any alteration or deviation from the above specifications will require an extra charge over and above this estimate. All agreements are contingent upon strikes, accidents, delays beyond Miracle Method's control." There is a signature line and date line for the customer to sign. Some of submitted Job Estimate Sheets had been signed by the customers and some had not.

Once the Job Estimate Sheet has been signed by the customer it is an accepted order by the employer. However, both parties agreed that it is common for accepted orders to be cancelled and never completed.

Any of the Job Estimate Sheets which were not signed by customers are not orders which were accepted by the employer, did not generate commissions and do not result in a commission payable to the claimant, regardless of how much time and effort he spent with the client.

The remaining Job Estimate Sheets which were signed by customers would be considered orders accepted by the employer and would generate commission to the claimant if the work was completed and payment was made to the employer. No proof was submitted that any of the work was completed and customer payment received.

The claimant made no oral argument regarding the two sick days of salary he claims the employer deducted from his wages during 2017, which he referenced in his written wage claim. He did not point to any of the extensive documentation he previously submitted to prove his claim of unpaid salary.

The claimant made no oral argument regarding his final week's wages being paid incorrectly, which he referenced in written wage claim. He did not point to any of the extensive documentation he previously submitted to prove his claim of unpaid salary.

DISCUSSION

The claimant argues he generated sales for the employer for which he is now due commissions in the total of \$81,462.86. In support of this claim, he submitted Job Estimate Sheets which had been provided to potential clients which he claims were his sales to customers. He believes all of these Job Estimate Sheets should result in a commission payable to him, regardless of whether the documents were signed by the customer.

The New Hampshire Supreme Court, in Bryan K. Galloway v. Chicago-Soft, Ltd. 142 NH 752, established a "general rule" regarding commission sales that states, "a person employed on a commission basis to solicit sales orders is entitled to his

commission when the order it is accepted by his employer. The entitlement to commissions is not affected by the fact that payment for those orders may be delayed until after they have been shipped. This general rule may be altered by a written agreement by the parties or by the conduct of the parties which clearly (*emphasis in original*) demonstrates a different compensation scheme".

Though required by RSA 275:49 I and II and Lab 803.03 (a), (c) and (f)(6), the employer failed to memorialize the commission plan terms and conditions in writing. As such, the employer did not alter the general rule as allowed under this standard.

Accordingly, any of the Job Estimate Sheets which were not signed by customers are not orders which were accepted by the employer, did not generate commissions and do not result in a commission payable to the claimant, regardless of how much time and effort he spent with the client.

The remaining Job Estimate Sheets which were signed by customers would be considered orders accepted by the employer and would generate commission to the claimant if the work was completed and payment was made to the employer. No proof was submitted that any of the work was completed and customer payment received.

The claimant bears the burden to prove that the specific work from the Job Estimate Sheet he provided to the employer bearing the customers signature was completed and that the employer received payment for those specific services. The claimant did not meet that burden as he failed to provide persuasive testimony or evidence that any work was completed pursuant to the Job Estimate Sheets which were signed by the customers.

Further, the claimant generated \$6,832.82 in commissions during his first twelve months of employment. It does not appear commensurate that he would have generated \$81,462.86 in commissions during his final five months of employment.

The claimant did not show any specific pay stubs or other documentation to show that he was in fact not paid his full salary for any dates in 2017 or for his final week of work in October 2018, nor did he provide any persuasive testimony to this end.

Because the claimant did not provide any testimony or point to any evidence to show he was not paid his full salary as required by RSA 275:43-b, he did not meet his burden in these matters.

As no wages were found to be due, no liquidated damages can be awarded.

Even if wages had been found to be due, the claim for liquidated damages would have failed.

RSA 275:44 IV holds an employer liable to an employee for liquidated damages if the employer, "willfully and without good cause fails to pay" all wages within the timeframe required by statute. The New Hampshire Supreme Court defined "willfully and without good cause" in Ives v. Manchester Subaru, Inc. 126 NH 796 to mean, "voluntarily, with knowledge of the obligation and despite the financial ability to pay the wages owed". The Court continued, "an employer acts willfully if, having the financial ability to pay wages which he knows he owes, he/she fails to pay them".

The claimant would have the burden to prove by a preponderance of the evidence that the employer voluntarily, with knowledge of the obligation and despite the financial ability to pay the wages owed, failed to pay them.

In this case, the employer provided credible and persuasive testimony that they believed the claimant has received all wages due.

Because they held a genuine belief no wages are owed, they could not be held liable for liquidated damages under this standard.

CONCLUSIONS

As the claimant did not provide persuasive testimony and evidence that the signed Job Estimate Sheets resulted in work performed by the employer and paid for by the customer, the Hearing Officer finds that the claimant failed to prove by a preponderance of the evidence he is due the claimed commissions.

Because the claimant did not provide persuasive testimony and evidence that he is due the claimed salary, the Hearing Officer finds that the claimant failed to prove by a preponderance of the evidence he is due the claimed salary.


Because no wages are found to be owed, no liquidated damages can be awarded.

DECISION

Based on the testimony and evidence presented, as RSA 275:43 I requires that an employer pay all wages due an employee, and as this Department finds that the claimant failed to prove by a preponderance of the evidence that he is owed the claimed wages/commissions, it is hereby ruled that this portion of the Wage Claim is invalid.

As RSA 275:43 I requires that an employer pay all wages due an employee, and as RSA 275:43-b requires that a salaried employee received their salary, in full, for any pay period in which they perform any work, and as this Department finds that the claimant failed to prove by a preponderance of the evidence that he was not paid all wages/salary due, it is hereby ruled that this portion of the Wage Claim is invalid.

As RSA 275:44 IV holds an employer liable to an employee for liquidated damages if the employer willfully and without good cause fails to pay wages due in the time frame required by statute, and as this Department finds that the claimant failed to prove by a preponderance of the evidence that the employer willfully and without good cause failed to pay wages due in the time frame required, it is hereby ruled that this portion of the Wage Claim is invalid.


Hearing Officer

Date of Decision: February 20, 2019

Original: Claimant
cc: Employer