

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

v.
ATECH AUTOMOTIVE

Case No. 62335

DECISION OF THE HEARING OFFICER

Appearances: _____, claimant, on his own behalf, Pro Se
Mark Brown, on behalf of ATech Automotive

Nature of Dispute: RSA 275:43 I – Weekly, Unpaid Wages
RSA 275:48 I – Deductions, Unauthorized
RSA 275:43 VII- Unpaid Compensatory Time

Date of Hearing: June 14, 2021

BACKGROUND AND STATEMENT OF THE ISSUES

On the basis of the claimant's assertion that he is owed \$3,075.00 in unpaid wages and illegal deductions, he filed a Wage Claim with the New Hampshire Department of Labor (DOL) on March 17, 2021; a Notice of Wage Claim was forwarded to the employer on March 19, 2021. The employer objected to the Wage Claim in writing. The claimant requested a hearing on April 12, 2021. Notices of Hearing were sent to both parties on May 18, 2021.

A formal hearing was held at the Department of Labor Headquarters in Concord, New Hampshire on June 14, 2021 at 1 PM. All parties appeared telephonically. Telephonic testimony was provided by Mr. _____ on his own behalf, as well as Mr. Mark Brown on behalf of ATech Automotive.

FINDINGS OF FACT

Duly sworn, the claimant shared that he was born on April 3, 1963 and resided in Milford, NH at the time of the hearing. The claimant began performing work for ATech Automotive on June 3, 2020. The employer asked him to come and work for his company performing automotive repairs. The claimant agreed that he was brought onboard as a "1099" employee but understood after 90 days that he would become a full-time employee.

The claimant indicated that he worked hours during the employer's business day from 6:30 AM through 5 PM. He worked Mondays through Fridays. He was asked how we knew what work was to be performed and indicated that consumers would call and advise what work they needed done. Scheduling of the services to be performed was done by multiple people in the office, including the claimant. The work the claimant performed included towing vehicles, performing mechanical or maintenance repairs, and preparing utility trailers for sales. The claimant testified that the employer was ultimately responsible for the end results of the work performed.

The claimant does not have a business of his own registered with the Secretary of State; he does have a Social Security number. The claimant indicated that having assistants never came up. The claimant was paid \$1,500.00 each week. He was routinely paid on Fridays with a paper check. No taxes are withheld.

The claimant last performed work for ATech Automotive on March 12, 2021. He went to the Hollis Post Office and picked up a vehicle to have a seatbelt fixed. That Friday he was paid for the prior week's work. He went to the employer's office the following Tuesday to get his final check and was told he'd have to wait. He never did receive the final weeks' pay of \$1,500.00. The employer deducted car storage payments from the final wages. The claimant acknowledged that he does use a storage space for vehicle but that they did not have a written contract or agreement for the employer to withhold storage space rent from his paychecks.

The claimant contends he is also owed wages for compensatory time for performing after hours towing services. He performed towing for police and broken mail trucks. The claimant did not keep a log of the dates and hours worked performing these after hour tows. He indicated there was a written repair order for each service provided, but he did not provide these as evidence for review at the hearing.

Duly sworn, Mark Brown testified that his date of birth is January 16, 1957 and at the time of the hearing he resided in Brookline, NH. The employer testified that the claimant is paid \$1,500.00 weekly for work he performs. He contends the claimant was not an employee but rather a 1099 contractor. He did not complete a W-4 at the time of hire and taxes are not withheld from his pay. He contends the claimant held himself out to be in business for himself and used the employer's shop, after hours, to perform work for others. The employer testified that the claimant was responsible for the end result of the work he performed.

The employer testified that he and the claimant had a verbal agreement regarding a rental space for him to store his vehicle and contends that the claimant owes him more money for the rental space than he owes the claimant in wages. He feels he is the one owed money.

The claimant denies holding himself out as a business owner. He testified that he does not solicit business. He agreed that he did perform work on his own car and on his son's car at the business location. He testified that otherwise all work he performed was for ATech Automotive.

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 \$3,075.00 in unpaid wages and illegal deductions. 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.

As a threshold matter, a determination must be made as to whether the claimant was in fact an employee of ATech Automotive. The employer contends that the claimant was a contractor and not an employee. There is no dispute that the claimant was paid weekly in the amount of \$1,500.00, taxes were not withheld, he received a 1099. This however does not mean that the claimant is an independent contractor. If an individual performs services for pay, with limited exceptions for real estate and residential placement for persons with disabilities, they are presumed to be an employee under RSA 281-A: 2VI (b) (1). The employer must then

rebut this presumption by proof that the person meets all of the criteria provided by RSA 281-A: VI (b) (1) (A)-(G).

Here, the testimony supports that the claimant possesses a Social Security number. It appears that the claimant has control and discretion over the means and manner of the work he performed. The claimant had little control over the time the work was performed. While he was involved in some of the scheduling, other tasks were scheduled for him and he was required to work during business hours between 6:30 AM and 5 PM. The evidence does not support that the claimant holds himself out to be in business for himself. He does not have a business registered with the Secretary of State, there is no indication that he drives a vehicle with decals advertising his own company, that he invoices for services on his own company letterhead or hands out business cards. The evidence also does not support that the claimant is contractually liable for the satisfactory completion of the work he performs.

Ultimately, it is determined that the claimant was an employee of ATech Automotive in accordance with RSA 281-A:2 VI. It appears that the employer has attempted to wash his hands of his obligations as a business owner/employer under a misguided belief of subcontractor status. There is no dispute that the claimant performed work for the week of March 8, 2021 through March 12, 2021. There is also no dispute that the claimant was paid \$1,500.00 weekly. The employer acknowledged that wages in the amount of \$1,500.00 were earned; however, the employer argued that the claimant owes him money for unpaid rental space which exceeds the \$1,500.00 in wages that he earned for the final week of work. The employer did not pay the claimant for his final week worked as a means of recouping money he believes he is owed under their car storage agreement.

Applicable law governing illegal deductions from wages is New Hampshire RSA 275:48 (I), which states, in part:

No employer may withhold or divert any portion of an employee's wages unless:
(a) The employer is required or empowered to do so by state or federal law, including payroll taxes.
(b) The employer has a written authorization by the employee for deductions for a lawful purpose accruing to the benefit of the employee as provided in regulations issued by the commissioner.

The evidence does not support that the employer had written authorization from the claimant to deduct storage space rental from his pay. The withholdings of such from the claimant's final paycheck is not permissible. Payment of wages in the amount of \$1,500.00 for the claimant's work performed on the week of March 8, 2021 through March 12, 2021 are found to be owed and due.

With respect to the claimant's request for payment for compensatory time worked performing after-hours towing for the police and post office vehicles, the claimant has failed to produce sufficient evidence to support his claim. The claimant was unable to provide evidence to support dates and hours worked performing the services. The evidence does not support payment is due for compensatory hours worked.

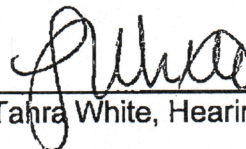
The claimant contends that he is due \$1,050.00 for illegal deductions that were taken without verbal or written consent. The claimant testified that his employment agreement was that he was paid \$1,500.00 per week. He testified that he was paid weekly on Fridays via paper check. An evidentiary packet contains copies of checks paid which predominantly show payments of \$1,500.00. There is one payment in the amount of \$1,800.00, and three below \$1,500.00 (\$1,400.00, \$1,050.00, and \$1,350.00). As there are no pay stubs provided or time records provided it is impossible to know what these deductions (or additions) were for. The records certainly do not support ongoing deductions for storage in the amount of \$1,050.00 as requested. The claimant has failed to meet his burden of proof with respect to this issue.

DECISION

After a thorough consideration of the evidence and testimony presented, and as RSA 275:43 (I) requires that an employer pay an employee all wages that are owed and due, it is found that the claimant has successfully met his burden to prove by a preponderance of the evidence that he is owed for unpaid wages; it is hereby ruled that **this Wage Claim is valid in the amount of \$1,500.00.**

The employer is hereby ordered to send a check to the Department of Labor, payable to _____ in the total of **\$1,500.00**, less applicable taxes with a statement of said deductions, **within thirty (30) days of the date of this Order.**

July 8, 2021
Date of Decision



Tahira White, Hearing Officer

Original: Claimant
cc: Employer

TW/cb