

STATE OF NEW HAMPSHIRE  
DEPARTMENT OF LABOR  
CONCORD, NEW HAMPSHIRE

  
v.

Sentek Dynamics, Inc.

CASE #62724

**DECISION OF THE HEARING OFFICER**

**APPEARANCES:** Jeffrey Christensen, Esq., representing the claimant,  
and Kevin Sibbernson, Esq., representing the  
employer

**NATURE OF DISPUTE:** RSA 275:42, I, II — employer/employee relationship  
RSA 275:43, I — unpaid wages and unpaid  
commissions

**DATE OF HEARING:** September 15, 2021 (record held open until  
October 6, 2021 for submission of written closings)

**BACKGROUND AND STATEMENT OF THE ISSUES**

The claimant filed his a wage claim on May 21, 2021. He alleged two separate claims: First, that he was owed commissions on sales; the amount claimed was \$174,015.85. Second, that the employer without justification reduced his hours from July to December 2020, and again from December 2020 to April 2020, resulting in lost wages; the amount claimed was \$31,800.00.

The employer objected to the claim on June 11, 2021. In addition to denying the claim for wages and commissions, the employer asserted that the claimant was an independent contractor and not an employee. The claimant requested a hearing on June 21, 2021. Notice of the hearing was sent on July 28, 2021.

At the conclusion of the hearing, the record was held open until October 6, 2021 for submission of written closings, including a joint statement of undisputed facts. Both parties timely responded. The parties also agreed to bifurcation of issues: employer/employee status, entitlement to commissions, and the claim for unpaid wages would be decided first. In the event of an affirmative answer as to the first issue and an affirmative answer to either commissions or wages or both,

the actual dollar amounts due to the claimant would be submitted for determination by the Department if the parties were unable to reach an agreement. Further procedural details regarding this agreement were spelled out in the Department's letter dated September 17, 2021.

### FINDINGS OF FACT

The following findings are based on the testimony of the claimant, employer's representative James Zhuge, exhibits offered by both parties,<sup>1</sup> and matters of record in the Department file. Both witnesses swore that their written submissions to the Department were true and accurate to the best of their knowledge and belief, and those submissions are taken as part of the testimony in the case.

Claimant is 63 years old and lives in Bow. He has a bachelor of science degree in business management from Merrimack College, awarded in 1982. He has about 30 years' experience working in the field of environmental test equipment sales. He worked for three different companies on a salary-plus-commissions basis, and then for 13 years he ran his own business. He testified that the usual commission rate in this field is around five percent.

Claimant started working for the Santa Clara-based employer toward the end of June 2019. The terms of his relationship with the company were set forth in an offer letter from company president James Zhuge. Cl. Exh. 1.

Claimant was hired to provide inside sales support. He was paid \$40.00 per hour. He was expected to work 30–40 hours a week. He reported to sales director Reza Tavana. He worked out of his home in Bow. He submitted monthly invoices showing hours worked and was paid accordingly. Er. Exh. D. His payment was not contingent upon completion of specific tasks. He testified that when he went to visit clients for sales or support, he wore a shirt that had the company logo on it. He also had a business card that identified him as "Inside Sales" for the company, bore the company logo, and gave an email address for him at the company domain. He was directed in how to perform his work by his manager and by Mr. Zhuge; for example, he was told how to prepare and present quotes. He was also instructed as to which clients or potential clients he needed to see or make contact with. The company paid his travel expenses. He testified that he did not work for any other companies, or for his own company, while he was working for the employer.

By the terms of a confidential information and invention assignment agreement that claimant was required to sign, Cl. Exh. 2, inventions or works of authorship by the claimant belonged to the company, with some exceptions, and

---

<sup>1</sup> Due to untimely disclosure, claimant's exhibits 3 and 5 were admitted but limited to the dates on which these two emails were sent.

he was prohibited from engaging in conflicting contract work during the time he worked for the company and twelve months after.

In December 2019, the claimant was given a different job and a different title. He was made a regional sales manager and given part of the geographic region (the Western region) previously handled by another employee. He was responsible for the international sales in the Western region. He started in the new position January 1, 2020. In his new role, he had more direct contact with customers. He said he was working longer hours, but did not invoice them to the employer.

The claimant testified that his new role was supposed to include commissions on top of his hourly pay, which remained at \$40.00. He said that he discussed commissions with Mr. Zhuge in December 2019. Specific commission rates, commission sharing, or other terms that would apply in calculating the claimant's commissions were not discussed. Based on his prior experience in the industry, claimant believed that his commission rate would be five percent. He said that Mr. Zhuge told him he would put something together and get back to the claimant, but never did.

In June 2020, in response to a business slow-down related to COVID-19, Mr. Zhuge reduced the maximum number of hours the claimant was allowed to work, from 40 initially down to 15, then to 25, and later, 35.

Claimant said that at around this time (June 2020), he had a second discussion with the president regarding commissions. He ask where was the commission agreement he had been promised. He said that Mr. Zhuge "brushed it under the table." Claimant never received a written commission agreement. Neither was he ever told that he was not on commission in his role as regional sales manager.

Claimant testified that the company had sales quotas for each region. The quota for his region was \$1.2 million. He said that he exceeded it, achieving sales of \$2.4–\$2.5 million. The last and largest sale he took credit for was to a company in southeast Asia (referred to as "Company 1" to preserve confidentiality). The sale was worth about \$1.5 million. Claimant testified that the deal was pretty much finalized by December 2020 and claimant was expecting a final purchase order. He told Mr. Zhuge just before Christmas that he was waiting for the purchase order.

Claimant testified that, on December 27, 2020, he was placed on furlough and instructed to stop working on company efforts; he was to refer matters to the sales director. Two days later, the purchase order from Company 1 came in. Further work was required on the contract, but by that time, the claimant was on furlough and was prevented from doing it.

Claimant was never taken off furlough. He deemed that he was effectively terminated on December 27, 2020.

On April 15, 2021, Mr. Zhuge offered to rehire the claimant:

If you are still available, we are able to offer you part time work at \$35/hour and roughly 20 hours a week. The work amount can go up or down, depending on the company performance. Let me know if you are interested. If not, it is OK.

James Zhuge

Er. Exh. G. Claimant responded on April 22, 2021, asking for more specifics about the offer and also asking where his commission was for the work he did as regional sales manager and claiming unpaid wages as well:

James,

Thank you for your April 15 email concerning your job offer.

First, what job duties are you asking me to perform? Do you intend to have me run the international region that I was in charge of previously? I assume this will be the case.

If it is the case, we will have to discuss compensation which will include the industry standard 5% commission. You previously promised me a commission when I took over international sales, and you still haven't paid it to me. I took on the responsibility for international sales precisely because you promised me a commission. You owe me over \$142,000 in unpaid commissions alone. I was responsible for 43% of the business in 2020, and I was never compensated for it. You also owe me additional monies for putting me out of work for 12 weeks and reducing my hours while I was still there.

Er. Exh. G. Claimant never received a reply to this email. He filed the instant complaint on May 21, 2021.

James Zhuge is 58 years old and lives in Palo Alto, California. He is president of the employer company. The company started about 10 years ago. He described the company's business as sourcing primarily Asian-made products to fit customer needs.

Mr. Zhuge denied ever offering the claimant a commission agreement. He said that the subject was discussed in December 2019 when the claimant's job was changed to regional sales manager. At that time, he told the claimant that a commission agreement might be offered if the claimant would accept a reduction in his hourly rate of pay. Claimant was not interested in such an arrangement, therefore nothing further was done in that regard. Claimant's compensation was continued on the \$40.00 per hour basis.

Mr. Zhuge agreed that the claimant raised the issue of commissions again in June 2020 when his hours were cut back. He said he repeated the offer of a commission agreement in return for a reduction in claimant's hourly rate, but again claimant was not interested. Mr. Zhuge testified that no specific commission rate or other terms were ever discussed.

Mr. Zhuge testified that claimant's email of April 22, 2021 was the first time he had ever claimed that he was owed commissions or unpaid wages.

## DISCUSSION AND CONCLUSIONS

The claimant had the burden of proving by a preponderance of the evidence that she 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).

Employer-Employee Relationship. On the issue of RSA 275:42, I, II, incorporating provisions of RSA 281-A:2, it was the claimant's burden to prove that he was an employee and not an independent contractor as the employer contends. It was not contested that the claimant was paid to perform services for the employer. Therefore, pursuant to RSA 281-A:6(b)(1), claimant was presumed to be an employee. To rebut this presumption, it had to be shown that the claimant met each of seven statutory criteria, set forth in RSA 281-A:6(b)(1)(A)-(G). Arguably, it was the employer's burden to rebut the presumption as to each criterion.

Regardless of whether it was the employer's burden to rebut the presumption, or the claimant's burden to show the rebutting criteria were not satisfied, based on the claimant's testimony, which was not contradicted and is credited, it is clear that at least three of the independent-contractor criteria were not met.

RSA 281-A:6(b)(1)(B): Although claimant could choose the hours he worked, he did not have control and discretion over the means and manner of performance of the work. He was directed in how to perform his work by his manager and by Mr. Zhuge; for example, he was told how to prepare and present quotes. He was also instructed as to which clients or potential clients he needed to see or make contact with.

RSA 281-A:6(b)(1)(E): Claimant did not hold himself out as being in business for himself. When he went to visit clients for sales or support, he wore a shirt that had the company logo on it. He also had a business card that identified him as "Inside Sales" for the company, bore the company logo, and gave his email address at the company's email domain. Under the terms of a confidential information and invention assignment agreement that claimant was required to sign, inventions or works of authorship by the claimant belonged to the company, with some exceptions, and he was prohibited from engaging in conflicting contract work during the time he worked for the company and twelve months after.

RSA 281–A:6(b)(1) (F): The relationship was described as at-will and there was no evidence to show that the claimant would be contractually liable to the employer for failure to complete his assigned work or for deficiencies in such work.

Based on the foregoing, it is found that the claimant met his burden of proving the employer-employee relationship.

Claim for unpaid commissions. RSA 275:43, I requires that an employer pay all wages when due. Wages include commissions. “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 is the claimant’s burden to prove that he met the contingencies entitling him to receive the claimed commission.

In case, it was undisputed that there was no written commission agreement. The claimant’s testimony was that in December 2019, Mr. Zhuge told him that a written commission agreement would be presented to him at some point, and that such agreement would apply to his sales in his new job as regional sales manager. He admitted that specific commission rates, commission sharing, and other terms that would apply in calculating the claimant’s commissions were never discussed. Even accepting claimant’s testimony, it would require a considerable amount of speculation to ascertain whether the claimant met the contingencies he needed to meet in order to qualify for commissions, under a yet-to-be formulated agreement—let alone determine what commission rate to apply.

Moreover, although Mr. Zhuge acknowledged having a conversation about a commission agreement in December 2019 and another one in June 2020, he denied that he ever made an unconditional promise to put together a commission plan for the claimant. He testified that he told the claimant that the claimant would have to accept a reduction in his hourly rate of pay if he wanted to go on commission, and the claimant was not interested in doing that. Therefore Mr. Zhuge did not pursue the matter.

Claimant performed in his new role as regional sales manager throughout 2020, never received a commission, and only brought up the subject in June when told that his hours were going to be reduced. He did not refer to the matter again until April 2021, in the context of responding to an offer for rehire, following his termination on December 27, 2020.

Considering all the above circumstances, Mr. Zhuge’s testimony is credited that he never prepared a commission plan for the claimant because the claimant would not agree to his stated condition that the claimant accept a reduction in his hourly pay if he wanted to be offered a commission plan.

Accordingly, it is found that the claimant failed to meet his burden of proof that he was entitled to commissions on sales he made in his new job.

Claim for lost wages due to reduced hours. In his wage claim, claimant alleged that the employer without justification reduced his hours from July to December 2020, and again from December 2020 to April 2021, resulting in lost wages in the amount \$31,800.

Based on the testimony and evidence submitted at hearing, it is found that the reductions in hours were prospective in nature. Claimant was told to reduce his hours and he did so. He was paid for all the hours he worked. There was no evidence that the claimant had a contract entitling him to a fixed salary or a fixed amount of hours going forward. He was an at-will employee. The employer was free to reduce his hours according to business needs, so long as it did so prospectively and did not refuse to pay him for hours worked.

Claimant did not meet his burden of proving that he was not paid his wages due.

### DECISION

Having carefully reviewed the testimony and evidence submitted, it is found that the claimant proved there was an employer/employee relationship, but failed to prove that the employer owed him for unpaid commissions or unpaid hourly wages. His claims under RSA 275:43, I are therefore ruled **invalid**.

November 2, 2021  
Date of Decision

  
George A. Stewart, Hearing Officer

GAS/cb