

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

██████████
v.

Junior Tejada and Alpha Contracting Services, L.L.C.
CASE #63606

DECISION OF THE HEARING OFFICER

APPEARANCES: Claimant, self-represented
Junior Tejada, on behalf of the employer, self-represented
Helton Rodrigues, on behalf of the prime contractor Alpha Contracting Services, L.L.C., self-represented

NATURE OF DISPUTE: RSA 275:43, I — Weekly (unpaid wages)
RSA 275:44, IV — Employees Separated from Payroll before Pay Days (liquidated damages)

DATE OF HEARING: May 11, 2022

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant filed a wage claim on October 4, 2021, alleging that he was owed \$1,725.00 for hanging sheetrock at a residence in Hudson. He identified the employer as Alpha Contracting Services, of 301 Daniel Webster Highway in Merrimack and the prime contractor as Madelin Matrilie, of 36 Palm St. in Nashua. In an email to the Department on October 5, 2021 the claimant further alleged that he was hired to hang 100 sheets of drywall at \$13.00 per sheet, but he actually installed 125 sheets.

In an amended complaint filed October 13, 2021, the claimant listed the employer as DJ Pro Painting of 36 Palm St. in Nashua and the prime contractor as Alpha Contracting Services of 301 Daniel Webster Highway in Merrimack. He also included the specific allegations from the October 5, 2021 email.

Notice of claim was sent to the employer and the prime contractor. The employer filed a response indicating that DJ Pro was not the name of the

claimant's employer. The prime contractor filed no response. The claimant requested a hearing. Notice of hearing was sent on April 8, 2022.

At the hearing, the parties agreed that the employer was Junior Tejada (he was no longer using the name DJ Pro Painting) and the prime contractor was Alpha Contracting Services, L.L.C. Madelin Matrille was employer Junior Tejada's wife. Claimant was accompanied by ██████████ of Nashua, to serve as his interpreter. ██████████ was advised of the duties of an interpreter and he took an oath to perform those duties accurately and with neutrality to all parties.

FINDINGS OF FACT

The following findings are based on the testimony of the claimant, the employer, and the prime contractor, exhibits offered by the claimant and employer, and matters of record in the Department file. The claimant and the employer acknowledged under oath that their written submissions to the Department prior to the hearing were true and accurate to the best of their knowledge and belief, and those statements are treated herein as part of the testimony in the case.

The claimant is ██████ years old and lives in Nashua. He was hired by Mr. Tejada to hang sheetrock on the second floor of the house in Hudson. He was to be paid \$13.00 per sheet and the job was estimated to require 100 sheets. He did the work starting September 1, 2021.

The day before the job started, claimant rented a U-Haul truck to move his personal belongings because he was moving out of his residence. He put his personal belongings into storage. On September 1, 2021, he still had the truck and he used it to transport some of the sheetrock from Home Depot to the jobsite. He testified that he had to pay about \$72.00 extra to the U-Haul for the extra time. He had a copy of the rental agreement on his mobile phone showing an estimated rental cost of \$72.00 for a September 1, 2021 truck rental.

The job took about three days. At some point during the work, a disagreement arose as the number of sheets that the claimant had installed. Claimant insisted it was more than the 100 sheets of the original estimate.

A September 7, 2021 text message conversation between the claimant and the employer was introduced into evidence. In this conversation, the claimant stated that there were 125 sheets at the job, he installed 112, and 13 were not used. He said he should have been paid \$1,456.00 for the 112 sheets. He acknowledged that the employer had already paid him \$900, and said that the employer still owed him \$556 for the sheetrock.

The employer's response, if any, to this request was not included in the exhibit.

Junior Tejada, 30, of Nashua, testified that he hired the claimant to sheetrock the second floor, including the stairwell leading up to it. He agreed that the claimant had used a rental truck to bring some of the sheetrock, but he denied that claimant had asked to be reimbursed for this amount, or that he had agreed to do so.

Mr. Tejada said the job should have required 105 sheets at most. Claimant completed the second floor but not the stairwell to the second floor. He paid the claimant \$900 before the job was completed but he refused to pay the claimant any more than that because the claimant did not finish the job. However, he stated at the hearing that he was now willing to pay the \$556.00 that the claimant had asked for in the text message conversation on September 7, 2021 (although he did not agree that the claimant had installed more than 100 sheets).

Helton Rodrigues, 42, of Nashua testified that the company he represented was the prime contractor on the house where the claimant worked. He testified that he had estimated the amount of sheetrock that would be required for the claimant's job was 100 sheets plus 5 extra for possible wastage. He did not deal with the claimant directly, but dealt with Mr. Tejada, who was a subcontractor on the job. He testified that he had paid all his subcontractors on the job.

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).

The claimant's testimony that he hung 112 sheets at an agreed rate of \$13.00 is credited. So is his testimony that he used a rental truck to transport some of the sheetrock to the jobsite, with the employer's knowledge, and incurred \$72.00 in expenses on account of that.

With respect to the wage claim for hanging sheetrock, pursuant to RSA 275:42, III, "wages" includes compensation for labor by an employee whether figured by hour, piece, or other basis of calculation. In this case, it is found that the claimant hung 112 sheets at an agreed rate of \$13.00 per sheet and was therefore entitled to wages of \$1,456.00. He was paid \$900.00, leaving a balance owing of \$556.00.

With respect to the claim for reimbursement of truck-rental costs, pursuant to RSA 275:43, V and RSA 275:57, employee expenses that are a matter of employment practice or policy are also deemed wages, when due. It is found that the claimant extended his truck rental contract with U-Haul for purpose of using it to transport sheetrock to the worksite and thereby incurred an expense of \$72.00. It is further found that such expenses are paid by the employer as a matter of practice or policy. There was no evidence that the claimant requested reimbursement prior to filing the instant claim. However, a delay in seeking reimbursement does not preclude a claimant from doing so in a wage claim.

With respect to the claim for liquidated damages, RSA 275:44 provides, in pertinent part,

IV. If an employer willfully and without good cause fails to pay an employee wages as required under paragraphs I, II or III of this section, such employer shall be additionally liable to the employee for liquidated damages in the amount of 10 percent of the unpaid wages for each day except Sunday and legal holidays upon which such failure continues after the day upon which payment is required or in an amount equal to the unpaid wages, whichever is smaller.

The referenced subparagraphs I, II and III set forth the applicable time limits for payment. The applicable time periods are either the next regular payday or within 72 hours of separation, depending on the circumstances. In this case, it is immaterial whether the shorter or the longer time limit applied, because even assuming the longer period applied, the employer's delay in payment has exceeded 10 countable days. Thus, if a liquidated damage award were warranted in this case, it would be the maximum amount allowed under the statute, i.e., the full amount of the unpaid wages.

Under the facts of this case, only a partial award of liquidated damages is warranted.

Pursuant to RSA 275:44, IV, an award of liquidated damages requires a finding that the employer acted "willfully and without good cause." Our Supreme Court has construed this expression as a single phrase meaning "voluntarily, with knowledge that the wages are owed and despite financial ability to pay them." Ives v. Manchester Subaru, Inc. (N.H. 1985). The Court also stated, "A willful act is a voluntary act committed with an intent to cause its results. It is not, by contrast, an accident or an act committed on the basis of a mistake of fact."

Here, it is found that there was a legitimate dispute as to the exact amount of sheetrock that the claimant installed. However, it was not disputed that the claimant installed at least 100 sheets at \$13.00 per sheet. Based on that fact, he was owed at least \$1,300.00. The employer paid the claimant only \$900.00, leaving a balance of \$400.00 that the employer knew or should have known was due. With respect to this amount only, it is found that the employer's delay in paying was willful and without good cause.

As to the expense for the truck rental, the claimant did not prove that the employer was presented with a specific request for repayment until the claim was filed here, and thus the employer's failure to pay that amount was not willful and without good cause.

DECISION

With respect to the claim for unpaid wages, the Department finds the claim valid to the following extent:

Sheetrock installed	\$1,456.00
Rental truck	\$ 72.00
Credit for amount already paid	<u>(\$ 900.00)</u>
	\$ 628.00

With respect to the claim for liquidated damages, the Department finds that the employer acted willfully and without good cause in not paying the claimant \$400.00 that was owed for the undisputed 100 pieces of sheetrock. As this amount remained unpaid for more than 10 countable days, liquidated damages are awarded in the amount of \$400.00. (Liquidated damages are not awarded for the additional 12 pieces that were in dispute.)

The total award, wages plus liquidated damages, is \$1,028.00.

The employer is hereby ordered to send a check to the Labor Department, payable to ██████████ in the amount of \$1,028.00, within 30 days of the date of this Order.

RSA 275:46 holds the prime contractor liable to the worker for unpaid wages in the event of a subcontractor's failure to pay them. However, based on the employer's testimony at the hearing, it is understood that the employer is willing and able to comply with this order. If the employer fails to make the required payment, the prime contractor is required to do so.

June 1, 2022
Date of Decision


George A. Stewart, Hearing Officer

GAS/nd