

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

[REDACTED]

v.

FOOTE'S DRYWALL

CASE NO. 22-WG- 00199

DECISION OF THE HEARING OFFICER

Appearances: [REDACTED] the claimant appeared Pro Se.

Tim Foote, the owner, appeared on behalf of the employer

Nature of Dispute: RSA 275:42 I & II Employer/Employee Relationship
RSA 275:43 I - Unpaid Wages
~~RSA 275:43-b — Payment of Salaried Employees, Unpaid Salary~~
(Removed at Hearing)

Employer: Foote's Drywall

Date of Hearing: December 12, 2022

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant filed a wage claim on October 24, 2022, asserting that he is due wages in the amount of \$3,400.00 for unpaid gross wages.

The employer was notified by the Department of Labor (DOL) of the initial claim via letter dated October 25, 2022. The employer raised an objection which was received at the DOL on November 10, 2022. Following this objection, the claimant requested a hearing on the matter. A hearing was then scheduled accordingly for review of the claimant's claim for unpaid wages and employer/employee relationship on December 12, 2022 at 9:45 am. The claimant appeared in person at the appropriate date and time. Tim Foote, the owner of Foote's Drywall called the DOL and advised he was stuck in traffic and could not appear in person. Mr. Foote asked if he could appear via telephone, the claimant did not object and the hearing went forward.

The parties agreed at the beginning of the hearing that the claimant was to be paid hourly and requested that RSA 275: 43-b Payment of Salaried Employees, Unpaid Salary be removed.

FINDINGS OF FACT

██████████ (Mr. ██████████) is a 54-year-old male who has worked multiple jobs with Mr. Foote over the last 20+ years. Mr. Foote had been hired by a homeowner in Bow, NH for a remodel. Mr. ██████████ was contacted about doing some of the work with Mr. Foote beginning on September 5, 2022. He was paid \$25 per hour and worked for 134 hours. Mr. ██████████ has done work on his own and for several other contractors over the course of his working years.

Mr. ██████████ testified that he completed the tasks using his tools and materials provided by Mr. Foote. Mr. ██████████ explained that his own tools were unavailable to him at the time because they had been pawned. Mr. ██████████ set his own hours due to his living at McKenna House and needing to be back by a certain time every day. Mr. ██████████ testified that he entered into a verbal agreement and never completed any employment paperwork with Mr. Foote. Mr. ██████████ testified that he was never paid for the work he performed. Mr. ██████████ further testified that he was aware that the homeowner had not paid for the work. Mr. ██████████ also testified that he signed on to a lawsuit against the homeowner with Mr. Foote.

Mr. Foote testified that he had a verbal agreement with Mr. ██████████ to perform some of the work on the remodel. Mr. Foote testified that he has known Mr. ██████████ for many years and has worked with him several times. Mr. Foote explained that Mr. ██████████ substance problems have caused issues in the past, and as such he would not hire him as an employee. Mr. Foote testified that he and Mr. ██████████ had discussed that the homeowner had not paid for the work yet.

DISCUSSION AND CONCLUSIONS

The claimant has the burden of proof in this matter to show by a preponderance of the evidence that he is/was an employee and not an independent contractor. 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.

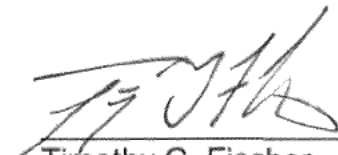
RSA 275: 42 II States: II. "Employee" means and includes every person who may be permitted, required, or directed by any employer, in consideration of direct or indirect gain or profit, to engage in any employment, but shall not include any person exempted from the definition of employee as stated in RSA 281-A:2, VI(b)(2), (3), or (4), or RSA 281-A:2, VII(b), or a person providing services as part of a residential placement for individuals with developmental, acquired, or emotional disabilities, or any person who meets all of the following criteria: (a) The person possesses or has applied for a federal employer identification number or social security number, or in the alternative, has agreed in writing to carry out the responsibilities imposed on employers under this chapter. (b) The person has control and discretion over the means and manner of performance of the work, in that the result of the work, rather than the means or manner by which the work is performed, is the primary element bargained for by the employer. (c) The person has control over the time when the work is performed, and the time of performance is not dictated by the employer. However, this shall not prohibit the employer from reaching an agreement with the person as to completion schedule, range

of work hours, and maximum number of work hours to be provided by the person, and in the case of entertainment, the time such entertainment is to be presented. (d) The person hires and pays the person's assistants, if any, and to the extent such assistants are employees, supervises the details of the assistants' work. (e) The person holds himself or herself out to be in business for himself or herself or is registered with the state as a business and the person has continuing or recurring business liabilities or obligations. (f) The person is responsible for satisfactory completion of work and may be held contractually responsible for failure to complete the work. (g) The person is not required to work exclusively for the employer.”

In this case, Mr. ██████████ testified that he has worked for many different contractors and accepted work directly from homeowners. Mr. ██████████ further testified that he did not complete any employment paperwork for Foote's Drywall. Mr. ██████████ also testified that he set his own hours. Mr. ██████████ further testified that while he used tools provided by Mr. Foote, this was only due to his own tools being pawned. Additionally, Mr. ██████████ and Mr. Foote noted the homeowner has not paid his bill for the work. Both gentlemen further agreed that it is customary in the contracting business for hourly employees to be paid weekly, and sub-contractors to be paid at the end of the job. Given this testimony, it is clear that Mr. ██████████ was an independent sub-contractor and not an employee.

DECISION

Based on the evidence and testimony presented, the claimant has not shown by a preponderance of the evidence that he was an employee of Foote's Drywall. Therefore, it is found that Mr. ██████████ claim for unpaid wages is **invalid**.



Timothy G. Fischer
Hearing Officer

Date of Decision: January 6, 2023

TGF/nd