

**COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO  
CIVIL DIVISION**

MIRACLE HOME HEALTH CAER LLC, :  
Appellant, : CASE NO. 11 CVF 09 12278  
-vs- : JUDGE SCHNEIDER  
:  
DIRECTOR, OHIO DEPARTMENT OF :  
JOB AND FAMILY SERVICES, et al., :  
Appellees. :

**DECISION AND ENTRY**

**SCHNEIDER, JUDGE**

This matter is an unemployment compensation tax appeal that comes before this Court pursuant to R.C. 4141.26. In a September 15, 2011 Decision, the Unemployment Compensation Review Commission (“Review Commission”) affirmed a Director’s Reconsidered Decision dated April 4, 2007 (“Reconsidered Decision”), which held that (i) Appellant Miracle Home Health Care, LLC (“Miracle Home”) is a liable employer effective June 16, 2003, and (ii) the individuals designated by Appellant as home caregivers are covered employees under the Ohio Unemployment Compensation Law. The Review Commission then remanded the matter to the Director of the Department of Job & Family Services to compute Miracle Home’s contribution rates for the years 2003 through 2006. This appeal was timely filed. The relevant facts and procedural history are as follows.

In the Reconsidered Decision dated April 4, 2007, the Review Commission Director affirmed a Determination of Employer’s Liability and Contribution Rate Determination dated December 15, 2006. The Reconsidered Decision found that Appellant was liable for unemployment compensation for its home caregiver employees, previously unreported, effective

July 16, 2003. It assigned a rate of 2.700% for years 2003, 2004 and 2005, as well as a rate of 4.000% for the year 2006. The Reconsidered Decision rejected Appellant's contention that the home caregivers were independent contractors, not employees, and, therefore, exempt from reporting.

On April 23, 2007, Appellant timely filed a Notice of Appeal of the Reconsidered Decision with the Review Commission. On February 17, 2010, a Hearing Officer, duly assigned by the Commission to conduct such matters for and on its behalf, held an evidentiary hearing in Columbus, Ohio. The parties were represented by counsel, witnesses appeared and testified, and exhibits were admitted into the record. On February 25, 2011, the Review Commission issued a Decision modifying the Director's April 4, 2007 Reconsidered Decision ("February 2011 Decision"). The February 2011 Decision found that while Appellant was a liable employer effective June 16, 2003, the individuals designated as home caregivers were "not covered employees" under the Ohio Unemployment Compensation Law.

On March 11, 2011, Appellee Ohio Department of Job and Family Services ("ODJFS") filed a Motion to Vacate the February 2011 Decision. On March 16, 2011, the Review Commission issued a "Notice to Vacate a Review Commission Decision," which vacated the February 2011 Decision. An additional evidentiary hearing was held before a Hearing Officer, assigned by the Commission to act on its behalf, on May 6, 2011, in Columbus, Ohio. All of the parties participated and were given both the opportunity to supplement the record as well as file substantive briefs. Following the hearing, the Review Commission issued its September 15, 2011 Decision ("September 2011 Decision") affirming the Reconsidered Decision. Specifically, the September 2011 Decision reversed the February 2011 Decision that the individuals designated as home caregivers were not covered employees and affirmed the Reconsidered

Decision that the home caregivers were, in fact, covered employees, not independent contractors, under the Ohio Unemployment Compensation Law.

Pursuant to R.C. 4141.26(D)(2), the Review Commission is the statutory trier-of-fact regarding employer tax appeals. In its September 2011 Decision, the Review Commission found the following facts to be true:

1. The employer, Miracle Health Care, LLC, provides home health care services to clients. This employer is paid through several state and federal programs. Miracle Home Health Care, LLC admits that it does have some employees who are covered under Ohio Unemployment Compensation Law. At issue in the current appeal is whether individuals who work as home caregivers for this company are in covered employment. In the year 2005, there were approximately 190 such individuals.
2. Employees providing services as home caregivers for Miracle Home Health Care, LLC are required either to be certified by the state of Ohio, or to complete training offered by Miracle Home Health Care, LLC. There is no cost for the training provided by Miracle Home Health Care, LLC, but individuals are not paid while they are trained. Individuals are not obligated to provide services to clients of Miracle Home Health Care, LLC after they complete the training.
3. Miracle Home Health Care, LLC secures home health services for its clients. Miracle Home Health Care, LLC is obligated to ensure that those clients are provided with medical care as directed by the physicians in a timely fashion. To ensure this, Miracle Home Health Care, LLC has created a list of individuals who are willing and certified to work as home caregivers. A continuing relationship exists between Miracle Home Health Care, LLC and the home caregivers that contemplates continuing or recurring work, even if not full-time. These individuals are not obligated to take clients exclusively from Miracle Home Health Care, LLC. In many instances, these individuals provide services for other entities, or have their own clients.
4. Miracle Home Health Care, LLC provides the schedule directed by the physician to the home caregiver. Thereafter, the home caregiver contacts the client to determine the hours and dates on which the services are to be provided in the client's home. The home caregiver is not required to comply with specific instructions from Miracle Home Health Care, LLC, regarding where, where, or how to perform the services. Miracle Home Health care, LLC does not require set hours during which services are to be performed.
5. Home caregivers are required to keep notes on the progress of the clients, and to specify the times and types of services they provide in these notes. The notes must be initialed by the client as dictated by the programs under which Miracle Home Health

Care, LLC is paid. This is done to ensure that the programs are paying for services that are actually provided, and this information is used for billing purposes. Miracle Home Health Care, LLC does not require that the home caregiver follow a particular order of work. If home caregivers do not wish to take a client, they are free to decline. If they decline, their name is moved from the top of the list to the bottom of the list and they will be contacted again when Miracle Home Health Care, LLC, has clients who need services.

6. Home caregivers are not required to wear a uniform, and cannot have another individual perform the work in their stead. Home caregivers are paid on a bi-weekly basis by Miracle Home Health Care, LLC. Miracle Home Health Care, LLC does not pay expenses or furnish materials for use by the home caregiver. The home caregiver has no investment in the facilities used to perform services, and experiences no profit or loss as to result of the performance of such services. No fringe benefits are provided to the home caregivers. No taxes are withheld from the home caregivers' pay.
7. The Director of Nursing for Miracle Home Health Care, LLC ensures that the home health care services are provided, which is required by the agencies that pay Miracle Home Health Care, LLC for the services. This Director of Nursing does not provide any direct supervision of home caregivers in the client's homes.
8. Miracle Home Health care, LLC has a right to discharge the home caregivers, and the home caregivers have the right to end the relationship with Miracle Home Health Care, LLC without incurring liability pursuant to the employment contract.

(September 2011 Decision, p. 2-3).

### **STANDARD OF REVIEW**

The standard of review for appeals from the Review Commission is found in R.C. 4141.26(D)(2), which states, in pertinent part:

. . . The court may affirm the determination or order complained of in the appeal if it finds, upon consideration of the entire record, that the determination or order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of such a finding, it may reverse, vacate, or modify the determination or order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law. The judgment of the court shall be final and conclusive unless reversed, vacated or modified on appeal.

In an R.C. 4141.26 appeal to the court of common pleas, the court must review and examine the evidence presented to the board. *Stouffer Hotel Mgt. Corp. v. Ohio Unemp. Comp. Bd. of Rev.* (1993), 87 Ohio App. 3d 179, 183, 621 N.E.2d 1343. The court may affirm the Review Commission's determination only if the court finds the determination supported by reliable, probative and substantial evidence and is in accordance with law. *Id.* While a reviewing court is "not permitted to make factual findings or to determine the credibility of witnesses, [it does] have a duty to determine whether the [review commission's] decision is supported by the evidence in the record." *Tzangas, Plakas & Mannos v. Ohio Bur. Emp. Serv.*, (1995), 73 Ohio St.3d 694, 696.

### **APPELLANT'S ARGUMENT**

The Appellant did not assert any assignments of error in its brief. Instead, both parties contend that the sole issue in this appeal is whether the home health caregivers of Appellant are covered under the Ohio Unemployment Compensation Act. Appellant's argument is that the Review Commission's September 2011 Decision is unlawful, unreasonable and is against the manifest weight of evidence because its home health caregivers are independent contractors, not employees.

### **LAW AND ANALYSIS**

Whether someone is an employee or an independent contractor is ordinarily an issue that must be decided by the trier of fact, particularly when sufficient evidence has been submitted to allow reasonable minds to come to different conclusions on the issue. *Brown v. CDS Transport, Inc.*, Franklin App. No. 10AP-46, 2010 Ohio 4606, ¶10, citing *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 524 N.E.2d 881, paragraph one of the syllabus; *Billman v. Massillon Dev. Group, LLC*, Stark App. No. 2007-CA-00169, 2008 Ohio 287. See also *Chickey v. Watts*, Franklin App.

No. 04AP-818, 2005 Ohio 4974 at p. 9-10. However, “where the evidence is not in conflict or the facts are admitted, the question of whether a person is an employee or an independent contractor is a matter of law to be determined by the court.” *Id.* at p. 9.

Whether one is an employee or an independent contractor depends on the specific facts of each case, with the key question being who has the right to control the manner or means of work. *Brown*, 2010 Ohio 4606, ¶9, citing *Bostic*, 37 Ohio St.3d at paragraph one of the syllabus; *Mendoza v. Bishop*, Butler App. No. CA2004-04-080, 2005 Ohio 238, ¶34; *Gillum v. Indus. Comm’n.* (1943), 141 Ohio St. 373, 48 N.E.2d 234, paragraph two of the syllabus. As noted by the Ohio Supreme Court, in making such a determination, "the factors to be considered include, but are certainly not limited to, such indicia as who controls the details and quality of the work; who controls the hours worked; who selects the materials, tools and personnel used; who selects the routes traveled; the length of employment; the type of business; the method of payment; and any pertinent agreements or contracts." *Bostic*, 37 Ohio St.3d at 146; *Brown*, 2010 Ohio 4606 at ¶9; *Baker v. Curtis C. Howard Equipment*, Madison App. No. CA98-04-019, unreported, 1998 Ohio App. LEXIS at \*4; *Nye v. Kemp* (1994), 97 Ohio App.3d 130, 133, 646 N.E.2d 262. "All indicia of an employment relationship in a given case must be assessed together as a whole." *Vajda v. St. Paul Mercury Ins. Co.*, Cuyahoga App. No. 80917, 2003 Ohio 160, ¶15, citing *Harmon v. Schnurmacher* (1992), 84 Ohio App. 3d 207, 211, 616 N.E.2d 591.

Both Appellant and Appellee argue the factors of the twenty part test set forth in Ohio Adm. Code 4141-3-05’s definition of employment with respect to the Review Commission’s determination that Appellant’s workers are covered employees. While these factors are to be used by the Director “as an aid in determining whether there is sufficient direction or control present,” the rule itself notes that the twenty factors “are designed only as guides for determining

whether sufficient direction or control exists and must be considered in totality. . . .” Ohio Admn. Code 4141-3-05. Moreover, the twenty factors of Ohio Admn. Code 4141-3-05 and the three-pronged test contained in R.C. 4141.01(B)(1)(b) are not mutually exclusive of the Ohio Supreme Court’s analysis in *Bostic. Edan Farms, Inc. v. Toth*, Mahoning App. No. 99-CA-185, 2000 Ohio 2669, ¶¶6-7. See *McConnell v. Ohio Bureau of Empl. Servs.* (Oct. 5, 1995), Franklin App. 95APE03-262, unreported, 1995 Ohio App. LEXIS 4424. Accordingly, this Court is governed by the standards set forth by the Ohio Supreme Court and the Tenth District Court of Appeals in *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 524 N.E.2d 881 and *Brown v. CDS Transport, Inc.*, Franklin App. No. 10AP-46, 2010 Ohio 4606, respectively.

The burden of proving entitlement to an independent contractor exemption is on the employer. R.C. 4141.01(B)(1)(b) presumes that any individual who performs services for pay is an employee for purposes of R.C. Chapter 4141, “unless it is shown to the satisfaction of the administrator that such individual” is an independent contractor. *Peter D. Hart Research Assoc., Inc. v. Administrator, Ohio Bureau of Emp. Servs.* (December 28, 1995), Franklin App. 95APE06-736, unreported, 1995 Ohio App. LEXIS 5870.

In this case, the Review Commission’s determination that Appellant had the right to direct and control the manner or means of work of its home caregivers, and thus, they were employees covered under the Ohio Unemployment Compensation Act, is supported by reliable, probative and substantial evidence and is in accordance with Ohio law. As found by the Review Commission, by the terms of the “Contractor’s Contract” between Appellant and its home caregivers, Appellant expressly reserved the right to direct and control the activities of the home caregivers. The contract provides that the services to be furnished are to be directed by Appellant, the caregivers are required to confirm to all applicable policies of Appellant,

including personnel qualifications, and the caregivers are under the “direct supervision by MHC, LLC” and are required to report to its management. The contract further gives Appellant the right to control the manner in which the caregivers do their work by providing that “MHC LLC, management will have full control of coordinating and evaluating contractors work on [a] daily basis. An individual from MHC, LLC., will be appointed to direct and full [sic] supervision.” (R. Exh. A., p. 7). “The fact that an employer [, such as Appellant,] does not exercise its right of control over an employee is not dispositive so long as the right of control exists and remains with the employer.” *Prime Kosher Foods, Inc. v. Administrator, Bureau of Employment Services* (10<sup>th</sup> Dist. 1987), 35 Ohio App. 3d 121, 123 (contract gave company the right of direct supervision of workers and there was no evidence that the company had relinquished its contractual right of control. The contract was the principal feature that distinguished the relationship). As long as the right to control is and remains with the employer under a contract, there is sufficient evidence for a finding that the worker is an employee and not an independent contractor. *Id.*

Appellant does not dispute that its contract with its home caregivers gives it the *right* to control the manner in which its home caregivers work, but, instead, asserts that the contract is an “inartfully worded written agreement” that does not reflect the actual conduct of the parties. (Reply Br. p. 1). Appellant contends that any genuine control or oversight of its workers is a result of state and federal regulations that require training, documentation and oversight to ensure the quality of the services delivered and that home health care aids are not defrauding the government. In essence, Appellant argues that this Court should ignore the mandatory training, documentation and oversight Appellant imposes on its workers merely because such direction and control is necessary for Appellant to get paid by the government. Appellant’s argument is unavailing. The rationale for Appellant’s imposition of direction and control over its workers is



not relevant to a determination of its workers' status under the Ohio Unemployment Compensation Act. Nor does the fact that Appellant is ensuring compliance with state and federal law diminish the actual direction and control exercised by Appellant over its workers.

Further, there is reliable, credible evidence in the record, above and beyond the contract, to support the Review Commission's September 2011 Decision. This evidence includes the factual findings of the Review Commission that:

1. Appellant requires particular training for the home caregivers, the home health care services are part of the regular business of Appellant;
2. Appellant hires and pays the wages of the home caregivers';
3. A continuing relationship exists between Appellant and a home caregiver that contemplates continuing or recurring work, even if not full-time;
4. Appellant requires the home caregiver to make and submit written progress reports;
5. There is lack of investment by the home caregivers in the facilities used to perform the services;
6. There is lack of profit or loss to the home caregiver as a result of the performance of such services; and
7. Appellant has the right to discharge a home caregiver and the home caregiver has the right to end the relationship with Appellant without incurring liability pursuant to an employment contract or agreement.

September 2011 Decision p. 7-8.

Accordingly, upon review of the contract and the evidence, the record supports the Review Commission's determination that Appellant's home caregivers are covered employees and are not independent contractors. Although no individual factor in Ohio Adm. Code 4141-3-

05 controls, the specific findings of the Review Commission with regard to Appellant's direction and control over its home caregivers were within the province of said finder of fact.

**DECISION**

This Court concludes, as a matter of law, that the September 15, 2011 Decision of Unemployment Compensation Review Commission was not unlawful, unreasonable or against the manifest weight of the evidence, and it was supported by reliable, probative, and substantial evidence in accordance with Ohio law. Accordingly, the Review Commission's September 15, 2011 Decision is hereby **AFFIRMED**.

Rule 58(B) of the Ohio Rules of Civil Procedure provides the following:

**(B) Notice of filing.** When the court signs a judgment, the court shall endorse thereon a direction to the clerk to serve upon all parties not in default for failure to appear notice of the judgment and its date of entry upon the journal. Within three days of entering the judgment on the journal, the clerk shall serve the parties in a manner prescribed by Civ. R. 5(B) and note the service in the appearance docket. Upon serving the notice and notation of the service in the appearance docket, the service is complete. The failure of the clerk to serve notice does not affect the validity of the judgment or the running of the time for appeal except as provided in App. R. 4(A).

**THE COURT FINDS THAT THERE IS NO JUST REASON FOR DELAY. THIS IS A FINAL APPEALABLE ORDER.** Pursuant to Civil Rule 58, the Clerk of Court shall

serve notice upon all parties of this judgment and its date of entry.

**IT IS SO ORDERED.**

Copies to:

Theodore R. Saker, Jr., Esq.  
Counsel for Appellant Miracle Home Health Care LLC

David Lefton, Esq.  
Office of the Attorney General  
Counsel for Appellee Director, Ohio Department of Job and Family Services

Franklin County Court of Common Pleas

**Date:** 03-14-2012  
**Case Title:** MIRACLE HOME HEALTH CARE LLC -VS- OHIO STATE  
DEPARTMENT JOBS FAMILY SERVICES  
**Case Number:** 11CV012278  
**Type:** DECISION/ENTRY

It Is So Ordered.



/s/ Judge Charles A. Schneider

Court Disposition

Case Number: 11CV012278

Case Style: MIRACLE HOME HEALTH CARE LLC -VS- OHIO STATE  
DEPARTMENT JOBS FAMILY SERVICES

Case Terminated: 10 - Magistrate

Final Appealable Order: Yes