

IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO

CARMEN MELILLO	)	CASE NO. 790886
	)	
Plaintiff-Appellant,	)	MEMORANDUM OF
	)	OPINION AND ORDER
v.	)	
	)	
DIRECTOR, OHIO DEPARTMENT	)	
OF JOB AND FAMILY	)	
SERVICES, et al.	)	
	)	
Defendants-Appellees.	)	

FRIEDMAN, J.:

{¶1.} Carmen Melillo was determined by the Unemployment Compensation Review Commission (“Commission”) to be an independent contractor and consequently denied unemployment benefits. He appeals the Commission’s decision as unlawful, unreasonable, and against the manifest weight of the evidence. For the reasons discussed below, the Commission’s decision is affirmed.

**FACTS**

{¶2.} The record reveals the following facts. Appellant, Carmen Melillo, was employed as a delivery driver for U.S. Cargo, Appellee, from January 26, 1993 until April 1, 2001. Appellant was a courier and his job duties included picking up and delivering packages for appellee and its customers. Beginning April 1, 2001, appellant was reclassified as an independent contractor under the supervision of Timothy Pullman, the operations manager. His job duties remained unchanged, although he now was required to use his own automobile and to carry automobile insurance in an amount determined by appellee.

{¶3.} Appellant was required to wear a U.S. Cargo uniform and display a U.S. Cargo badge when he made his deliveries. In 2010 he was required to lease a scanner from U.S. Cargo in order to record his deliveries for appellee’s tracking

system. Each day he received a manifest prepared by the operations manager that listed all pickups and deliveries and the time frame for them to be made. At the conclusion of his daily route, appellant would submit the manifest and this document was used to determine his weekly pay.

{¶4.} Appellant was not required to work exclusively for appellee and could sub-contract appellee's delivery services. He received a 1099 for tax purposes and designated himself as an "individual sole proprietor" on his W-9.

Appellant and appellee maintained this relationship until 2011, when appellee terminated the contract. Appellant had worked exclusively with appellee during that time span. The contract stipulated that either party reserved a right of termination with 10-days notice.

{¶5.} Appellant filed for unemployment benefits on October 30, 2011. The Ohio Department of Jobs and Family Services denied his claim on the basis that he did not have enough qualifying weeks of employment to receive benefits because he was found to be an independent contractor. The Unemployment Compensation Review Commission upheld the decision.

### **DISCUSSION**

{¶6.} The standard that Ohio courts adhere to when reviewing a commission decision denying unemployment benefits is whether the decision is unlawful, unreasonable, or against the manifest weight of the evidence. *Tzangas, Plakas & Mannos v. Administrator, Ohio Bureau of Employment Servs.*, 73 Ohio St. 3d 694, 696 (1995). "The fact that reasonable minds might reach different conclusions is not a basis for the reversal of the board's decision." *Id.* Under this standard, it is not the court's responsibility to determine if the review commission made the best decision. Instead, the court must determine that there is evidence sufficient to support the decision such that it is not unreasonable, and to show that such decision is not against the manifest weight of the evidence.

{¶7.} Appellant claims that the Commission improperly determined him to be an independent contractor.

{¶8.} A covered employer-employee relationship exists when (1) the person paying for performance has the right to direct or control the performance, and (2) when remuneration is received by the worker. R.C. §4141.01(B)(1). In order to determine whether appellee had the right to direct or control appellant's performance, the Commission utilized a 20-part test set forth in Ohio Admin. Code §4141-3-05(B). These 20 factors are designed to aid the Commission in determining the appellant's status.

{¶9.} Appellant alleges the Commission improperly utilized the 20-part test when it determined he was an independent contractor. He contends that the hearing officer made three determinations that were against the manifest weight of the evidence: Factors 1, 10, and 13.

{¶10.} Factors 1 and 10 state:

(1) The worker is required to comply with the instructions of the person for whom services are being performed, regarding when, where, and how the worker is to perform services;

(10) The person for whom services are being performed requires that the worker follow the order of work set by the person for whom services are being performed;

Ohio Admin. Code §4141-3-05(B).

{¶11.} For factor 1, the hearing officer determined that Appellant "was not required to comply with the instructions of his supervisor at U.S. Cargo regarding when, where, and how he was to perform the services." (*Decision of the UCRC*, p. 6) Similarly, for factor 10, the hearing officer determined that appellant "was not required to follow a specific order of work." *Id.*

{¶12.} Appellant contests these findings. He argues that he was required to make specific deliveries during specific time periods, which greatly restricted his ability to make stops in the order that he chose. He states that this format forced him to do his route in a specific sequence. (*Transcript of Carmen Melillo*, 25-26). However,

appellee's representatives testified that their customers, not the appellee, dictated the Appellant's delivery windows. U.S. Cargo's operation manager, Timothy Pullman, also testified that he listed appellant's stops in numerical order by zip code and not by prescribed order. (*Transcript of Timothy Pullman*, 19-20). The Court finds that as to factors 1 and 10, the Commission's decision did not go against the manifest weight of the evidence.

{¶13.} Factor 13 states:

(13) The person for whom services are being performed pays expenses for the worker performing services;  
Ohio Admin. Code §4141-3-05(B).

{¶14.} Appellant also appeals the Commission's findings for factor 13. The hearing officer found that "U.S. Cargo did not pay expenses for claimant." (*Decision of the UCRC*, p. 6). Appellant argues that his pay records from January 1, 2010 until July 29, 2011, show he was provided fuel reimbursements. However, appellant admitted that these reimbursements were not consistent. "We were getting some fuel uh compensation. That was quite a while ago though." (*Transcript of Carmen Melillo* at 27) Appellee's witnesses testified that appellant did not receive gas reimbursements. (*Transcript of Timothy Pullman* at 9, 21) Furthermore, appellant admitted that he used his own vehicle and paid all of its maintenance costs. (*Transcript of Carmen Melillo* at 27) Once again, this Court finds that the Commission's decision did not go against the manifest weight of the evidence.

{¶15.} The hearing officer's findings state that fewer than half of the 20 factors support appellant's status as an employee. (*Decision of UCRC*, p. 7) However, in the appellant's assignment of error, he states that at least 12 of the factors, as determined by the hearing officer, favor his status as an employee. It is unclear from the record how many factors the hearing officer considered, because his findings only list "less than half" favor employee status. *Id.* Yet, even if the 12 factors appellant claims show employment did indeed favor his case, these would

not affirmatively make the Commission's decision against the weight of the evidence. Appellee has noted that the 20 factors "are designed only as guides for determining whether sufficient direction or control exists and must be considered in totality." Ohio Admin. Code. §4141-3-05(B).

{¶16.} Appellee has provided several Ohio cases that support the decisions of the hearing officer and the Commission. In *Commercial Motor Freight, Inc. v. Ebright* (1944), 143 Ohio St. 127, the Ohio Supreme Court affirmed a finding of independent contractor status based on similar facts. The drivers in *Ebright* provided their own vehicles, and paid for the equipment and maintenance the vehicles required. *Id.* at 131-132. The drivers were only paid for completed work, and had the right to sub-contract out their services. *Id.* at 131. Similarly, in *Laukhart v. Administrator, Ohio Bureau of Workers' Comp.*, 1996 Ohio App. LEXIS 2216, the driver in *Laukhart* entered into an independent contractor agreement, chose his own routes, and had no taxes withheld from his paycheck. *Id.* at \*8.

{¶17.} The cases cited by appellee clearly establish that Ohio courts have considered factual situations similar to appellant's, and consistently have found competent and credible evidence to support a finding of an independent contractor status.

{¶18.} To support his argument, appellant cites *Edan Farm, Inc. v. Toth*, 2000 Ohio App. LEXIS 6276, in which the trial court awarded a delivery driver unemployment benefits. In *Toth*, the driver had signed an independent contractor agreement, and was paid based on the income his deliveries generated. *Id.* at 2. The Mahoning County Court of Appeals affirmed the trial court's judgment. However, the court's affirmance was based upon procedural grounds, in that appellant had failed to provide the transcript of proceedings before the lower court. Therefore, it had no choice but to defer to the trial court's judgment. There was no determination on the merits of the appeal.

{¶19.} Appellant also cites to *Majestic Liquor Co. v. Cook*, 1989 Ohio App. LEXIS 156 (Ohio Ct. App., Cuyahoga County 1989). In *Cook*, the appellant was granted unemployment benefits after he was discharged from a sales representative position. The Commission originally found that appellant worked exclusively for Majestic Liquor, was assigned a particular sales territory, and was paid a yearly salary. *Id.* at 3. The *Cook* court additionally determined appellant to be an employee, despite the fact that his employer did not withhold income taxes. *Id.* at 4. Appellant contends that in light of the *Cook* court's holding, the hearing officer should have put no weight on Melillo's tax status. However, the *Cook* court did not discount tax information as credible evidence for a decision; rather it merely stated that appellant's tax status was not sufficient to find the review board's decision against the weight of the evidence. *Id.* In contrast, the hearing officer in the case at bar did not rely on appellant's tax status as a dispositive test, but properly considered it as one piece of the evidence in determining appellant's employment status.

### CONCLUSION

{¶20.} In order for this Court to reverse the decision of the Department of Job and Family Services, appellant must prove that the decision was unreasonable and against the manifest weight of the evidence. This court finds that appellant has failed to do so. The Review Commission's decision relied on sufficient competent and credible evidence. Accordingly, the court affirms the decision of the Unemployment Compensation Review Commission.

IT IS SO ORDERED.

  
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JUDGE STUART A. FRIEDMAN

DATED: July 30, 2013

CERTIFICATE OF SERVICE

Copies of the foregoing Memorandum of Opinion and Order were sent via U.S. mail to all counsel of record this date: 7/30/2013

  
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JUDGE STUART A. FRIEDMAN