

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

HOCKING HILLS SERVICES, LLC,	:	
	:	
Appellant,	:	Case No. 14CVF-005707
	:	
v.	:	JUDGE SCHNEIDER
	:	
DIRECTOR, OHIO DEPARTMENT OF JOB AND FAMILY SERVICES,	:	
	:	
Appellee.	:	

**DECISION AND JUDGMENT ENTRY
AFFIRMING THE DECISION OF THE UNEMPLOYMENT COMPENSATION
REVIEW COMMISSION DATED APRIL 20, 2014
AND
NOTICE OF FINAL APPEALABLE ORDER**

SCHNEIDER, JUDGE

This matter is an unemployment compensation tax appeal that comes before this Court pursuant to R.C. 4141.26. In an April 20, 2014 Decision, the Unemployment Compensation Review Commission (“Review Commission”) affirmed a Director’s Reconsidered Decision dated April 18, 2013 (“Reconsidered Decision”), which held that Appellant Hocking Hills Services, LLC (“Hocking Hills”) was a liable employer effective January 1, 2009, and assigned contribution rates of 2.70% for the year 2009, 2.70% for 2010, 12.0% for 2011, 11.40% for 2012, and 10.5% for 2013. The Review Commission’s April 20, 2014 Decision also affirmed the Reconsidered Decision’s finding that the individuals who provided cleaning services for Hocking Hills engaged in services that would be considered covered employment, and thus, were covered employees for purposes of the Ohio Unemployment Compensation Law. The Reconsidered Decision as well as the April 20, 2014 Decision of the Review Commission

rejected Hocking Hills' claim that its workers were independent contractors, and, therefore, Appellant was not a liable employer. This appeal was timely filed.

The Appellant did not file a Brief. Appellee Ohio Department of Job and Family Services ("ODFJS") filed its merit Brief on August 22, 2014. The Appellant filed a Reply Brief on August 29, 2014.

For the reasons that follow, this Court **AFFIRMS** the Decision of the Unemployment Compensation Review Commission dated April 20, 2014.

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.*, 87 Ohio App.3d 179, 183 (1993). 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.*

In *Our Place*, the Ohio Supreme Court provided the following definition of reliable, probative and substantial evidence as:

- (1) 'Reliable' evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true.
- (2) 'Probative' evidence is evidence that tends to prove the issue in question;

it must be relevant in determining the issue. (3) ‘Substantial’ evidence is evidence with some weight; it must have importance and value.

Our Place, Inc. v. Ohio Liquor Comm., 63 Ohio St.3d 570, 571 (1992).

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.*, 73 Ohio St.3d 694, 696 (1995). Additionally, in applying this standard, the court must “give due deference to the administrative resolution of evidentiary conflicts” and to the agency’s factual findings. *University of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 111 (1980). *See also VFW Post 8586 v. Ohio Liquor Control Comm.*, 83 Ohio St.3d 79, 82 (1998).

STATEMENT OF THE FACTS

Kim Kallimanis is the owner and operator of Hocking Hills, a provider of cleaning and related services primarily for homes and cabins. The company has been in existence since 2005. While Appellant argues that “[t]he business is not one of providing janitorial services, but of locating individuals willing to perform whatever services may be needed by a client,” (Reply Br. p. 2), the company’s website describes itself as “Maids of the Hocking Hills!” (R. 134; Appellee’s Exh. H), and Appellant’s own legal counsel described Hocking Hills as a “home/cabin cleaning company” in letters to the Review Commission and Unemployment Tax Appeals. (R. p. 5 & 11). It is also clear from Ms. Kallimanis’ testimony before the Review Commission that the majority of work performed by individuals associated with Hocking Hills is home/cabin cleaning.

In 2012, ODFJS performed an audit of Hocking Hills for the period of 2009 through 2012 based upon a tip that Hocking Hills may have misclassified its workers. Ms. Kallimanis attended the audit meeting. Former ODJFS Compliance Auditor Godfried Adomako performed the audit.

During the course of the audit, Auditor Adomako examined Ms. Kallimanis' hand-written responses to the Employee Questionnaire (Appellee's Exh. C), Hocking Hill's contractor agreement (Appellee's Exh. D), the Logan County ODJFS advertisement for employment with Hocking Hills created by ODJFS with Hocking Hills (Appellee's Exh. E), time sheets reports from Hocking Hill's workers (Appellee's Exh. F), invoices to clients prepared by Hocking Hills (Appellee's Exh. G), screenshots from Appellant's website (Appellee's Exhs. H&I), and the bank account statements, Form 1040 [REDACTED] Schedule C, 1099s, check register and profit or loss business form of Hocking Hills, which [REDACTED] included in ODJFS's audit report and summary. (Appellee's Exhs. A&B). As a result of the audit, ODJFS found that the individuals who performed cleaning services for Hocking Hills were employees, not independent contractors, and that Hocking Hills controlled and directed the performance of their services.

Pursuant to R.C. 4141.26(D)(2), Hocking Hills applied to the director of ODJFS for reconsideration of the contribution determination. Upon reconsideration, the director addressed whether the cleaners were in Hocking Hills' employment, thus triggering the statutory obligation that Hocking Hills pay contributions to the unemployment compensation fund. The director determined that because Hocking Hills retained the right to direct and control the cleaners, they qualified as employees. Consequently, the director affirmed his initial determination requiring Hocking Hills to contribute to the unemployment compensation fund.

Hocking Hills then applied to the Review Commission for a review of the director's reconsidered decision. The Review Commission provided Hocking Hills with a hearing. After the hearing, the Review Commission issued a decision finding that Hocking Hills' workers were employees covered under Ohio unemployment compensation law based upon the determinative factors of direction and control. In so finding, the Review Commission found persuasive: (1) the

requirement that each individual who as offered work had to sign a yearly “Crew Member/Contractor Agreement” that specified that the worker is providing services for Hocking Hills, not the homeowner, outlined when, where and how the worker was to perform the services, as well as the procedure for the submission of timesheets to Hocking Hills that the company used to pay the workers, (2) the guidelines for a dress code of workers contained in the Crew Member/Contractor Agreement, (3) training requirements and background checks imposed by Hocking Hills, and (4) Hocking Hills provided tools, equipment, materials and/or supplies when necessary for the workers to perform the job.

LAW AND ANALYSIS

A. Assignment of Error #1 – The Commission Did Not Err In Accepting An Affidavit And Corresponding Exhibits Offered By Appellee At The Hearing

Hocking Hills argues in its first assignment of error that the affidavit of Ms. Alphrena Prince, Assistant Chief of the Compliance Section of the Review Commission, and exhibits A through I attached thereto, “were not properly authenticated and, therefore, by law, could not be considered by the Commission.” Notice of Appeal, p. 1. Specifically, Appellant asserts that the affidavit was signed by Ms. Prince, but the notary attestation indicates that the affidavit was signed by an Amy Boreman-Weber, and thus, neither the affidavit nor the exhibits authenticated by the affidavit should have been considered by the Hearing Officer.

Although administrative appeals to government agencies are required to comport with fundamental aspects of due process, they are not judicial proceedings. Consequently, the rules of evidence “do not directly apply in administrative proceedings[.]” *Plain Loc. Schools Bd. of Edn. v. Franklin Cty. Bd. of Rev.*, 130 Ohio St.3d 230, 2011-Ohio-3362, ¶ 20; *Simon v. Lake Geauga Printing Co.*, 69 Ohio St.2d 41, 44 (1982). Hearsay may be considered by an administrative agency and the rules of hearsay exclusion are not strictly applied in administrative hearings.

Felice's Main St. v. Ohio Liquor Control Comm., 10th Dist. No. 01AP-1405, 2002-Ohio-5962, ¶11. When evidence is admitted despite being hearsay, the trier of fact must consider whether the evidence is reliable enough to be considered substantial and probative. *In re Petition for Annexation of 162.631 Acres*, 52 Ohio App.3d 8, 15 (10th Dist.1988). This is a question going to the weight, not the admissibility, of the evidence.

Additionally, due deference must be given by the Court to the administrative resolution of evidentiary conflicts. *Carter v. Ohio State Bd. of Edn.*, 10th Dist. No. 10AP-1116, 2011-Ohio-2945, ¶8. Because the rules of evidence are relaxed, an administrative agency has “substantial leeway in evaluating the evidence before it and drawing inferences from it.” *State ex rel. Donohoe v. Indus. Comm.*, 10th Dist. No. 08AP-201, 2010-Ohio-1317, ¶14, quoting *State ex rel. Shelly Co. v. Steigerwald*, 121 Ohio St.3d 158, 2009-Ohio-585, ¶28.

A review of the hearing transcript in this appeal reveals that Ms. Kallimanis, on behalf of Appellant, testified to and authenticated every single exhibit attached to the affidavit in question, except for the audit summary, which was Appellee’s Exhibit B. See R. p. 86, 87, 88-89, 90, 91, 92, 93-96, 97, 98, 101; Tr. p. 29, 30, 31-32, 33, 34, 36, 37, 38-39, 41, 44, 45. The record also reveals that most of the exhibits attached to the affidavit were Appellant’s own documents and business records. Hocking Hills does not deny that the exhibits attached to the affidavit were its official business records that it produced to ODJFS as well as ODJFS’s audit report for Hocking Hills. Nor does Hocking Hills point to any discrepancy between Assistant Chief Alphrena D. Prince’s affidavit authenticating the exhibits and the documents sworn to in her affidavit. Indeed, Appellant does not dispute that ODJFS Assistant Chief Alphrena D. Prince is correctly identified as the person making the statements sworn to in the affidavit, her title and

responsibilities at ODJFS are correctly stated in the affidavit, and it is her signature on the affidavit.

The transcript of the hearing additionally reveals that the Hearing Officer noted and considered Appellant’s objection to the offered affidavit and exhibits as well as considered Appellee’s explanation as to why an error occurred with the affidavit, before admitting them into the record. R. 62, 105; Tr. p. 5, 47-48. ODFJS asserted it was simply a typographical error in the notary attestation, the Hearing Officer accepted this explanation, and he agreed to allow ODJFS to submit a corrected affidavit. R. 105; Tr. p. 48. As a result, the Court finds that the Hearing Officer weighed the evidentiary conflict and appeared to rely on his own common sense in admitting the affidavit and exhibits into the record. The Court defers to the determination of the Hearing Officer and the Review Commission to admit the affidavit and exhibits into the hearing record and gives due deference to the administrative resolution of this evidentiary conflict, particularly in light of the fact that Ms. Kallimanis testified extensively regarding all but one exhibit attached to the affidavit and independently authenticated the exhibits. The admission of the affidavit and corresponding exhibits, which Appellant does not dispute are relevant, substantive and probative evidence, is in accordance with Ohio law. Appellant’s first assignment of error is overruled.

B. Assignment of Error #2 – The Commission Did Not Err In Failing To Allow Appellant The Opportunity To Cross-Examine Individuals Who Prepared Exhibits Admitted Into The Record

In its second assignment of error Appellant contends that the Review Commission erred in failing to allow Appellant the opportunity to cross-examine the individuals who prepared the exhibits on which the Review Commission relied, specifically former Auditor Godfred Adomako. This assignment of error is not supported by the record or Ohio law.

First, as noted above, the majority of the exhibits on which the Commission relied were prepared by Appellant and were Appellant's own business records, screen shots of Appellant's website, and responses given by Appellant and its employees to ODFJS's audit. Ms. Kallimanis testified as to every single exhibit extensively, except the audit summary. Legal counsel for Appellant had the opportunity to question Ms. Kallimanis about the exhibits as well as ask her follow-up/re-direct questions at the end of the hearing.

Second, while Mr. Adomako did not testify at the hearing, the Hearing Notice served on Appellant contained instructions that put Hocking Hills on notice that it had the right to request the issuance of subpoenas to require the attendance of necessary witnesses. Appellant could have subpoenaed any witnesses that it considered essential to its defense to testify at the hearing, including Mr. Adomako. It did not.

Third, and more importantly, the Ohio Supreme Court "has never required direct evidence" to prove a claim during an administrative proceeding; instead the hearing officer "may draw reasonable inferences and rely on his or her own common sense in evaluating the evidence." *Donohoe, supra* at ¶14, quoting *Shelly, supra* at ¶29, citing *State ex rel. Supreme Bumpers, Inc. v. Indus. Comm.*, 98 Ohio St.3d 134, 2002-Ohio-7089, ¶69. Indeed, the Tenth District Court of Appeals has noted that many procedural requirements, such as the right to cross-examine a witness, are "not required for due process in administrative actions to the same extent as in criminal court actions." *See also Orange City School Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 74 Ohio St.3d 415, 417 (1996) (upholding the admission of an appraisal that relied on data collected by one who did not testify and that violated Evid.R. 703 concerning expert testimony). As a result, ODFJS was not required to call Godfred Adomako as a witness at the hearing and the Review Commission was not required to allow Appellant the opportunity to

cross-examine Godfred Adomako in order to admit the audit report and summary that he prepared into the hearing record, particular when Appellant could have, but chose not to, issue a subpoena for his participation in the hearing. Appellant's second assignment of error is overruled.

C. Assignment of Error #3 – The Commission Did Not Err In Failing To Consider the BWC Audit Of January of 2012 That Found The Individuals Who Work For Appellants Were Independent Contractors

Appellant's third assignment of error contends that the Review Commission erred by failing to consider the fact that the Bureau of Workers' Compensation ("BWC") deemed Appellant's workers to be independent contractors in an audit conducted on January 10, 2012. Such argument, however, ignores the hearing record and Ohio law.

The hearing transcript shows that the Hearing Officer accepted and considered Ms. Kallimanis' testimony regarding the results of the 2012 BWC audit. The Hearing Officer also allowed legal counsel for Appellant to make arguments at the hearing related to the relevance of the results of the BWC audit. The Hearing Officer did not fail to consider the actual BWC audit report of Hocking Hills, as Appellant alleges, because Hocking Hills did not offer it as an exhibit at the hearing. There was nothing besides Ms. Kallimanis' unsupported testimony for the Hearing Officer and the Review Commission to consider.

Appellant's argument also ignores the fact that this is an appeal of a determination of whether Hocking Hills is an employer for purposes of unemployment taxes, not whether or not whether individuals should be covered by the BWC due to claimed work related injuries. The BWC, ODFJS and the Review Commission are all different agencies. The agencies are independent from one another and have different missions. The governing law and protocol enforced by and interpreted by the BWC and ODFJS is also different. As a result, the Hearing

Officer was not required to consider the audit findings of the BWC allegedly issued over a year prior to ODJFS's audit of Hocking Hills.

Under Ohio law, *res judicata* requires that there be a prior, final, valid decision on the merits by a court of competent jurisdiction, a second action involving the same parties raising claims that were or could have been litigated in the first cause of action, and the second action had to arise out of the same transaction or occurrence as the previous action. *Portage City. Bd. of Commrs. v. Akron*, 109 Ohio St.3d 106, 2006-Ohio-954, ¶84. Here, the BWC could never have bound Appellant to a decision that would have required the Appellant to pay more into the unemployment system. Correspondingly, ODJFS (and the Review Commission) could not have issued a finding that held that one or more of Appellant's cleaners be allowed to receive benefits from the BWC. Hence, the BWC is not a tribunal that had competent jurisdiction over the claims brought by ODFJS giving rise to this appeal. There is no *res judicata* effect to the BWC's decision.

Indeed, this Court has previously held that decisions from another administrative agency, such as the Industrial Commission or Bureau of Workers' Compensation, do not control the Review Commission's determination of whether or not a company's independent contractors are actually employees and the resulting contribution rates of the company. *See, e.g., Cougar's Valley Express Inc. v. ODJFS*, Franklin Cty. C.P. Case No. 14CVF-05-4122, Decision and Entry filed September 11, 2014 (The BWC and the Review Commission are independent from one another, have different missions, are responsible for the administrative of different statutes, and the decision of one agency does not have a *res judicata* effect on the other). *See also Dublin Express Transport Solutions, LTD. v. ODJFS*, Franklin County C.P. Case No. 13CV-13521, Decision and Entry filed March 25, 2014 (A decision of the National Labor Relations Board on

the issue of whether Appellant was an employer under Ohio’s unemployment compensation laws may be persuasive, but not dispositive, authority). Similarly, the Ohio Supreme Court and Tenth District Court of Appeals have held that the fact that another agency has enforced a certain provision of Ohio’s revised code “is not dispositive as to whether that same conduct” demonstrates a violation of a different provision of the revised code. *Suburban Inn, Inc. v. Ohio Liquor Control Comm.*, 10th Dist. No. 13AP811, 2014-Ohio-4355, ¶11; *State ex rel. Richmond v. Indus. Comm.*, 139 Ohio St.3d 157, 2014-Ohio-1604, ¶19 (violations of other regulations, such as OSHA’s, will not, by themselves, support a VSSR claim and, conversely, compliance with OSHA’s regulations, by itself, does not mandate a denial of a VSSR claim). As a result, Appellant’s third assignment of error is overruled.

D. Assignment of Error #4 – The Commission Did Not Err In Failing To Consider the ODFJS Director’s Alleged Waiver Of Appellant’s Status As An Employer

Appellant contends that the Review Commission erred by failing to properly take into consideration the Director’s waiver of Appellant’s status. According to Appellant’s Notice of Appeal, Appellant claims that ODJFS is estopped from assessing unemployment taxes because workers are referred to Appellant for employment by the Logan County office of ODFJS through the Ohio Learn to Earn Program and, presumably, it knows that Hocking Hills’ workers are independent contractors. In support of Appellant’s argument, Appellant attached to its Notice of Appeal an undated letter from Michael B. Colbert, Director of ODJFS, to Hocking Hills enclosing a flyer on easy ways to report unemployment benefit information electronically and a flyer introducing the Ohio Learn to Earn program, which gives employers the opportunity to train unemployment compensation claimants on-site at their businesses. (Notice of Appeal, Exh. C; R. 220-22).

The Court is precluded from considering this proffered evidence attached to Appellant's Notice of Appeal for the following reasons: (1) the record in this case is limited to what has been certified from the Review Commission, as well as the evidence before it at the time of the administrative disposition; (2) Appellant offered no evidence at the hearing before the Review Commission with regard to Hocking Hills' participation in the Ohio Learn to Earn Program or Mr. Colbert's letter, (3) Appellant has made no request for the admission of additional evidence and no meritorious basis has been offered for the Court to consider any newly discovered evidence at this time; and (4) these exhibits are unsworn and constitute inadmissible hearsay. As a result, this Court is not satisfied that the requirements of R.C. 119.12 have been met with regard to the admission of additional evidence. The Court will not consider Exhibit C to Appellant's Notice of Appeal and any argument related to Exhibit C. *See Northfield Park Assoc. v. Ohio State Racing Commission*, 2006-Ohio-3446, ¶57 (10thDist.)("certainly, pursuant to R.C. 119.12, the trial court has no discretion to admit additional evidence if it is not satisfied that the evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the agency."); *Breach v. Bd. of Nursing*, 2011-Ohio-3451, ¶16 (10thDist.).

Instead, the only evidence in the record with regard to the waiver issue is Ms. Kallimanis' testimony that she spoke with an individual named Renee at the Logan County office of ODFJS, told her that Hocking Hills was looking for some cleaning people, and Renee came up with the job order that was posted on behalf of Hocking Hills. (R. 96, Tr. p. 39). According to Ms. Kallimanis, ODFJS helps Hocking Hills get up to 90% of its workers and the Logan County office of ODFJS is still helping Hocking Hills to this day. (R. 104; Tr. 47). In closing argument at the hearing, counsel for Appellant argued, without any evidentiary support from the hearing

record, that the Logan County ODJFS office wanted to make sure that Hocking Hills “was on the up and up” when it began referring workers and so it was the Logan County ODJFS office that requested the BWC audit of Hocking Hills in 2012. (R. 105-06, Tr. 48-49). Legal counsel asserted that after the BWC ruled that Hocking Hills had a sub-contractor relationship with its workers, OJDFS “has continued to assist Hocking Hills Services to this very day.” (R. 106, Tr. 49). Again, these arguments are not supported by the evidentiary record at the hearing. There is no evidence in the record the Logan County ODJFS office was involved in a BWC audit of Hocking Hills or that there was a waiver of Appellant’s status as an employer by the director of ODJFS.

Further, as discussed above, assuming for purposes of argument that the Logan County office of the ODJFS did request the BWC audit of Hocking Hills and was aware of the results of said audit, the fact that the BWC may have found Hocking Hills had a sub-contractor relationship with its workers for purposes of work related injury claims has no *res judicata* effect on the Review Commission and does not constitute a waiver by ODJFS. The BWC applies and interprets different Ohio statutes and administrative code provisions. Decisions from the BWC do not control ODJFS’s and/or the Review Commission’s determination of whether or not a company’s independent contractors are actually employees and the resulting contribution rates of the company. Appellant’s fourth assignment of error is overruled.

E. Assignment of Error #5 – The Commission Did Not Err By Failing To Properly Weigh The 20 Factors For Determining Appellant’s Status As An Employer

Appellant’s fifth assignment of error asserts that the Review Commission failed to properly weigh Appellant’s answers to the 20 question test that the Review Commission uses to determine employer/non-employer status and inaccurately concluded Appellant is a liable employer. Specifically, Appellant asserts in its Notice of Appeal that Appellant’s answers to the

20 questions posed by the Review Commission “clearly showed that Appellant was working in a broker type capacity, ‘farming’ out jobs to independent contractors which have the time and are able to perform the job request.” (Notice of Appeal, p. 4-5). Appellant’s Notice of Appeal also asserts that Appellant’s answers to the 20 questions “bolstered its claim that it does not have any substantive direction or control over the individuals performing job requests.” *Id.* p. 5.

Appellant’s Reply Brief, however, makes the exact opposite argument of its fifth assignment of error. In its Reply Brief, Appellant contends that the Review Commission should have given more weight to Kim Kallimanis’ testimony at the hearing, rather than Appellant’s initial, written responses to ODFJS’s 20 questions that “were provided when Appellant had no representation and there was a large language barrier between Appellant and the ODFJS investigator Godfried Anamako.” Appellant’s Reply Br. p. 6.

At the hearing, Ms. Kallimanis testified that she personally completed and handwrote the answers of Hocking Hills to the 20 questions contained in the Behavior Control form, Appellee’s Exhibit C, describing behavior control and financial control of the business. For instance, with regard to Question 5, “who hires, supervises and pays the individual performing services,” Ms. Kallimanis answered: “Hocking Hills Services.” (R. p. 86, Tr. p. 30). She admitted that she was not confused about this question when she answered it. *Id.* In Question 11, “what type of reports, oral or written does the business require the individuals performing services to submit,” Ms. Kallimanis answered: “invoices weekly.” (R. p. 86, Tr. p. 30). Again, she admitted that she was not confused about this question when she answered it. *Id.* In fact, at no time in the hearing did Ms. Kallimanis identify any specific written response of Hocking Hills that was made in error, was made without understanding the question being asked, or should be changed in any way. Consequently, Hocking Hills’s answers to the 20 questions contained in the Behavior

Control form, Appellee's Exhibit C, describing behavior control and financial control of the business, were properly admitted into the record and considered by the Review Commission, along with all of the other evidence at the hearing.

With regard to Ms. Kallimanis' testimony at the hearing, it is clear from the findings of facts of the Review Commission's April 20, 2014 Decision that the Review Commission did consider her testimony and did give it weight when deciding that Hocking Hills retained the right of direction and control for the purposes of the Ohio unemployment compensation laws. Indeed, the Decision specifically notes that Commission considered the "testimony and evidence presented" at the hearing. Decision, p. 7. As Ms. Kallimanis was the only witness to testify at the hearing, the testimony considered by the Review Commission was undoubtedly hers.

Nonetheless, with regard to how much weight the Review Commission gave Ms. Kallimanis' testimony versus Hocking Hills's written answers to the 20 questions contained in the Behavior Control form, as noted above, an administrative agency has "substantial leeway in evaluating the evidence before it and drawing inferences from it." *State ex rel. Donohoe v. Indus. Comm.*, 10th Dist. No. 08AP-201, 2010-Ohio-1317, ¶14, quoting *State ex rel. Shelly Co. v. Steigerwald*, 121 Ohio St.3d 158, 2009-Ohio-585, ¶28. To the extent that Ms. Kallimanis' testimony conflicted with the written answers that she gave on behalf of Hocking Hills to the Behavior Control form, and both Appellee's Exhibit C and Ms. Kallimanis' testimony were admissible, competent and probative evidence of the facts at issue, this Court defers to the determination of the Review Commission as to how much weight to give the conflicting evidence since the Hearing Officer had the opportunity to observe the demeanor of Ms. Kallimanis and weigh her credibility. *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 111. Appellant's fifth assignment of error is overruled.

F. The Commission’s Decision Was Supported By Substantive, Reliable And Probative Evidence And Was In Accordance With Law

Ohio employers must pay contributions into Ohio's unemployment compensation fund. R.C. 4141.23(A). The definition of “employer” includes limited liability companies that have “in employment at least one individual.” R.C. 4141.01(A)(1)(a). “Employment” means: “[S]ervice performed by an individual for remuneration under any contract of hire, written or oral, express or implied . . . , unless it is shown to the satisfaction of the director that such individual has been and will continue to be free from direction or control over the performance of such service, both under a contract of service and in fact.” R.C. 4141.01(B)(1) (emphasis added). The alleged employer bears the burden of proving that the worker is not an employee and, thus, that it need not contribute to the unemployment compensation fund. *Miracle Home Health Care, L.L.C. v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 12AP318, 2012-Ohio-5669, ¶21.

Ohio Adm.Code 4141-3-05 sets forth 20 factors as “guides” for determining whether sufficient direction or control exists to create an employer-employee relationship. These factors are drawn from the common law, where they are used to distinguish between employees and independent contractors. The factors, which must be considered in their totality, include:

- (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 the services;
- (2) The person for whom services are being performed requires particular training for the worker performing services;
- (3) The services provided are part of the regular business of the person from whom services are being performed;
- (4) The person for whom services are being performed requires that services be provided by a particular worker;
- (5) The person for whom services are being performed hires, supervises or pays the wages of the worker performing services;
- (6) A continuing relationship exists between the person for whom services are being performed and the worker performing services that contemplates continuing or recurring work, even if not full time;

- (7) The person for whom services are being performed requires set hours during which services are to be performed;
- (8) The person for whom services are being performed requires the worker to devote himself or herself full time to the business of the person for whom services are being performed;
- (9) The person for whom services are being performed requires that work be performed on its premises;
- (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;
- (11) The person for whom services are being performed requires the worker to make oral or written progress reports;
- (12) The person for whom services are being performed pays the worker on a regular basis such as hourly, weekly or monthly;
- (13) The person for whom services are being performed pays expenses for the worker performing services;
- (14) The person for whom services are being performed furnishes tools, instrumentalities, and other materials for use by the worker in performing services;
- (15) There is a lack of investment by the worker in the facilities used to perform services;
- (16) There is a lack of profit or loss to the worker performing services as a result of the performance of such services;
- (17) The worker performing services is not performing services for a number of persons at the same time;
- (18) The worker performing services does not make such services available to the general public;
- (19) The person for whom services are being performed has a right to discharge the worker performing services; and
- (20) The worker performing services has the right to end the relationship with the person for whom services are being performed without incurring liability pursuant to an employment contract or agreement.

Ohio Adm.Code 4141-3-05(B)(1) – (20).

However, the twenty factors of Ohio Adm.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 v. Connor*, 37 Ohio St.3d 144 (1988). *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*, supra, and *Brown v. CDS Transport, Inc.*, 10th Dist. No. 10AP-46, 2010-Ohio-4606, respectively.

In this case, the Court has reviewed the record to determine if sufficient direction or control existed to create an employer-employee relationship “both under a contract of service and in fact.” The Court finds that given the language of the contract at issue Hocking Hills Services possesses the ability to direct all aspects of how the workers render cleaning services to Hocking Hill Services’ clients. Notably, the contract provides the crew member/cleaner is providing services for Hocking Hills, not the homeowner. If Hocking Hills Services does not engage a crew member/cleaners’ services for a client, the cleaner performs no services for that client. Consequently, under the contract, Hocking Hills Services is the entity for whom the workers ultimately provide his and her services. It does not matter if Hocking Hills Services does not actually exercise all of the broad discretion and control that it reserves in its Crew Member/Contractor Agreement. *See Miracle Home Health Care, L.L.C. v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 12AP-318, 2012-Ohio-5669, ¶23. This finding is also supported by the ODFJS Audit Report, which indicates that eleven of the twenty factors were present, Appellee’s Exh. A, as well as Ms. Kallimanis’ testimony.

Additionally, the Court finds that, even after excluding the Crew Member/Contractor Agreement from consideration, the record contains reliable, probative, and substantial evidence that supports the Review Commission's decision. The evidence establishes that: (1) Hocking Hills Services requires particular training for its workers, and the workers must have a background check and carry insurance; (2) the cleaning services provided by the workers are an integral part of Hocking Hills’ regular business; (3) Hocking Hills Services hires and pays the wages of the cleaners; (4) there is a continuing relationship between Hocking Hills Services and

its workers that contemplates continuing or recurring work; (5) Hocking Hills Services schedules the work of its cleaners from 11:00 am to 4:00 pm, with Saturdays usually off and the cleaners were required to work on Sundays; (6) Hocking Hills Services requires the cleaners to make and submit written reports in the form of timesheets; (7) Hocking Hills sets the time in which the workers were to complete the job; (8) the worker is required to comply with the instructions of Hocking Hills Services and the checklist that is given to each worker to use. The checklist has each room broken down with the tasks for that particular checklist; (9) Ms. Kallimanis inspects the sites prior to anyone going out to work on them, and Hocking Hills provides tools, equipment and materials, when necessary, for the cleaners to do the work; (10) the cleaners do not experience profit or loss; (11) Hocking Hills may discharge its cleaners; and (12) the cleaners may end their relationship with Hocking Hills Services without incurring liability pursuant to an employment contract or agreement.

Accordingly, upon review of the contract and the evidence, the record supports the Review Commission's determination that Appellant's cleaners and workers 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 workers were within the province of said finder of fact.

DECISION

For the foregoing reasons, the Court finds that the Decision of the Unemployment Compensation Review Commission dated April 20, 2014 is supported by reliable, probative and substantial evidence and is in accordance with law. It is **AFFIRMED**. Appellant's five assignments of error are **OVERRULED**.

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. Costs to Appellant.

IT IS SO ORDERED.

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Franklin County Court of Common Pleas

Date: 09-23-2015
Case Title: HOCKING HILLS SERVICES LLC -VS- OHIO DEPARTMENT
JOBS FAMILY SRVS
Case Number: 14CV005707
Type: DECISION/ENTRY

It Is So Ordered.

A handwritten signature in black ink, appearing to read 'C.A. Schneider', is written over a circular, textured stamp. The stamp is partially obscured by the signature and has a grainy, halftone-like appearance.

/s/ Judge Charles A. Schneider

Court Disposition

Case Number: 14CV005707

Case Style: HOCKING HILLS SERVICES LLC -VS- OHIO
DEPARTMENT JOBS FAMILY SRVS

Case Terminated: 10 - Magistrate

Final Appealable Order: Yes