

COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO  
CIVIL DIVISION

BNA Construction, LTD.,	:	
Appellant,	:	CASE NO. 15CV-10-9594
-vs-	:	<b>JUDGE SERROTT</b>
Director, Ohio Department of Job and Family Services, et al.,	:	
Appellee.	:	

**JUDGMENT ENTRY AND ORDER AFFIRMING THE DECISION OF THE  
DIRECTOR OF OHIO DEPARTMENT OF JOB AND FAMILY SERVICES**

Rendered this 23<sup>rd</sup> day of March, 2016.

**SERROTT, JUDGE.**

This matter is before the Court upon the Administrative Appeal by the Appellant, “BNA”, an employer, from the decision of the Appellee, “ODJFS” finding a number of workers of Appellant to be “employees” for purposes of unemployment rate taxation. Appellant, “BNA”, raises two issues on appeal. Appellant claims the Hearing Officer abused his discretion in refusing to continue Appellant’s case and that the Appellee’s determination is not supported by “substantial, reliable, and probative evidence.” For the following reasons, the Court finds that neither of the claimed errors has merit and therefore, the Appellee’s decision is AFFIRMED.

The Appellant requested a continuance of the administrative hearing only after the hearing had begun. The hearing had been continued several times for a period of about one (1) month each time. (TR April pp47-48, TR May 2 pp 19-20, TR June pp. 31-32.) At one point, Appellant’s counsel withdrew to be a potential witness but then continued to represent Appellant. Appellant contends the case should have been continued because counsel was going

to be a witness. Counsel's purpose in testifying was to refute the testimony of the auditor that counsel was on the phone during part of the audit credit review process. Counsel denied being part of the phone call.

However, counsel had time in between continuances of the "continued hearings" to obtain new counsel but failed to do so. Furthermore, as noted by Appellee, Mr. Lucero, as the owner/representative of the business, did testify to that very issue. Thus, Appellant was able to present testimony challenging the credibility of the auditor regarding that phone call. Also, the Appellant has failed to establish how it was prejudiced by the denial of the sixty (60) day continuance request. The Appellant was able to develop this testimony through Mr. Lucero and the issue of the use of the twenty (20) factor test was considered by the Hearing Officer.

A tribunal that refuses to grant a continuance will only be reversed if the tribunal abused its discretion in denying the continuance. Warren v. Warren, 10th Dist.No. 10AP-837, 2011-Ohio-3083 ¶7. In reviewing the relevant factors a court must consider in determining whether a tribunal abused its discretion, this Court does not believe the Hearing Officer acted in an arbitrary, unreasonable, or capricious manner. Appellant had ample time in between hearings to secure new counsel. Appellant did not request the continuance until the hearing was already underway. The issue was litigated and testimony on the credibility of the auditor was introduced by Appellant. Finally, Appellant fails to show any prejudice in the denial of the continuance. For all these reasons, this claimed error is OVERRULED.

Next, Appellant claims that the decision of the Appellee and the Hearing Officer was not supported by substantial, reliable and probative evidence. Pursuant to R.C. 4141.26(D), this Court must review the underlying decision to determine whether it is supported by reliable,

probative, and substantial evidence and is in accordance with the law. The Ohio Supreme Court has defined “reliable,” “probative,” and “substantial” evidence as follows:

(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."

*Bartchy v. State Bd. of Educ.*, 120 Ohio St.3d 205, 2008-Ohio-4826, ¶39, quoting *Our Place, Inc. v. Ohio Liquor Control Comm.* (1992), 63 Ohio St.3d 570, 571.

Additionally, “an agency's findings of fact are presumed to be correct and must be deferred to by a reviewing court unless that court determines that the agency's findings are internally inconsistent, impeached by evidence of a prior inconsistent statement, rest upon improper inferences, or are otherwise unsupportable.” *Id.* at ¶37.

A review of the detailed decision made by the Hearing Officer establishes that the Appellee did consider all twenty (20) factors to determine whether the workers were employees or independent contractors for unemployment purposes. (See Hearing Officer Decision pp 6-8). Moreover, the transcript fully supports the findings of the Hearing Officer. This Court is not permitted to substitute its opinions regarding the credibility of the auditor for that of the Hearing Officer. The Hearing Officer found her credible and found that over ten (10) of the applicable factors supported Appellee’s claim the workers were employees. The underlying order is fully supported by substantial, reliable and probative evidence. Therefore, for all these reasons, the Court OVERRULES the second claimed error.

The Court AFFIRMS the decision of the Appellee. Pursuant to Civ. R. 58, the Clerk of Courts is to afford all parties with notice of and the date of this judgment.

COPIES TO:

Alvaro G. Velez, Esq.  
100 East Campus View Blvd., Suite 250  
Worthington, Ohio 43235  
Counsel for Appellant

Laurence R. Synder, Esq.  
615 West Superior Ave., 11<sup>th</sup> Floor  
Cleveland, Ohio 44113-1899  
Counsel for Appellees

Franklin County Court of Common Pleas

**Date:** 03-24-2016  
**Case Title:** BNA CONSTRUCTION LTD -VS- OHIO STATE DEPT JOB AND FAMILY SERVICES ET AL  
**Case Number:** 15CV009594  
**Type:** DECISION/ENTRY

It Is So Ordered.

The image shows a handwritten signature in black ink that reads "Mark Serrott". The signature is written over a circular, embossed seal of the Franklin County Court of Common Pleas. The seal contains the text "COMMON PLEAS COURT" at the top, "FRANKLIN COUNTY, OHIO" in the middle, and "SEE THINGS ARE" at the bottom.

/s/ Judge Mark Serrott

Court Disposition

Case Number: 15CV009594

Case Style: BNA CONSTRUCTION LTD -VS- OHIO STATE DEPT  
JOB AND FAMILY SERVICES ET AL

Case Terminated: 18 - Other Terminations

Final Appealable Order: Yes