

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

MARK HENDERSON,

Case No: 11CVF-09-12229

Appellant,

JUDGE HOGAN

-vs-

**DIRECTOR, OHIO DEPARTMENT OF JOB
AND FAMILY SERVICES, ET AL.,**

Appellees.

DECISION AND ENTRY
AFFIRMING THE COMMISSION'S DECISION
DISALLOWING REQUEST FOR REVIEW OF
SEPTEMBER 7, 2011

HOGAN, JUDGE

This matter is before the Court on Mark Henderson's (hereinafter referred to as Appellant) appeal from the Ohio Unemployment Compensation Review Commission's (hereinafter referred to as Commission) September 7, 2011 Decision Disallowing Request for Review. In this Appeal, the Appellant named the Director of the Ohio Department of Job and Family Services (hereinafter referred to as the Appellee) and Appellant also named Mid-Ohio Contracting Services, Inc. (hereinafter referred to as Mid-Ohio).

Appellant filed his Brief on January 4, 2012. The Appellees responded with the filing of their Briefs on January 18, 2012. For the reasons that follow, this Court **AFFIRMS** the September 7, 2011 Decision Disallowing Request for Review.

I. STATEMENT OF THE CASE

This appeal arises as a result of the Commission's denial of Appellant's requested review of a determination that the Appellant was an independent contractor and therefore not entitled to benefits.

II. STATEMENT OF THE FACTS

As an initial point of procedure, the record reflects two hearings during the administrative process. For the purpose of identification, this Court will use Hr. Tr.1 for the January 21, 2011 Telephone hearing and Hr. T.2 for the July 12, 2011 hearing. The Court is aware that the position of Mid-Ohio and Appellee is that only the hearing of July 12, 2011 is relevant to the appeal.

The Appellant began working with Mid-Ohio in October of 2006. Appellant worked with Mid-Ohio until June of 2010. (Hr. Tr.1 at page 5). The record established that Mid-Ohio is in the contracting business primarily doing home renovations. (Hr. Tr.1 at page 12) Appellant testified at the first hearing that he had been hired to be a general laborer for Mid-Ohio. (Hr. Tr.1 at pages 5 and 12) He performed plumbing, electrical, framing, drywall, texturing, painting and other work for Mid-Ohio. (Hr. Tr.1 at page 6) Appellant established that he was paid weekly but he was provided with a 1099 instead of a W2.

At the second hearing, attended by Mid-Ohio the Appellant testified as follows at page 28 of the July 12, 2011 transcript:

7 | **A: What, the offer that was made was everyone was going to follow the**
8 | **employee handbook. Everyone um if you, if you did not become an**
9 | **employee, you would have to get Worker's Comp and uh your own insurance**
10 | **and that was the option that I took because yes I do get a tax, I can**
11 | **get a tax, a tax deferment for being half Native American and being**
12 | **Seneca.**
13 | **Q: You declined the offer of employment (inaudible)?**
14 | **A: I declined the offer of being W2'd as an employee and getting their**
15 | **you know company insurance and all that. I did not decline being an**
16 | **employee. I already was an employee, so.**

17 Q: Were you paid by 1099?

18 A: Mm hm.

The following testimony is from Mr. DeHays on behalf of Mid-Ohio: (Hr. Tr.2 page 10)

18 A: I offered him employment. He turned it down. He felt that there
 19 was some benefit, he actually made it public to the other people we
 20 brought on for employment, there was some benefit he received, by being
 21 Native American for being a 1099 or by being self employed, I guess you
 22 could say.

The Appellant admitted that getting a 1099 was how he wanted it done.

Following the July 12, 2011 hearing, the Hearing Officer issued her Decision. The Hearing officer concluded that the Appellant was not an employee of Mid-Ohio. Please note the following language from her Decision:

To hold this Mid-Ohio Contracting Inc liable when the claimant has done nothing but disavow that he worked for the company would be contrary to the legislative intent of the statute. There is no evidence that the employer had any selfish motivation. In this case, the employer has presented a stronger argument on why the claimant was an independent contractor. Therefore, the Hearing Officer excludes that wages from Mid-Ohio Contracting Inc are excluded for purposes of unemployment compensation.

Appellant filed objections to the Decision. However, Appellant never objected to the second hearing either at the hearing or in writing following the July 12, 2011 hearing.

In Appellant's objections, the Appellant stated:¹

CJ: I would not switch to a W-2 for two main reasons, I had to use my own truck. Quite often because Mr. DeHays would not get a company vehicle, therefore I would not be able to file a Schedule "C" and could not claim the miles used. Also I did not trust him or Mr. Noss to accurately disperse funds on my behalf to the IRS as required and did not want to be held responsible for any shortcomings or lack of filings.

Also, the Appellant's Notice of Appeal, filed with this Court, only addresses the decision that followed the July hearing. Appellant did not indicate the existence of any procedural issues.

The Commission reviewed the Decision and adopted same when it issued its

¹ This can be found at page 534 of the Certified Record as filed with this Court on December 7, 2011.

Decision Disallowing Request for Review. It mailed that Decision on September 7, 2011 and the Appellant filed his Notice of Appeal with this Court on September 30, 2011.

After the filing of the appeal, there was a motion filed requesting more time to file briefs. By Entry of November 29, 2011 this Court granted the Appellant until January 6, 2012 to file its Brief. In the same Entry this Court gave the Appellee and Mid-Ohio a deadline of January 20, 2012 to file their Briefs. There was no provision given for a Reply.

This matter is ready for review.

III. STANDARD OF REVIEW

R.C. 4141.282(H) sets forth the standard of review that this Court must apply when considering appeals of decisions rendered by the Commission. R.C. 4141.282(H) provides:

If the court finds that the decision of the commission was unlawful, unreasonable, or against the manifest weight of the evidence, it shall reverse, vacate, or remand the matter to the commission. Otherwise, the court shall affirm the decision of the commission.

The Ohio Supreme Court stated that “[t]he board’s role as fact finder is intact; a reviewing court may reverse the board’s determination only if it is unlawful, unreasonable, or against the manifest weight of the evidence.” *Tzangas, Plakas & Mannos v. Ohio Bur. Of Emp. Serv.* (1995), 73 Ohio St.3d 694,697. The Hearing Officer and the Commission are primarily responsible for the factual determinations and judging the credibility of the witnesses. *Brown-Brockmeyer Co. v. Roach* (1947), 148 Ohio St. 511; *Angelkovski v. Buckeye Potato Chips* (1983), 11 Ohio App.3d 159,162.

More specifically:

The Commission and its referees are the triers of fact. See *Feldman v. Loeb* (1987), 37 Ohio App.3d 188, 190, 525 N.E.2d 496. Therefore, the common pleas court acts as an appellate court and is limited to determining whether the Commission's decision was supported by some competent and credible

evidence. *Id.* The common pleas court may not substitute its judgment for that of the hearing officer or the board. *Simon v. Lake Geauga Printing Co.*(1982), 69 Ohio St.2d 41, 45, 23 O.O.3d 57, 430 N.E.2d 468.

Hence, this Court will defer to the Hearing Officer's and the Commission's determination of purely factual issues when said issues address the credibility of the witnesses and the weight of the evidence. *Angelkovski v. Buckeye Potato Chips, Id.*, at 162.

From within this framework, this Court will render its decision.

IV. ANALYSIS:

This Court will present the issues raised by the Appellant and address each issue in the order argued by the Appellant.

A.) The Review Commission erred when it accepted Mid-Ohio Contracting's appeal after the applicable timeframe and without any showing of good cause:

This Court has reviewed the certified record. The record does not reflect any formal efforts by Mid-Ohio to secure the hearing eventually conducted in July of 2011. However, the record did reflect that the Mid-Ohio was not given notice of the first hearing.

Appellant now objects to the second hearing because there was a lack of any showing that Mid-Ohio had 'good cause' to request the second hearing. The Appellant relied upon R.C. §4141.281(D)(6). Please note the following language from that statute:

(6) NO APPEARANCE -- APPELLEE

For hearings at either the hearing officer or review level, if the appellee fails to appear at the hearing, the hearing officer shall proceed with the hearing and shall issue a decision based on the evidence of record. The commission **shall vacate the decision upon a showing that written notice of the hearing was not sent to the appellee's last known address, or good cause for the appellee's failure to appear is shown to the commission within fourteen days after the hearing date.** (Emphasis added)

Appellant asserted that there is no evidence in the record to support that Mid-Ohio – appellee for the purpose of the statute – ever established good cause in order to be able to

have a second hearing.

However, the language of the statute shows that good cause is not required if there is evidence that Mid-Ohio never received official notice of the first hearing. The statute clearly states that upon a showing that the written notice was not send to the appellee's last known address, the commission 'shall' vacate the decision. Here Mid-Ohio's notice went to 427 East Rich Street, Columbus, Ohio 43215-4315. The certified record shows that at least one envelope mailed to that address was returned.

A review of the Appellee's Brief, showed that Appellee did not take issue with Mid-Ohio's statement that it was not served with notice of the first hearing. The Appellee merely agreed with the arguments of Mid-Ohio and adopted Mid-Ohio 'facts, law, and argument'. Had there been a material breach in the administrative process, Appellee would have been duty bound to bring that matter to the attention of this Court.

In the end, this matter is also moot because the Appellant failed to object during the administrative process. The Appellant did not file an objection once he received notice of a second hearing. The Appellant did not raise an objection during the second hearing. After receiving the adverse Decision, the Appellant failed to raise the second hearing as an issue when he filed his written objections to the Commission.

Not only did it appear that the second hearing was justified, even if it was not, the matter was waived. Appellant's argument concerning the propriety of the second hearing is rejected by this Court.

B.) Mr. Henderson's employment was under the direction and control of Mid-Ohio Contracting, qualifying him as an employee for Unemployment Compensation purposes:

In this section of Appellant's Brief, Appellant actually advanced two separate

arguments. The first argument claimed that under the facts, it was clearly wrong for the Hearing Officer to have concluded that the Appellant was an independent contractor. The second issue concerned the Appellant's assertion that the Hearing Officer actually failed to apply the right legal standard.

The first argument is rejected by this Court. A review of the evidence from the second hearing showed that the Hearing Officer had a number of factual issues that helped in the determination that the Appellant was an independent contractor. The following findings, as contained within the Hearing Officer's Decision are supported by the record:

Mr. DeHayes left his employment and founded the construction company named Mid-Ohio Contracting Services LTD with another partner in January 2010. During the formation of the company, Mr. DeHayes gave each contractor that was working for him a handbook and asked the individual to complete W2 forms and officially go on to the company's payroll. Claimant refused. He would not sign the handbook. He refused to switch to a W2 and told his employer that he wanted to be paid by a 1099.

Mr. DeHayes tells him then he would be required to show proof of worker's compensation insurance. Claimant pays for worker's compensation insurance. It is listed under his previous company's name of ProPunch. Claimant provides proof to Mid-Ohio Contracting that he had the proper insurance in order to work. Claimant continues to work in the same capacity. He is paid by 1099. Mid-Ohio Contracting became unhappy with the claimant's work after several client complained of the quality of his work. The company informed the claimant that they were no longer using his services.

Claimant was not precluded from outside work. Claimant advertised for contract services on Craig's list and never formally dismantled his previous company. He had no set hours but was provided use of a uniform. During the child support proceedings, the claimant did not list Mid-Ohio Contracting Services LTD as his employer.

The Appellant argued that, following the guidelines of Ohio Admn. Code Ann. §4141-3-05(B), the evidence supported his position that he was an employee. But that is Appellant's interpretation of the evidence. The facts enumerated by the Hearing Officer led to the Hearing Officer's determination that the Appellant was an independent contractor. That decision is not unlawful, unreasonable, or against the manifest weight of the evidence. Correspondingly, the Commission's Decision Disallowing Request for Review was not unlawful, unreasonable, or against the manifest weight of the evidence.

Next, the Appellant asserted that the Hearing Officer did not apply the correct standard. The Appellant based that argument on the following sentence as contained within

the Hearing Officer's 6 page Decision: "To hold this [sic] Mid-Ohio Contracting Inc. liable when the claimant has done nothing but disavow that he worked for the company would be contrary to the legislative intent of the statute." Yet it is clear to this Court that the Hearing Officer followed the law and applied the correct standard of review. The Decision references R.C. §4141.01(B)(2)(k). It is also clear from the entirety of the Decision that the Hearing Officer was applying the correct standard. The Commission was correct to rely upon it.

The Commission's Decision Disallowing Request for Review is not unlawful, unreasonable, or against the manifest weight of the evidence.

V. DECISION:

The Decision Disallowing Request for Review mailed September 7, 2011 is

AFFIRMED.

Costs to the Appellant.

THIS IS A FINAL APPEALABLE ORDER

Copies to:

Kathleen C. McGarvey
1108 City Park Avenue
Columbus, Ohio 43206
Counsel for the Appellant

Michael DeWine, Esq.
Ohio Attorney General
David E. Lefton, Esq.
Assistant Attorney General
30 E. Broad Street, 26th Floor
COLUMBUS, OH 43215-3248
Counsel for Appellee Ohio Department of Job
And Family Services

Thomas S. Amato, Esq.

6000 Lombardo Center Drive, Suite 635
Cleveland, Ohio 44131
Counsel for Appellee Mid-Ohio
Contracting Services, Inc.

Franklin County Court of Common Pleas

Date: 01-27-2012
Case Title: MARK HENDERSON -VS- OHIO STATE DEPARTMENT JOB
FAMILY SERVICES DI
Case Number: 11CV012229
Type: DECISION/ENTRY

It Is So Ordered.

A handwritten signature in black ink, appearing to read "D. T. Hogan", is written over a blue circular seal. The seal contains the text "COMMON PLEAS COURT" at the top and "ALL THINGS ARE" at the bottom, with a central emblem.

/s/ Judge Daniel T. Hogan