

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

COUGAR'S VALLEY EXPRESS INC.,

Case No: 14CVF-05-5122

Appellant,

JUDGE SHEWARD

-vs-

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

Appellees.

DECISION AND ENTRY
AFFIRMING THE COMMISSION'S DECISION
OF APRIL 17, 2014

SHEWARD, JUDGE

The above-styled case is before the Court on Appellant's appeal from the April 17, 2014 Decision issued by the Unemployment Compensation Review Commission (Commission). The Appellant named the Director, Ohio Department of Jobs and Family Services (hereinafter referred to as Appellee). The Appellant filed its Brief on July 29, 2014. The Commission filed its Brief on August 4, 2014. Appellant filed its Reply on August 22, 2014.

For the reasons that follow, this Court **AFFIRMS** the Commission's Decision of April 17, 2014.

I. STATEMENT OF THE CASE:

Appellant filed a Notice of Appeal with this Court. The Notice of Appeal asserted that the Commission's Decision of April 17, 2014 was in error and that a prior decision from the Industrial Commission (IC) controls. In the alternative, the Appellant claimed that the decision was not supported by the evidence.

II. STATEMENT OF THE FACTS:

This administrative action has had a tortured history. On March 8, 2010 the Appellant's

contribution rate was determined and mailed to the Appellant. The contribution rates were increased for the years 2005 – 2010. The agency determined that most of the Appellant's 'independent contractors' were actually employees.

The Appellant requested a reconsideration of the adverse holding. The request was determined to have been filed untimely by a decision dated August 15, 2012. The Appellant asked that said decision be reviewed and the Commission held a hearing. The Commission found that the Appellant's original request had in fact been timely received and therefore the Appellant could seek further administrative review.

The merits of the Appellant's appeal were heard the first time at a hearing conducted over two days; i.e., June 19, 2013 and August 20, 2013. On September 25, 2013 the Commission affirmed the prior March 8, 2010 rate determination. That decision was appealed by the Appellant to this Court. The prior case number was 13CVF-11673.

The prior appeal was remanded by this Court's Decision dated January 24, 2014. The remand was necessary because the Commission could not produce the transcript from one of the two hearing dates. Following the remand, a new *de novo* hearing was held on April 15, 2014. All parties appeared at that hearing.

During the hearing the Hearing Officer heard from Brandi Vaught. She was/is a UC tax compliance external auditor. (Hr. Tr. p. 11, lines 8 – 12) Ms. Vaught established what she reviewed and what she worked on to come to her conclusions. (Hr. Tr. p. 12, lines 10 – 16) Ms. Vaught testified that the issue of Appellant's workers came to the agency's attention by way of a fraud tip. (Hr. Tr. p. 12, lines 8 – 10)

Ms. Vaught testified about using the standard 20 review criteria. She testified as to her findings after the review of all of the documentation in the file. She found that the Appellant had

sufficient control over its drivers to make them employees. She testified as follows:

Um they [Appellant] supplied independent contractor agreements stating that all individuals, all drivers have to comply with all written procedures and directives um they were also told when they had a load, where the load was to be delivered. They were also not permitted to get their own loads. If they found something on a load board at truck stop, it had to be run through Cougar's Valley. (Hr. Tr. p. 14, lines 5 – 11)

Ms. Vaught also found that the drivers were not able to contract out the work to a sub-contractor.

(Hr. Tr. p. 14, lines 18 – 22) Ms. Vaught reviewed the issues and determined that the drivers were in fact employees of the Appellant.

Ms. Vaught also spoke to the affidavits in the file from two individuals who worked with the Appellant. One came from Mr. Crawford. Ms. Vaught noted that Mr. Crawford had worked for the Appellant for 13 years. Furthermore, she noted that Mr. Crawford stated that he was told by the Appellant that he was an independent contractor. Ms. Vaught found that relevant to her determination because if in fact Mr. Crawford had been an independent contractor, he would not have needed the Appellant to tell him that. (Hr. Tr. p. 19, lines 4 – 24) Ms. Vaught also testified concerning her review of a federal database. Apparently the vast majority of Appellant's drivers were not listed as independent contractors in that database. If the drivers thought that they were independent contractors, they would have been listed. (Hr. Tr. p. 39, lines 18 – 24)

During cross examination, the counsel for the Appellant admitted that the trucks that had allegedly been leased to the 'independent contractors' were in fact trucks 'owned' by the Appellant. (Hr. Tr. p. 62, lines 5 – 13) That admission helped to establish that the Appellant had created the documents in an effort to create an appearance that the drivers were independent contractors.

On April 17, 2014 a decision was issued that again affirmed the March 8, 2010 determination. The Appellant again appealed the matter to this Court. 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. Please note the following:

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. R.C. §4141.282(H)

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.

Furthermore, in this appeal the Appellant asserted that the doctrine of *res judicata* precluded the Commission from holding as it did due to the fact that the IC had already ruled that a driver of the Appellant was not an employee. Appellant claimed that the prior decision was controlling on the Commission. The Commission disagrees.

IV. ANALYSIS:

The Court will first address the issue of *res judicata*.

A) Res Judicata:

The concept of *res judicata* is explained in the following passage:

Res judicata requires the plaintiff to present every ground for relief in the first action, or be forever barred from asserting it. *Hempstead v. Cleveland Bd of Edn.*, 8th Dist. No. 90955, 2008-Ohio-5350, ¶ 7. In order for a claim to be barred on the grounds of *res judicata*, the following four elements must be met: "(1) a prior final, valid decision on the merits by a court of competent jurisdiction; (2) a second action involving the same parties, or their privies, as the first; (3) a second action raising claims that were or could have been litigated in the first action; and (4) a second action arising out of the transaction or occurrence that was the subject matter of the previous action." *Portage Cty. Bd. of Commrs. v. Akron*, 109 Ohio St.3d 106, 2006-Ohio-954, 846 N.E.2d 478, ¶84, quoting *Hapgood v. Warren*, 127 F.3d 490 (6th Cir.1997). *Fitzgerald v. County of Cuyahoga*, 2012-Ohio-2638 (8th Dist.) at ¶¶ 11 & 12.

The Appellant has asserted that a prior decision from the IC is dispositive of the issue. One of the Appellant's drivers asserted that he should be covered by the BWC due to a claimed work related injury. The driver was held to be an independent contractor by the District Hearing Officer for the IC. That ruling became final. Therefore, Appellant asserted that the IC had made the judicial determination that all of Appellant's drivers were in fact independent contractors. The IC's decision predated the Commission's decision in this case. Hence, the Appellant argued that the IC decision was *res judicata* as to the issue of the legal status of Appellant's drivers.

The Commission responded by pointing out the obvious. The Commission is responsible

for the administration of R.C. §4141.01 *et seq.* The BWC is responsible for the administration of R.C. §4123.01 *et seq.* The Commission asserted that the two agencies are not the same. Being independent from one another, and having different missions, the Commission argued that it would be error for this Court to hold that the two agencies are the same for the purpose of *res judicata*.

This Court will focus on the authority of the agencies. For *res judicata* to apply, one must have had the opportunity to bring ‘all claims’ before a tribunal that has ‘competent jurisdiction’. The IC could never have bound the Appellant to a decision that would have required the Appellant to pay more into the unemployment system. Correspondingly, the Commission could never have issued a finding that held that one or more of the Appellant’s drivers should be allowed to receive benefits from the BWC. Hence, the IC is not a tribunal that had competent jurisdiction. The Commission’s Decision of April 17, 2014 is not barred by *res judicata*.

B) Review of Commission’s Decision:

The main thrust of the Appellant’s appeal dealt with the issue of *res judicata*. However, the Appellant also claimed that there was insufficient evidence to support the Commission’s ultimate decision. After a review of the hearing transcript and the evidence as contained within the certified record, this Court does not agree with Appellant’s argument.

There was a great deal of evidence that supported the conclusion of the Hearing Officer and the Commission. The Commission evaluated the criteria found in O.A.C §4141-3-05 as well as the language of R.C. §4141.01(B)(1). The evidence highlighted *supra* supported the Commission’s conclusion that the drivers were not independent contractors. This Court cannot hold that the Commission’s Decision was unlawful, unreasonable, or against the manifest weight of the evidence.

V. DECISION:

The Commission’s Decision of April 17, 2014 is lawful, reasonable and supported by the

evidence. It is **AFFIRMED**.

THIS IS A FINAL APPEALABLE ORDER

Copies to:

PIERO P COZZA
401 MARKET STREET
SUITE 401
STEUBENVILLE, OH 43952
Counsel for the Appellant

ALAN P SCHWEPE
30 EAST BROAD STREET
26TH FL
COLUMBUS, OH 43215-3428
Counsel for the Appellee

OHIO STATE EMPLOYMENT COMPENSATION
P O BOX 182299
COLUMBUS, OH 43218-2299
Appellee pro se

OHIO DEPARTMENT JOB & FAMILY SERVICES
4020 E FIFTH AVENUE
COLUMBUS, OH 43219-1811
Appellee pro se

Franklin County Court of Common Pleas

Date: 09-11-2014

Case Title: COUGARS VALLEY EXPRESS INC -VS- OHIO STATE
DEPARTMENT JOB FAMILY SERVICE ET AL

Case Number: 14CV005122

Type: DECISION/ENTRY

It Is So Ordered.

The image shows a handwritten signature in black ink that reads "Richard S. Sheward". The signature is written over a circular blue seal. The seal contains the text "FRANKLIN COUNTY OHIO" around the top and "ALL THINGS ARE" around the bottom. The signature is written in a cursive style.

Judge Richard S. Sheward

Court Disposition

Case Number: 14CV005122

Case Style: COUGARS VALLEY EXPRESS INC -VS- OHIO STATE
DEPARTMENT JOB FAMILY SERVICE ET AL

Case Terminated: 10 - Magistrate

Final Appealable Order: Yes