

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

Marine City Sales, LLC, :
Appellant, : CASE NO. 14CVF09-390
-vs- : **JUDGE JENIFER FRENCH**
Ohio Department of Job and :
Family Services, :
Appellee. :

DECISION AND ENTRY ON MERITS OF APPEAL

FRENCH, JUDGE

I. INTRODUCTION

This is an appeal from a Decision of the Unemployment Compensation Review Commission (hereinafter "Commission"), pursuant to R.C. 4141.26. The issue in this case is whether the individuals working for Appellant were properly determined to be covered employees, as opposed to independent contractors.

Briefs have been offered by counsel and the record of proceedings has been filed.

II. FACTUAL AND PROCEDURAL BACKGROUND

Appellant is the operator of a business that installs modular and manufactured housing in Port Clinton, Ohio. On February 2, 2012, the Ohio Department of Job and Family Services (hereinafter "ODJFS") notified Appellant of a determination that it was a liable employer for unemployment compensation purposes. Appellant applied to the Director of ODJFS for reconsideration of the determination. On November 30, 2012, the Director affirmed the determination that thirty-three (33) employees were misclassified as independent contractors, resulting in unpaid unemployment compensation premiums.

Appellant then applied to the Commission for a review of the Director's reconsidered decision. On November 13, 2013, the Commission conducted a hearing. ODJS presented the testimony of Linda Earl, an Unemployment Compliance Auditor. Appellant introduced the testimony of Dana Stahl and Deanne Kramer.

On December 19, 2013, the Commission rendered its Decision, finding that the workers at issue were employees rather than independent contractors. The Commission provided the following reasoning:

The determining factor is control. In this instance, the employer does have the right to control these individuals performing modular home construction to the extent as to bring their services under unemployment compensation law coverage as defined by Ohio law. [***] Marine City Sales, LLC specialized in modular home construction, and the skilled and unskilled laborers were essential to the profitability of the company. The individuals performed services that were an integral part of the regular functions of the company. The company provided tools, equipment, materials and supplies necessary to perform the job and the services were performed at the job site. The company provided instruction, and paid the workers on a regular recurrent schedule.

Decision, at 6. On January 14, 2014, Appellant filed this appeal from the Commission's Decision.

The record has been filed and arguments have been timely submitted by the parties. For the reasons identified below, the Adjudication Order must be affirmed.

III. STANDARD OF REVIEW

This Court must affirm the Order of the Commission if it is supported by reliable, probative and substantial evidence and is in accordance with law. R.C. 4141.26(D)(2).

The quality of the required evidence was defined by the Ohio Supreme Court in *Our Place v. Liquor Control Comm.* (1992), 63 Ohio St. 3d 570 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. *Id.* at 571.

The common pleas court’s review of the administrative record is neither a trial de novo nor an appeal on questions of law only, but consists of “a hybrid review in which the court must appraise all the evidence as to the credibility of the witnesses, the probative character of the evidence and the weight thereof.” *Marciano v. Liquor Control Comm.* (Apr. 22, 2003), Franklin App. No. 02AP-943, unreported, citing *Lies v. Veterinary Med. Bd.* (1981), 2 Ohio App.3d 204, 207. In undertaking such a review, the court must give due deference to the administrative agency’s resolution of evidentiary conflicts, but the findings of the agency are not conclusive. *Id.*

IV. ANALYSIS AND FINDINGS OF THE COURT

Appellant claims that the order of the Commission is not supported by reliable, probative and substantial evidence. It is argued that ODJFS’ reclassification was based entirely on information obtained from an anonymous informant. According to Appellant, the auditor failed to establish or verify the accuracy of any of this information. When before the Commission, Appellant claims that it countered these preliminary findings by the use of affidavits of its contractors, sworn testimony by its project coordinator, along with written statements of other persons. Finally, Appellant insists that it was deprived of due process by both the Commission’s reliance on uncorroborated allegations of an informant, and its failure to provide the means of identifying and cross-examining the informant.

In response, Appellee maintains that compliance audits of this nature are frequently initiated via some kind of tip to the IRS, but there is no requirement that the informant be produced as a hearing witness subject to cross-examination. It is argued that based on the documents supplied by Appellant and the findings of the on-site audit, Appellant's workers operated under a set schedule, performed many functions at Appellant's place of business or job sites, and received instructions, along with materials. In response to an on-site audit, Appellee asserts that Appellant failed to produce a check register and other fundamental documents. According to Appellee, no explanation was provided as to the type of services performed by the alleged independent contractors, and Appellant's answers were incomplete regarding the standard twenty (20) questions germane under Ohio law. Based on the evidence, it is contended that ODJFS was right to determine that in performing office work, accounting, cleaning, carpentry, surveying, sitting, dry-walling, electrical, plumbing and gutter installation, Appellant assumed sufficient direction and control over these individuals to support employee classification. Lastly, it is stated that recognized due process has been satisfied based on the provision of notice and a hearing.

It is from these assignments of error and arguments that the Court reviews the decision issued by the Commission.

Ohio employers must pay contributions into Ohio's unemployment compensation fund. R.C. 4141.23(A). The definition of "employer" includes any individual or organization that has "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). It is the alleged employer that 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, LLC v. Ohio Dep't of Job & Family Servs.*, 2012-Ohio-5669 (Ohio Ct. App., Franklin County Dec. 4, 2012), ¶¶21-22; *Peter D. Hart Research Assocs. v. Adm'r*, 1995 Ohio App. LEXIS 5870, at 8 (Ohio Ct. App., Franklin County Dec. 28, 1995); *McConnell v. Ohio Bureau of Empl. Servs.*, 1995 Ohio App. LEXIS 4424 (Ohio Ct. App., Franklin County Oct. 5, 1995).

Ohio Adm. Code 4141-3-05(B) sets forth twenty (20) factors as “guides” for determining if there is sufficient direction or control 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. *Miracle Home Health Care, LLC, supra*, at ¶22. The factors that 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;
- (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.

The above factors are “guides” to be considered in their totality. The essential and determining factor is the right to direct or control the performance of services, as well as the means or manner of doing the work. If the employer has this right to control, the worker is an employee. *Prime Kosher Foods, Inc. v. Administrator, Bureau of Employment Services*, 35 Ohio App. 3d 121, 123 (Ohio Ct. App., Franklin County 1987); see also *Marshall v. Aaron* (1984), 15 Ohio St. 3d 48, 49, 146; *N & G Constr., Inc. v. Lindley* (1978), 56 Ohio St. 2d 415. The fact that an employer does not exercise its right of control over an employee is not dispositive as long as the right of control exists and remains with the employer. *Id.*

In this case, the Commission found that Appellant directed or controlled the manner or method by which instructions were given to individuals performing services essential to the business, while using tools and materials furnished by Appellant, as well as the manufacturer of the modular homes. At the hearing, Compliance Auditor Linda Earl attested that in response to the audit, Appellant supplied a number of affidavits from workers. However, these were said to all contain the same brief statements and were generally, devoid of substantive content. (Tr. 17). As a result, they did not give any guidance to the central issues of direction and control, tools/supplies, contracts, meeting attendance and ongoing relationships. (Tr. 18). Similarly, there are incomplete responses as to fee schedules and income tax returns. (Tr. 20). Ms. Earl was independently able to exclude several flagged workers from employee classification by corroborating their independence by her own research. (Tr. 16). Nevertheless, her testimony and the final audit shows the remaining workers were given specific hours identified with amounts paid, which “looked like time sheet information.” (Tr. 12). While Appellant makes reference to

jobs that were “bid and won”, there is no corroboration in the record to requests for verification of bids or contracts. (Tr. 41-42).

Consequently, a prima facie showing was established that suggested that these workers appeared to be directed or controlled in their performance of services by Appellant, as well as the means or manner of doing the work, which is more consistent with employees than subcontractors.

In response, two individuals were called to testify on behalf of Appellant. First, Mr. Dana Stahl attested that he is the CPA for the company. (Tr. 24). However, Mr. Stahl readily conceded had no first-hand knowledge of the pertinent issues governing this appeal. In responding to examination by the hearing officer, he denied familiarity with Appellant’s check register, payroll records or what specifically the workers did day-to-day. (Tr. 25-27). Accordingly, his testimony is of limited utility with respect to any of the recognized twenty (20) factors and overarching question of employer control. Next, Deanne Kramer was called as the former General Manager for Appellant. In spite of her title and regular work at the company’s central office, Ms. Kramer attested that she was never an employee. (Tr. 29-30). When asked if she had first-hand knowledge of what Appellant’s workers did, she responded “uh not really. They were given a job to do you know they gave an estimate and they pretty much worked on their own at their own time.” (Tr. 30). In response to the fact that Appellant supplied all parts to complete assigned work, Ms. Kramer stated “[w]e’re on an island. They had no way to get it.” (Tr. 31). Ms. Kramer denied that Appellant’s workers were required to attend meetings, that they received instructions regarding job performance or that the company controlled their time. (Tr. 30).

However, the remainder of her testimony and hearing evidence undermines these conclusory responses.

Upon review of the evidence in the record, it is not disputed that skilled and unskilled laborers were essential to the profitability of Appellant's business. These individuals performed services that were an integral part of the regular functions of the company. The company provided tools, equipment, construction materials and assembly supplies necessary to perform the job, and the services were performed at the job site under the direction of Appellant. The company equally supplied instructions, and appears to have paid workers on a regular recurrent schedule. Appellant would have the Court and Commission believe that it operates all the vital aspects of its business with zero employees. Overall, there appears in the record a sufficient basis to reach the opposite conclusion regarding employee classification.

After examine the evidence in its totality, the Commission appears to have been persuaded that the testimony of Appellant's witnesses was not credible or persuasive in their conclusory assertions that oppose the findings of the ADJFS audit. This court remains obligated to accord due deference to the agency's interpretation of the technical requirements of its rules and regulations. *Pons v. Ohio State Med. Bd, supra* at 621; *Rossiter v. State Med. Bd* (2004), 155 Ohio App. 3d 689. The purpose of the General Assembly in providing for administrative hearings in particular fields was to facilitate such matters by placing the decision on facts with boards or commissions composed of people equipped with the necessary knowledge and experience pertaining to a particular field. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621-22 (1993). In *Miracle Home Health Care, LLC, supra*, the Tenth District Court of Appeals in affirming the Commission's finding that workers were employees, rather than independent contractors, provided "[O]n close

questions-where the Commission might reasonably decide either way-courts have no authority to upset the Commission's decision." *Id.* at ¶30, citing *Irvine v. State, Unemployment Compensation Bd. of Review*, 19 Ohio St. 3d 15, 18 (Ohio 1985).

Similarly in this case, the Court is not inclined to substitute its judgment for that of the Commission. The evidence in the record is sufficient that the Commission, as the finder of fact, was entitled to find that the workers at issue were employees rather than independent contractors. One central issue that governs this outcome is the associated burden of proof and production at the administrative level. It is important to distinguish that it is Appellant that is faced with these burdens in the context of establishing that the classification of the subject workers as employees was incorrect. *Miracle Home Health Care, LLC, supra*, at ¶21-22. Here, the final audit established a prima facie showing of employment with respect to a number of individuals performing the regular functions of this business at both its office and assigned job sites. Appellant was afforded an evidentiary process to test these conclusions, several of which were preliminarily determined based upon a failure to adequately produce relevant information at the on-site audit. Admittedly, the Commission was not afforded the luxury of having the best and most comprehensive evidence pertaining to control and supervision of Appellant's workers. However, it was Appellant's failure to introduce competing evidence or witnesses with firsthand information that resulted in a struggle to overcome inferences that derived from the ODJFS recommendations. Appellant makes frequent mention that the unnamed informant can't be the sole basis for the Commission's decision; but this misstates the associated burden of proof at this stage. Furthermore, the limitations associated with hearsay evidence in a court of law do not extend to administrative hearings.

Statements or documents that might constitute inadmissible hearsay where stringent rules of

evidence are followed must be taken into account in administrative proceedings where relaxed rules of evidence are applied. *Simon v. Lake Geauga Printing Co.* (1982), 69 Ohio St.2d 41, 44; *Reynolds v. Ohio State Bd. of Examiners of Nursing Home Adm'rs*, 2003 Ohio 4958 (Ohio Ct. App., Franklin County 2003); *Black v. State Bd. of Psychology* (2005), 160 Ohio App. 3d 91, relying on *Haley v. Ohio State Dental Bd.* (1982), 7 Ohio App.3d 1, 6. More importantly, many of the conclusions contained in the on-site audit were the result of lack of cooperation or responsiveness by Appellant. Appellant's representatives only gave cursory and incomplete answers to necessary requests. After employing the aforementioned twenty (20) factors, there is evidentiary support to answer the majority of these "guides" affirmatively. As a result, the Commission was restricted in reaching its factual findings by the veracity to those attesting witnesses and the documents in the record.

The second argument presented is that there has been a denial of due process. This Court acknowledges that procedural due process is required in administrative proceedings. There is no dispute that R.C. 119.07, along with Section 16, Article I, of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution, mandates that due-process rights, both procedural and substantive, must be accorded to Appellant. Ohio Courts have used the test in *Mathews v. Eldridge* (1976), 424 U.S. 319, as the basis for due process analysis in administrative hearings. The *Mathews* case requires the court to weigh the following three factors to determine whether the process granted in the administrative proceeding is constitutionally adequate: (1) the private interest at stake, (2) the risk of an erroneous deprivation of that interest and the probable value of additional procedural safeguards, and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural

requirements would entail. *Id.* at 335. Courts reviewing due process under administrative law must look to ensure “fundamental fairness.” *Sohi v. Ohio State Dental Bd.*, 130 Ohio App. 3d 414, 422 (Ohio Ct. App., Hamilton County 1998). The application of procedural due process had been described as flexible and requires only that the agency provide reasonable notice and opportunity to be heard. *Alcover v. Ohio St. Med. Bd.*, 1987 Ohio App. LEXIS 9961 (Ohio Ct. App., Cuyahoga County Dec. 10, 1987).

In the instant appeal, the record reflects that notice of all of the contents of the ODJFS final audit report was conveyed to Appellant on January 30, 2012. Furthermore, an opportunity to participate in an evidentiary hearing was provided, wherein Appellant fully availed itself by calling two witnesses to provide testimony, as well as the ability to cross-examine Ms. Earl and introduce legal argument. See *McConnell v. Ohio Bureau of Empl. Servs.*, *supra*, at 10. This satisfies the mandates of both procedural and substantive due process, in spite of Appellant’s insistence that ODJFS should be ordered to identify and produce the departed worker that initially flagged concerns to the IRS. There is no such rule or requirement contained in R.C. Chapter 4141, and imposing one would have a chilling effect on the fair investigation of future employment classifications.

Although not specifically discussed as an assignment of error, the Court also finds that due process mandates are met by way of a telephonic hearing. Courts and juries are routinely required to evaluate the weight of testimony from depositions which are in recorded form. Evidence can often come from recordings where visual cues are lacking. While in person testimony is always preferable, the economic factors in having live testimony are considerations that require administrative agencies like the Commission to utilize telephonic services.

Having fully reviewed the record of proceedings and arguments of counsel, the Court finds that the Decision is in accordance with law, and supported by reliable, probative and substantial evidence. Given the evidence supporting the result, the Commission was within its discretion in reclassifying Appellant's employees and assessing associated premiums. Based on the foregoing, the Court hereby **AFFIRMS** the Decision of the Commission.

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.

The Clerk is instructed to serve the parties in accordance with Civ. R. 58(B) as set forth above.

COPIES TO:

David M. Buda, Esq., Counsel for Appellant Marine City Sales, LLC

Alan Schwepe, Esq., Counsel for Appellee Director ODJFS

Franklin County Court of Common Pleas

Date: 05-28-2015
Case Title: MARINE CITY SALES LLC -VS- OHIO STATE DEPARTMENT
JOBS & FAMILY SERV ET AL
Case Number: 14CV000390
Type: DECISION/ENTRY

It Is So Ordered.

A handwritten signature in black ink, appearing to read "J. A. French", is written over a blue circular seal. The seal contains the text "COMMON PLEAS COURT" at the top, "FRANKLIN COUNTY OHIO" in the middle, and "ALL THINGS ARE" at the bottom.

/s/ Judge Jenifer A. French

Court Disposition

Case Number: 14CV000390

Case Style: MARINE CITY SALES LLC -VS- OHIO STATE
DEPARTMENT JOBS & FAMILY SERV ET AL

Case Terminated: 18 - Other Terminations

Final Appealable Order: Yes