

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

<b>RUBINO CONSTRUCTION, INC.,</b>	:	
	:	
<b>Appellant,</b>	:	<b>Case No. 2016 CV 8225</b>
	:	
<b>vs.</b>	:	<b>JUDGE CHRIS M. BROWN</b>
	:	
<b>DIRECTOR, OHIO DEPT. OF JOB AND</b>	:	
<b>FAMILY SERVICES,</b>	:	
	:	
<b>Appellee.</b>	:	

**DECISION AND ENTRY**  
**AFFIRMING THE DECISION OF THE DIRECTOR**  
**OF OHIO UNEMPLOYMENT COMPENSATION REVIEW COMMISSION**

Rendered this 22<sup>nd</sup> day of August, 2017

**C. BROWN, JUDGE.**

This matter is before the Court on Appellant Rubino Construction, Inc.’s (“Appellant” or “Rubino”) appeal from the Ohio Unemployment Compensation Review Commission’s (the “Commission”) August 3, 2016 Decision Affirming that Appellant is an employer under Ohio unemployment law. Appellant named the Director of the Ohio Department of Job and Family Services (hereinafter referred to as the “Appellee”) as Appellee.

Appellant filed a Brief in this matter on November 8, 2016. Appellee filed its Brief on December 21, 2016. Appellant filed a Reply Brief on December 29, 2016. For the reasons that follow, this Court **AFFIRMS** the August 3, 2016 Decision.

**I. STATEMENT OF THE CASE**

On February 10, 2016, the Ohio Department of Job and Family Services (“ODJFS”) sent an Ohio Unemployment Tax Notification to Rubino, assigning an employer contribution rate. ODJFS determined that Rubino met the definition of an employer under Ohio Revised Code Section 4141.01. Rubino filed a request for reconsideration, which was denied on April 5, 2016. Rubino then filed a further appeal to the Ohio Unemployment Compensation Review Commission, which conducted a Telephone Hearing on June 22, 2016.

The sole issue of determination at the Telephone Hearing was whether Rubino is an employer under Ohio law. Following the hearing, the Commission issued a Decision on August 3, 2016 upholding the determination that Rubino is an employer obligated to contribute unemployment taxes.

From this Decision, Rubino filed a Notice of Appeal to this Court on August 30, 2016.

## **II. STATEMENT OF THE FACTS**

Rubino is a construction company owned and operated by Dominic Marchionda. In 2015, Rubino served as the general contractor with oversight on the renovation of the Wick Building in downtown Youngstown, Ohio. The Wick Building is owned by Wick Properties, LLC and Marchionda is a 50% owner in the building. As part of the project, Rubino hired Carmen Silvestri to provide demolition work on the building. Mr. Silvestri hired Alajandro Salinas to work on the demolition crew.

At the Telephone Hearing, the only two witnesses were Marchionda and Silvestri. The latter testified he is an independent demolition contractor who performed services for Rubino on buildings in downtown Youngstown, Ohio. (Tr. at pgs. 7-8). Marchionda is the local owner of NYO Properties, a corporation that buys old buildings in Youngstown and demolishes the inside to refurbish them into apartments, condominiums, or hotels. (Tr. at pg. 19). Silvestri does not have a business name, carry worker's compensation, advertise services, or offer his services to any companies other than Rubino. (Tr. at pg. 8). Each job has an architect or someone hired to do the subcontract, and that individual would instruct him on what needs to be demolished. (Tr. at pgs. 8-9). The construction manager for the demolition project on the Wick Building was GreenHeart Construction. (Tr. at pg. 8). Marchionda would pay Silvestri through a company check that says "Rubino Construction." (Tr. at pgs. 10-11).

Silvestri testified Salinas was a professional boxer in need of work. Silvestri hired Salinas to perform demolition duties on the Wick Building project. (Tr. at pg. 12). As a result of his boxing

training and fights, Salinas only worked a few days a week with clean up. (Tr. at pg. 12). Sometimes Salinas would take a week or two off for fighting. (Tr. at pgs. 13-14). There was no expectation of continuing work. (Tr. at pg. 15). Rubino did not require any training for Salinas. (Tr. at pg. 16). Salinas did not have a key to the Wick Building and never came in on Saturday or Sunday when no one else was there. (Tr. at pg. 20). Salinas would bring his own tools, such as a shovel or sledgehammer, or share tools from other contractors. (Tr. at pgs. 12-13). Rubino Construction paid for the use of dumpsters or pickup trucks for debris. (Tr. at pg. 13). Greenheart gave instruction on what needed to be done based on how many workers would show up. (Tr. at pg. 13). Silvestri kept track of the hours for the employees and they were paid by the hour. (Tr. at pgs. 13-14). Rubino Construction directly paid Salinas and other workers after Silvestri turned in the hours to Marchionda's company secretary. (Tr. at pg. 12, 14).

Marchionda testified he is the owner of Rubino Construction. (Tr. at pg. 24). He is a 50% owner in Wick Properties, LLC, who owned the Wick Building. (Tr. at pg. 33). He is also an owner in NYO Properties, who was going to manage the Wick Building upon completion. (Tr. at pg. 26). Rubino Construction was hired to do the renovation of the Wick Building in 2014. (Tr. at pg. 26). Rubino has no employees, but Marchionda provided the day-to-day services for the company, such as taking phone calls, making contracts, and he is compensated in profits. (Tr. at pgs. 26-27). On the Wick project, Rubino hired and paid Greenheart, as well as Silvestri and Salinas. (Tr. at pg. 28). Marchionda paid these individuals because he had prior incidents where a subcontractor did not pay their workers and he had been threatened. (Tr. at pg. 27). From that point on, Marchionda pays everyone directly with a Rubino check. (Tr. at pg. 27).

## **II. 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.*, 73 Ohio St.3d 694,697, 653 N.E.2d 1207 (1995). 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*, 148 Ohio St. 511 (1947); *Angelkovski v. Buckeye Potato Chips*, 11 Ohio App.3d 159,162, 463 N.E.2d 1280 (10th Dist. 1983).

More specifically:

The Commission and its referees are the triers of fact. 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. The common pleas court may not substitute its judgment for that of the hearing officer or the board. (Internal citations omitted.)

*Simon v. Lake Geauga Printing Co.*, 69 Ohio St.2d 41, 45, 23 O.O.3d 57, 430 N.E.2d 468 (1982).

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, supra*, at 162.

### **III. ANALYSIS**

ODJFS and the Commission found Rubino to be an employer obligated to pay unemployment taxes. In its Decision, the Commission concluded that Marchionda was an employee of Rubino working as a corporate officer who provides services to the corporation. The Commission also found the workers on the demolition crew, including Salinas, were employees of Rubino.

Rubino sets forth the following Assignment of Error:

- I. THE DECISION OF THE UNEMPLOYMENT COMPENSATION REVIEW COMMISSION WAS UNLAWFUL, UNREASONABLE, AND AGAINST THE

MANIFEST WEIGHT OF THE EVIDENCE

A. THE UNEMPLOYMENT COMPENSATION REVIEW COMMISSION ERRED WHEN IT HELD THAT ALEJANDRO SALINAS WAS AN EMPLOYEE OF RUBINO CONSTRUCTION, INC.

I. THE UNEMPLOYMENT COMPENSATION REVIEW COMMISSIONS DECISION WAS UNREASONABLE BECAUSE IT FAILED TO ADDRESS THE REQUIREMENTS OF R.C. 4141.01(B)(2)(k) AND SUMMARILY FOUND AN EMPLOYER-EMPLOYEE RELATIONSHIP

Ohio Revised Code Section 4141.01(B)(2)(k) sets forth the specific factors by which the Commission differentiates between an independent contractor and an employee. In the construction context, an employment relationship exists if:

“the director determines that the employer for whom services are performed has the right to direct or control the performance of the services and that the individuals who perform the services receive remuneration for the services performed. The director shall presume that the employer for whom services are performed has the right to direct or control the performance of the services if ten or more of the following criteria apply:

- (i) The employer directs or controls the manner or method by which instructions are given to the individual performing services;
- (ii) The employer requires particular training for the individual performing services;
- (iii) Services performed by the individual are integrated into the regular functioning of the employer;
- (iv) The employer requires that services be provided by a particular individual;
- (v) The employer hires, supervises, or pays the wages of the individual performing services;
- (vi) A continuing relationship between the employer and the individual performing services exists which contemplates continuing or recurring work, even if not full-time work;
- (vii) The employer requires the individual to perform services during established hours;
- (viii) The employer requires that the individual performing services be devoted on a full-time basis to the business of the employer;
- (ix) The employer requires the individual to perform services on the employer's premises;

- (x) The employer requires the individual performing services to follow the order of work established by the employer;
- (xi) The employer requires the individual performing services to make oral or written reports of progress;
- (xii) The employer makes payment to the individual for services on a regular basis, such as hourly, weekly, or monthly;
- (xiii) The employer pays expenses for the individual performing services;
- (xiv) The employer furnishes the tools and materials for use by the individual to perform services;
- (xv) The individual performing services has not invested in the facilities used to perform services;
- (xvi) The individual performing services does not realize a profit or suffer a loss as a result of the performance of the services;
- (xvii) The individual performing services is not performing services for more than two employers simultaneously;
- (xviii) The individual performing services does not make the services available to the general public;
- (xix) The employer has a right to discharge the individual performing services;
- (xx) The individual performing services has the right to end the individual's relationship with the employer without incurring liability pursuant to an employment contract or agreement.

The Commission cited the above factors as part of its reasoning to find Rubino as an employer. The Commission found the demolition workers were paid by the hour, their hours were tracked, they worked on a site on which Rubino was the general contractor, and there was sufficient control over the crew to establish an employer-employee relationship.

The Court finds several factors present, which support the Commission's finding. These factors are as follows:

1. Rubino directed or controlled the manner by which instructions were given to the demolition crew. Marchionda hired GreenHeart to serve as an agent of Rubino at the demolition site. According to the testimony of Silvestri, GreenHeart directed his crew to those demolition services that needed to be provided. [See subdivision (i) above]

2. The services provided by Salinas were integral to Rubino's work. Rubino is a general contractor hired to perform demolition and reconstruction services on buildings such as the Wick Building. The relationship between Rubino, Wick Properties, LLC, and NYO Properties is intertwined solely for this purpose. [See subdivision (iii) above]
3. Rubino paid the wages of Salinas and his co-workers. Regardless of the stated rationale, Salinas received a check directly from Rubino Construction, said wages were based on an hourly rate tracked by Silvestri and provided to Rubino. Further, Salinas was paid on a bi-weekly basis. [See subdivisions (v) and (xii) above]
4. Salinas was required to work during certain hours. Although he may have been flexible in the number of hours or days he worked, Salinas could only perform his job when the job site was made available to him during the same working hours as the crews present. He was supervised by Silvestri and GreenHeart during these hours and he was not permitted to perform his job on weekends or off hours. [See subdivision (vii) above].
5. The work provided had to be performed on the Wick Building, which was a job site operated and controlled by Rubino. Even if Rubino did not own the building, there is sufficient indicia of operation and control by virtue of Marchionda's tri-ownership status that the Commission was justified in determining the work was performed on the employer's premises. [See subdivision (ix) above].
6. Rubino provided tools necessary to perform the demolition work provided by Salinas. Although there was testimony that Salinas and/or his co-workers provided some of their own tools, other essential items such as dumpsters were paid for and provided by Rubino. Additionally, the job site was maintained by Rubino. [See subdivision (xiv) above].
7. Salinas was not invested in the facilities used to perform the services as those instrumentalities were provided by either Silvestri or Rubino. [See subdivision (xv) above].

8. Salinas did not realize any profit or suffer any loss as a result of the performance of his services because he was paid on an hourly basis. [See subdivision (xvi) above].
9. There was no evidence Salinas made performance of demolition services available to the general public. The burden of proving entitlement to the independent contractor exemption is on the employer. *BNA Construction, Ltd. v. ODJFS*, 10<sup>th</sup> Dist. Franklin App. No. 16AP-317, 2017-Ohio-7227. Therefore, the absence of evidence on this issue weighs in favor of finding Rubino to be an employer. (See subdivision (xviii) above].
10. Rubino had the right to termination Salinas, as acknowledged by Appellant in its brief. [See pg. 13 of Appellant's brief; see also subdivision (xix) above].

The Decision of the Commission properly cited the factors set forth in R.C. 4141.01(B)(2)(k). The hearing officer expressly delineated the factors found to be most pertinent and based its decision upon the evaluation of the testimony pertaining to those factors. The hearing officer's reference to the "criteria" in R.C. 4141.01(B)(2)(k) is evidence the decision was based on the plain text of the statute. *Henderson v. ODJFS*, 10<sup>th</sup> Dist. Franklin App. No. 12AP-154, 2012-Ohio-5382, at ¶ 22.

The Court further finds 11 of the 20 factors set forth in R.C. 4141.01(B)(2)(k) supports a finding that Rubino is an employer for the purpose of establishing the unemployment compensation rate. Therefore, there is a presumption that Salinas was an employee. The Commission did not find the evidence to overcome this presumption persuasive.

In addition, the Court finds Appellant did not set forth as part of its Assignment of Error any issue with the finding of Marchionda as an employee of Rubino. Therefore, that is not an issue before the Court. Even if this issue were properly presented to the Court in this appeal, the Court would find the Commission's decision was supported by the evidence.

The underlying Decision from the administrative agency is supported by substantial, reliable, and probative evidence. Therefore, this Court OVERRULES the assignment of error.

#### **IV. CONCLUSION**

Based upon the foregoing, the Decision of August 3, 2016 is hereby **AFFIRMED**. Costs to the Appellant.

**THIS IS A FINAL APPEALABLE ORDER.**

**IT IS SO ORDERED.**

**JUDGE CHRIS M. BROWN**

Franklin County Court of Common Pleas

**Date:** 08-22-2017

**Case Title:** RUBINO CONSTRUCTION INC -VS- OHIO STATE  
DEPARTMENT JOB & FAMILY SRVC

**Case Number:** 16CV008225

**Type:** ENTRY

It Is So Ordered.

The image shows a handwritten signature in black ink over a circular official seal. The seal features a landscape with a sun, trees, and water, surrounded by the text "COMMON PLEAS COURT" at the top, "FRANKLIN COUNTY OHIO" on the sides, and "WITH GOD ALL THINGS ARE POSSIBLE" at the bottom.

/s/s Judge Christopher M. Brown

Court Disposition

Case Number: 16CV008225

Case Style: RUBINO CONSTRUCTION INC -VS- OHIO STATE  
DEPARTMENT JOB & FAMILY SRVC

Case Terminated: 18 - Other Terminations

Final Appealable Order: Yes