

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Mark Henderson,	:	
Appellant-Appellant,	:	
v.	:	No. 12AP-154 (C.P.C. No. 11CVF-09-12229)
Director, Ohio Department of Job and Family Services et al.,	:	(REGULAR CALENDAR)
Appellees-Appellees.	:	

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D E C I S I O N

Rendered on November 20, 2012

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*Kathleen C. McGarvey*, for appellant.

*Michael DeWine*, Attorney General, and *David E. Lefton*, for appellee Director, Ohio Department of Job and Family Services.

*Thomas S. Amato*, for appellee Mid-Ohio Contracting Services, Ltd.

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APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Appellant, Mark Henderson, appeals from a judgment of the Franklin County Court of Common Pleas affirming a decision of the Ohio Unemployment Compensation Review Commission ("commission") denying appellant's request for unemployment compensation benefits. Because the decision is not unlawful, unreasonable or against the manifest weight of the evidence, we affirm.

## I. BACKGROUND

{¶ 2} On July 8, 2010, appellant filed an application for determination of unemployment benefit rights with appellee, Director, Ohio Department of Job and Family Services ("ODJFS"). In his application, appellant named appellee, Mid-Ohio Contracting Services, Ltd. ("Mid-Ohio"), as his employer. ODJFS initially disallowed the application. Upon appellant's appeal, ODJFS transferred jurisdiction to the commission. Following a January 21, 2011 telephone hearing, a commission hearing officer issued a decision allowing appellant's application.

{¶ 3} Mid-Ohio appealed the decision. Following further administrative proceedings, an in-person hearing was held on July 12, 2011, after which a commission hearing officer rendered a decision disallowing appellant's application. After the commission denied his request for review, appellant appealed to the Franklin County Court of Common Pleas. In a decision and entry filed January 27, 2012, the common pleas court affirmed the commission's decision, effectively ruling that appellant worked for Mid-Ohio as an independent contractor rather than as an employee.

## II. ASSIGNMENTS OF ERROR

{¶ 4} Appellant timely appeals, raising a single assignment of error:

The lower court's decision to affirm the denial of unemployment compensation benefits is erroneous because (1) Mr. Henderson worked under the direction and control of Mid-Ohio Contracting; and (2) the lower court improperly adopted the hearing officer's analysis which relied on her perception of the legislative intent rather than on the plain text of the statute.

## III. DISCUSSION

{¶ 5} An applicant seeking unemployment compensation benefits submits to ODJFS an application for such benefits along with information in support of his or her claim. *McGee v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 09AP-680, 2010-Ohio-673, ¶ 9. Initially, ODJFS makes findings of fact and conclusions of law as to whether the applicant is entitled to unemployment compensation benefits. *Id.*, citing R.C. 4141.28(B). Such decision is subject to an appeal to the commission for a de novo hearing. *Id.*, citing R.C. 4141.281(C)(1) and (3).

{¶ 6} A party dissatisfied with the commission's final determination may appeal to the appropriate court of common pleas, which shall hear the appeal on the record certified by the commission. *Id.*, citing R.C. 4141.282(H). Pursuant to R.C. 4141.282(H), "[i]f 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 modify the decision, or remand the matter to the commission. Otherwise, the court shall affirm the decision of the commission."

{¶ 7} This standard of review applies to all levels of appellate review in unemployment compensation cases. *Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Servs.*, 73 Ohio St.3d 694, 696-97 (1995). Applying the same standard of review at both the common pleas and appellate court levels does not result in a de novo review standard. *Id.* at 697. In reviewing commission decisions, a court may not make factual findings or determine witness credibility. *Id.* at 696, citing *Irvine v. State Unemployment Comp. Bd. of Rev.*, 19 Ohio St.3d 15, 18 (1985). Factual questions remain solely within the province of the commission. *Tzangas* at 697. Similarly, a court may not substitute its judgment for that of the commission. *McCarthy v. Connectronics Corp.*, 183 Ohio App.3d 248, 2009-Ohio-3392, ¶ 16 (6th Dist.), citing *Irvine* at 18. The fact that reasonable minds might reach different conclusions is not a basis for reversing the commission's decision. *McGee* at ¶ 11, citing *Tzangas* at 696. Instead, a court must "determine whether [the commission's] decision is supported by the evidence in the record." *Tzangas* at 696, citing *Irvine* at 18. Judgments supported by some competent, credible evidence on the essential elements of the controversy may not be reversed as being against the manifest weight of the evidence. *Houser v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 10AP-116, 2011-Ohio-1593, ¶ 7, citing *Carter v. Univ. of Toledo*, 6th Dist. No. L-07-1260, 2008-Ohio-1958, ¶ 12, citing *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279 (1978), syllabus.

{¶ 8} This court's focus is on the commission's decision, rather than on that of the common pleas court. *Howard v. Electronic Classroom of Tomorrow*, 10th Dist. No. 11AP-159, 2011-Ohio-6059, ¶ 12, citing *Moore v. Comparison Mkt., Inc.*, 9th Dist. No. 23255, 2006-Ohio-6382, ¶ 8. Thus, our task is to review the commission's decision and

determine whether it is supported by evidence in the certified record and is unlawful, unreasonable or against the manifest weight of the evidence. *McGee* at ¶ 12.

{¶ 9} By his single assignment of error, appellant contends the common pleas court erred in affirming the commission's decision finding him to be an independent contractor rather than an employee of Mid-Ohio. More specifically, appellant contends the common pleas court's adoption of the commission's order was unlawful because (1) the commission failed to properly apply the factors set forth in R.C. 4141.01(B)(2)(k) in assessing Mid-Ohio's right of direction and control over appellant, and (2) the commission relied upon its perception of the legislative intent of R.C. 4141.01(B)(2)(k) rather than on the plain text of the statute.

{¶ 10} "In order to collect unemployment [compensation benefits], a claimant must have worked in covered employment for a specified number of weeks and have discontinued working for just cause." *Butts v. OBES*, 7th Dist. No. 98 CO 7 (Aug. 19, 1999). The issue to be resolved in this case is whether appellant's position with Mid-Ohio constituted covered employment.

{¶ 11} R.C. 4141.01(B)(1) defines "employment" as "service 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."

{¶ 12} As relevant here, R.C. 4141.01(B)(2)(k) includes as employment "[c]onstruction services performed by any individual under a construction contract \* \* \* 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." R.C. 4141.01(B)(2)(k) lists 20 factors to be considered in assessing direction or control, and provides that the commission must presume that the employer has the right of direction and control if ten or more of the factors apply. Those 20 factors are: (1) the employer directs or controls the manner or method by which instructions are given to the individual performing services, (2) the employer requires particular training for the individual performing services, (3) services performed by the individual are integrated into the regular functioning of the

employer, (4) the employer requires that services be provided by a particular individual, (5) the employer hires, supervises or pays the wages of the individual performing services, (6) a continuing relationship exists between the employer and the individual performing services which contemplates continuing or recurring work, even if not full-time work, (7) the employer requires the individual to perform services during established hours, (8) the employer requires that the individual performing services be devoted on a full-time basis to the business of the employer, (9) the employer requires the individual to perform services on the employer's premises, (10) the employer requires the individual performing services to follow the order of work established by the employer, (11) the employer requires the individual performing services to make oral or written reports of progress, (12) the employer makes payment to the individual for services on a regular basis, such as hourly, weekly or monthly, (13) the employer pays expenses for the individual performing services, (14) the employer furnishes the tools and materials for use by the individual to perform services, (15) the individual performing services has not invested in the facilities used to perform services, (16) the individual performing services does not realize a profit or suffer a loss as a result of the performance of the service, (17) the individual performing services is not performing services for more than two employers simultaneously, (18) the individual performing services does not make the services available to the general public, (19) the employer has a right to discharge the individual performing services, and (20) 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.

{¶ 13} The transcript of testimony from the January 21, 2011 commission telephone hearing, at 1, states that "Claimant appeared and offered testimony. No representative of Mid-Ohio Contracting Services Ltd[.] appeared." At that hearing, appellant testified that he worked for Mid-Ohio, a company providing residential and commercial renovation services, from October 1, 2006 until he was terminated on June 21, 2010. Appellant performed general labor for Mid-Ohio. Appellant averred that he did not bid on jobs either individually or in the aggregate; rather, he was paid an hourly wage.

{¶ 14} According to appellant, although Mid-Ohio hired him as an employee, he requested that his wages be reported on a 1099 tax form rather than a W-2. Appellant testified that he explained to Mid-Ohio that he sought this method of reporting because as a Native American, he would lose certain tax benefits if his wages were reported on a W-2 form. Under this arrangement, appellant was required to report his own taxes.

{¶ 15} Appellant further testified that he was required to work a minimum of 40 hours per week, Monday through Friday. Mid-Ohio determined his work hours, requiring him to report to work no later than 7:30 a.m. He was required to take a 30-minute lunch break at a designated time and could not leave work without permission before 4:00 p.m. Appellant further testified that he was required to keep track of his hours on a daily time log supplied by Mid-Ohio, on which he reported his starting and ending times, his lunch break, and at what job site he worked. (Appellant's exhibit D.) He reported directly to a Mid-Ohio supervisor. He was paid weekly, and his paychecks were made out to him personally. His take-home pay was reduced by the amount of child support Mid-Ohio deducted pursuant to a court order. Appellant's child support order designates Mid-Ohio as his employer. (Appellant's exhibit F.)

{¶ 16} Appellant further averred that although he provided his own hand tools, Mid-Ohio provided him with materials and the major tools required in performing his work. Mid-Ohio required him to wear a company T-shirt while at work. Appellant had to notify Mid-Ohio if he missed work due to illness, and other leave had to be approved in advance by Mid-Ohio. Appellant declined Mid-Ohio's offer of insurance because it was too expensive. In February 2010, appellant received, signed, and was required to follow the employee handbook. (Appellant's exhibit G.)

{¶ 17} After the hearing, a commission hearing officer rendered a written decision allowing appellant's application. The hearing officer concluded that, based on the totality of the circumstances, appellant was not an independent contractor, as he worked under sufficient direction or control of Mid-Ohio. Accordingly, the hearing officer determined that appellant's work for Mid-Ohio constituted employment under R.C. 4141.01(B)(1).

{¶ 18} Following Mid-Ohio's appeal, a different commission hearing officer held an in-person hearing on July 12, 2011. Both appellant and Brad DeHays, president of Mid-Ohio, testified at that hearing.

{¶ 19} DeHays testified that appellant began working on renovation projects for Mid-Ohio in January 2007 after submitting bids through his (appellant's) company, Galaxy Drywall. Mid-Ohio provided the materials for the projects, but appellant supplied his own tools. Mid-Ohio did not provide any training for appellant. Appellant performed his services without supervision and on his own timetable; he had no set work schedule. Rather, appellant estimated the time required to perform a particular project, and was permitted to set his own schedule provided that the work was completed within the estimated timeframe. Because Mid-Ohio did not require appellant to work a set schedule, he was not subject to any attendance control policies or disciplinary actions. At appellant's request, Mid-Ohio paid him personally rather than through his company.

{¶ 20} According to DeHays, appellant worked for and was paid by other individuals during the time he worked for Mid-Ohio. Appellant occasionally turned down projects offered by Mid-Ohio because he was working on projects for others. Appellant provided Mid-Ohio with proof that he carried his own liability and workers' compensation insurance.

{¶ 21} DeHays further testified that in January 2010, Mid-Ohio's business structure changed, and at that time he offered appellant full-time employment with Mid-Ohio. Appellant declined the offer, opting to remain self-employed in order to obtain tax benefits reserved for Native Americans. DeHays averred that he continued to assign projects to appellant after he declined employment; however, he terminated his relationship with appellant in June 2010, due to complaints from clients dissatisfied with appellant's work.

{¶ 22} Appellant testified that prior to working for Mid-Ohio, he owned two businesses, Galaxy Drywall and ProPunch. He began working for Mid-Ohio in October 2006 on a contract basis. In late 2006, after performing several projects for Mid-Ohio, appellant explained to DeHays that he needed full-time employment. DeHays eventually hired appellant, paying him an hourly wage and setting his work schedule of 7:30 a.m. to 4:00 p.m. Although Mid-Ohio did not provide any training to appellant, it furnished all the materials and large tools appellant utilized on the job.

{¶ 23} Appellant further testified that during the four years he worked for Mid-Ohio, he performed only four or five outside jobs, all on the weekends; most were done in

exchange for legal services provided to him. He acknowledged, however, that he was paid for some of the outside jobs he performed. He denied declining work for Mid-Ohio.

{¶ 24} In response to the hearing officer's question about whether he declined Mid-Ohio's 2010 offer of employment, appellant testified that "the offer that was made was everyone was going to follow the employee handbook. \* \* \* [I]f you did not become an employee, you would have to get Worker[s]' Comp and \* \* \* your own insurance and that was the option that I took because yes I do get \* \* \* a tax deferment for being half Native American." (July 12, 2011 Tr. 28.) He further testified that he "declined the offer of being W2'd as an employee and getting their \* \* \* company insurance and all that. I did not decline being an employee. I already was an employee." (July 12, 2011 Tr. 28.) He acknowledged that his wages were reported on a 1099 tax form and that he obtained workers' compensation and liability insurance in his own name in January 2010. He averred that he did not bid on jobs, was paid an hourly wage, was under the direct supervision of a Mid-Ohio employee, and worked on projects as assigned by Mid-Ohio.

{¶ 25} Following the hearing, the hearing officer issued a written decision which included the following pertinent findings of fact:

Mr. DeHayes [sic] 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 [sic] 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 [sic] 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[s] 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.

(Hearing Officer Decision at 3-4.)

{¶ 26} Upon these facts, the hearing officer denied appellant's application, reasoning as follows:

The governing law over whether the money paid to claimant should be considered wages is Ohio Revised Code Section 4141.01(B)(2)(k). The Hearing Officer believed the legislative intent was two-fold. First, it was designed to protect [sic] innocent workers from being ineligible for unemployment compensation. In addition, it was enacted to prevent scrupulous [sic] employers from avoiding taxing liability by setting criteria concerning when a contractor has engaged in covered employment.

At the hearing, each side presented valid arguments for each side. Although there was a close split concerning the criteria, the Hearing Officer considered the employer's testimony as more credible in this case. At the hearing, Mr. DeHayes [sic] presented credible testimony that the employer put a good faith effort to place the claimant on the payroll of the company in January 2010 when the company was formerly formed. Both parties agree that the claimant declined the offer. He refused to go on the payroll and acknowledge a handbook. The claimant went \* \* \* so far as to acquire and maintain worker[s'] compensation insurance to avoid being considered an employee. Based upon the documentation, the claimant never mentioned that he was "employed" by Mid-Ohio Contracting to the court system in an independent matter. An additional consideration was that the claimant was free to perform side work without penalty.

To hold this [sic] Mid-Ohio Contracting [Ltd.] 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 [finds] that wages

from Mid-Ohio Contracting [Ltd.] are excluded for purposes of unemployment compensation.

(Hearing Officer Decision at 7.)

{¶ 27} Upon its review, the common pleas court affirmed the commission's decision disallowing appellant's request for review. The court quoted extensively from the hearing officer's factual findings and concluded that such findings were supported by the record. The court rejected appellant's argument that the evidence supported his position that he was an employee, noting that such claim was founded upon his interpretation of the evidence. The court also rejected appellant's contention that the hearing officer failed to apply the correct legal standard, stating "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." (Jan. 27, 2012 Decision and Entry at 8.) Accordingly, the trial court concluded that neither the hearing officer's decision nor the commission's decision disallowing appellant's request for review were unlawful, unreasonable or against the manifest weight of the evidence.

{¶ 28} On appeal to this court, appellant essentially asserts the same arguments presented to the common pleas court. Appellant first maintains that the evidence presented at the commission hearings establishes at least 10 of the 20 criteria set forth in R.C. 4141.01(B)(2)(k), and, accordingly, the commission was required to presume Mid-Ohio's direction and control over appellant. In support of his claim, appellant cites his own testimony that he did not bid on projects with Mid-Ohio, that he was subject to an hourly wage and was paid weekly, that Mid-Ohio set his work schedule, that he reported directly to a Mid-Ohio supervisor, that Mid-Ohio provided the tools and materials used in appellant's work, that he received and was required to follow Mid-Ohio's employee handbook, and that he chose to receive a 1099 only to preserve tax benefits as a Native American. However, Mid-Ohio's representative, DeHays, provided contrasting testimony establishing that appellant bid on all projects for Mid-Ohio, that appellant was not supervised by Mid-Ohio, that appellant had no set work schedule, and that appellant provided his own tools. In addition, DeHays testified that appellant was not subject to

disciplinary actions by Mid-Ohio, frequently worked on projects for other individuals while working for Mid-Ohio, and expressly declined Mid-Ohio's offer of employment in order to maintain his self-employed status.

{¶ 29} Although appellant argues that the commission's order was unlawful because it failed to properly apply the factors set forth in R.C. 4141.01(B)(2)(k) in assessing Mid-Ohio's right of direction and control over appellant, appellant essentially challenges the commission's ruling based on the weight of the evidence. As noted above, the commission's final decision may not be reversed as being against the manifest weight of the evidence if it is supported by some evidence in the record. *Houser* at ¶ 7. The fact that reasonable minds might reach different conclusions is not a basis for reversing the commission's decision. *McGee* at ¶ 11. Although no individual factor or combination of factors in R.C. 4141.01(B)(2)(k) controls, the specific findings of the commission that appellant declined Mid-Ohio's offer to be placed on the company's payroll, that Mid-Ohio did not set appellant's hours, and that appellant was free to perform outside work without penalty, were within the province of the commission. The hearing officer acknowledged that both appellant and Mid-Ohio presented credible evidence and valid arguments; however, the hearing officer expressly found Mid-Ohio's evidence more credible. On close questions, "'[w]here the [commission] might reasonably decide either way, the courts have no authority to upset the [commission's] decision.'" *Irvine* at 18, quoting *Charles Livingston & Sons, Inc. v. Constance*, 115 Ohio App. 437 (7th Dist.1961).

{¶ 30} Appellant secondly contends that the commission's decision was unlawful because the hearing officer relied upon her perception of the legislative intent of R.C. 4141.01(B)(2)(k) rather than on the plain text of the statute. Appellant bases this argument solely on the hearing officer's statement that "[t]o hold this [sic] Mid-Ohio Contracting [Ltd.] 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." (Hearing Officer Decision at 7.) However, this statement is but one small portion of the hearing officer's decision. Preceding this statement, the hearing officer cited the factors set forth in R.C. 4141.01(B)(2)(k) and noted that there was "a close split concerning the criteria." (Hearing Officer Decision at 7.) The hearing officer expressly delineated the factors she found to be relevant and based her decision upon her evaluation of the testimony

pertaining to those factors. The hearing officer's reference to the "criteria" in R.C. 4141.01(B)(2)(k) evidences that she based her decision on the plain text of the statute. The challenged statement regarding legislative intent does not eclipse the hearing officer's express application of the statutory factors.

#### **IV. CONCLUSION**

{¶ 31} Upon thorough examination of the record, we conclude, in concurrence with the common pleas court's ruling, that the commission's determination was not unlawful, unreasonable or against the manifest weight of the evidence. Accordingly, appellant's sole assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

*Judgment affirmed.*

BROWN, P.J., and DORRIAN, J., concur.

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