

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

BRT Transport, LLC,	:	
	:	
Appellant-Appellant,	:	No. 14AP-800
	:	(C.P.C. No. 14CVF-367)
v.	:	
	:	
Ohio Department of	:	(REGULAR CALENDAR)
Job & Family Services,	:	
	:	
Appellee-Appellee.	:	
	:	

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D E C I S I O N

Rendered on May 28, 2015

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*Ellis Law Office, LLC, and James H. Ellis, III, for appellant.*

*Michael DeWine, Attorney General, and Patria V. Hoskins, for appellee.*

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APPEAL from the Franklin County Court of Common Pleas

LUPER SCHUSTER, J.

{¶ 1} Appellant, BRT Transport, LLC ("BRT"), appeals from a judgment of the Franklin County Court of Common Pleas affirming the decision of the Ohio Unemployment Compensation Review Commission (the "commission") finding that BRT is a liable employer under Ohio unemployment compensation law. For the reasons that follow, we affirm.

**I. Facts and Procedural History**

{¶ 2} In January 2010, appellee, the Ohio Department of Job & Family Services ("ODJFS"), initiated an audit of BRT, a limited liability company organized under the laws of Ohio, after learning that BRT might have misclassified workers or failed to correctly report workers in accordance with the law governing Ohio unemployment

compensation, R.C. Chapter 4141. Initially the audit was limited to the year 2008, but, due to the preliminary findings, ODJFS expanded the audit to include years 2007, 2009, 2010, and 2011.

{¶ 3} To conclude the audit process, a final audit report, dated September 26, 2011, was mailed to BRT. As set forth in the final audit report, ODJFS determined that BRT failed to properly classify workers as employees, pursuant to R.C. 4141.01(B), failed to keep accurate employment records for its workers, pursuant to R.C. 4141.18, and failed to file wage reports with ODJFS, pursuant to R.C. 4141.20(B). The final audit report identified 35 individuals who had received payments from BRT. Many of the individuals on the final audit report are identified by first and last name, but some are only identified by first name. For example, the final audit report identifies "DJ," "Niki," "Tiara," and others as receiving payments for labor. The final audit report states that BRT "paid these individuals to drive company trucks and perform miscellaneous office work." (Final Audit Report, 3.) The final audit report further states, "The individuals were reclassified as employees." (Final Audit Report, 3.)

{¶ 4} On September 27, 2011, ODJFS mailed an "Ohio Unemployment Tax Notification Determination of Employer's Liability and Contribution Rate Determination" (the "Determination") to BRT. Consistent with the final audit report, the Determination indicated ODJFS considered BRT an "employer" under R.C. 4141.01, subject to Ohio unemployment compensation law. Consequently, pursuant to R.C. 4141.25, ODJFS assigned unemployment compensation fund contribution rates for BRT for 2007, 2008, 2009, 2010, and 2011.<sup>1</sup> The Determination also included the following statement:

This determination applies to services performed by the individual(s) which were previously not being reported on your Unemployment Compensation Quarterly Tax Return. The individual(s), who were found to be in covered employment by a Compliance Field Auditor during a recent investigation, must be considered in covered employment and reported as such as their services do not fall within the categories of excluded employment under the Ohio Unemployment Compensation Law.

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<sup>1</sup> Although the Determination set the contribution rates for 2007, 2008, 2009, 2010, and 2011, subsequent decisions in this matter mistakenly indicate contributions rates were set for 2007, 2008, 2009, 2010, and 2012. The reference to 2012, instead of 2011, appears to be a clerical error.

{¶ 5} BRT filed a request for reconsideration of the Determination, arguing that it leases trucks to independent drivers to perform hauling services for other companies. BRT further asserted that the drivers are not employees of BRT. BRT submitted an affidavit of Dan Barnett, the sole member and president of BRT, in support of its request for reconsideration of the Determination. The affidavit details the business operations of BRT, and focuses on the drivers' relationship to those operations. According to BRT, ODJFS improperly characterized the drivers as employees of BRT because BRT did not have sufficient control over the performance of the services of the drivers. In the request for reconsideration, BRT did not refer to non-drivers, such as office workers, or suggest that ODJFS incorrectly characterized non-drivers associated with BRT or its owner.

{¶ 6} On August 16, 2012, the director of ODJFS issued a reconsidered decision affirming the Determination. The reconsidered decision analyzed the status of the individuals who performed services for BRT, noting the burden of proof rested with BRT to show that it was not responsible for contributions to the unemployment compensation fund. Based on his review of the ODJFS records, information provided by BRT, and applicable law, the ODJFS director found BRT "did reserve the right to direct or control the manner or means of the work performed by the individual truck drivers as outlined in the audit report, and therefore an 'employer-employee' relationship was present for the purposes of the Ohio unemployment compensation law regarding their employment." (Director's Reconsidered Decision, 3.) The reconsidered decision did not directly refer to individuals who did not provide driving services for BRT (the "non-drivers"), nor did it analyze whether those individuals were properly characterized as employees.

{¶ 7} On September 13, 2012, BRT appealed the reconsidered decision to the commission, arguing the reconsidered decision was arbitrary and contrary to law. Specifically, BRT argued the drivers are not employees of Dan Barnett, and the drivers are not employees of BRT. In support of its arguments, BRT discussed its business operations and services provided to it by the truck drivers. BRT's conclusion in support of the appeal stated the following: "the characterization of the independent drivers who lease semi-tractors from BRT as employees is contrary to the well-settled authorities cited by both BRT and the Director. Therefore, the Director's Reconsidered Decision is arbitrary and contrary to law." (Appeal of the Director's Reconsidered Decision, 4.) BRT's appeal

to the commission did not assert that the reconsidered decision failed to properly characterize non-drivers, including office workers, associated with BRT.

{¶ 8} On November 4, 2013, a commission hearing officer conducted a hearing on BRT's appeal from the reconsidered decision. ODJFS Compliance Field Auditor Maria Iwinski, who prepared the final audit report, and Dan Barnett testified at the hearing. Iwinski explained that truck drivers and two office workers were reclassified as employees as a result of the audit. Iwinski identified the two office workers as Dan Barnett's former wife and daughter. Barnett testified about BRT's operations and the services provided by truck drivers for BRT. Barnett also testified that, while his daughter did provide general office work for BRT, his former wife, and at least two of his relatives identified by first name on the final audit report, did not provide any services to BRT. BRT's counsel's concluding statement at the hearing was directed at the agency's prior determination that the drivers were employees, but he did not assert that certain non-drivers were misclassified as employees.

{¶ 9} On December 19, 2013, the commission issued a decision affirming the reconsidered decision. The commission's decision specifically found the "[i]ndividuals performing services as drivers were engaged in covered employment. Said services are covered by Ohio Unemployment Compensation laws and are considered employment pursuant to statute and rule. The contribution rates for the years 2007 through 2012 were properly assigned." <sup>2</sup> (Commission Decision, 5-6.) The commission's decision did not analyze whether BRT's office workers, or other non-drivers associated with BRT, were properly characterized as employees.

{¶ 10} On January 14, 2014, BRT appealed the commission's decision to the Franklin County Court of Common Pleas pursuant to R.C. 4141.26. The notice of appeal described the following as grounds for the appeal:

1. The Director's determination that individuals performing services as drivers were engaged in covered employment is arbitrary, contrary to Ohio law and not supported by reliable, probative and substantial evidence.

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<sup>2</sup> As noted in footnote 1, decisions issued after the Determination refer to 2012 instead of 2011 due to an apparent clerical error.

2. The Director's determination that the services of individuals as drivers are covered by Ohio unemployment compensation laws and are considered employment [sic] pursuant to statute and rule is arbitrary, contrary to Ohio law and not supported by reliable, probative and substantial evidence.

3. The application of the contribution rates established by the Director for the years 2007 through 2013 [sic] to drivers associated with [BRT] is arbitrary, contrary to Ohio law and not supported by reliable, probative and substantial evidence.

Consistent with the prior administrative appeals, the notice of appeal did not reference BRT's office workers, or other non-drivers.

{¶ 11} On March 25, 2014, BRT filed a brief in the Franklin County Court of Common Pleas in support of its appeal from the commission's decision. In its brief, BRT separated the "persons deemed employees" into three classes: "non-performing relatives," "performing relatives," and "lessee/drivers." BRT identified the non-performing relatives class as "[r]elatives of Dan Barnett who performed no services for [BRT], but received gifts of money from Mr. Barnett through payments from [BRT]." (Mar. 25, 2014 BRT Brief, 7.) BRT identified the performing relatives class as "[r]elatives of Dan Barnett who performed services and received money but who had no set hours or pay rate." (Mar. 25, 2014 BRT Brief, 8.) The "performing relatives" class included Dan Barnett's son, Terry Barnett, and Dan Barnett's daughter, Charmaine Barnett. Finally, BRT identified the lessee/drivers class as "[i]ndividuals who entered into a lease agreement with [BRT] for the rental of a semi-truck (tractor) owned by [BRT]." (Mar. 25, 2014 BRT Brief, 8.) BRT argued that certain relatives of Dan Barnett were identified as employees in the final audit report even though those individuals performed no services for BRT or were otherwise not employees of BRT. BRT also challenged the determination that BRT controlled the means and methods of the performance of the transportation services provided by the truck drivers, arguing the evidence weighed heavily against a determination that the truck drivers were employees of BRT.

{¶ 12} The trial court affirmed the decision of the commission on September 10, 2014. In its decision, the trial court analyzed the application of the indicia of control required for the establishment of an employer-employee relationship. The trial court

found in the record reliable, probative, and substantial evidence supporting the facts found by the commission. The court found "[s]ufficient factors exist to establish that BRT misclassified its employees as independent contractors when in fact BRT exercised control over the workers to the extent that they were 'employees.' " (Final Judgment Entry, 5.) The court also noted, "As for BRT's non-driver employees, the Commission clearly found wanting BRT's explanation that they were given gifts unrelated to work performed. The more persuasive evidence in the record establishes that non-driver employees of BRT were remunerated for their labors." (Final Judgment Entry, 5.)

{¶ 13} BRT appeals from the judgment of the trial court.

## **II. Assignments of Error**

{¶ 14} BRT assigns the following errors for our review:

[1.] The lower court arbitrarily and unlawfully applied the standard for determining employment status under Ohio Revised Code §4141.01[B](1).

[2.] The lower court acted [arbitrarily] and unlawfully in ruling that individuals who performed no services for the appellant and received gifts were employees under Ohio Revised Code §4141.01[B](1).

## **III. Standard of Review**

{¶ 15} The common pleas court's standard of review for appeals from decisions of the commission affecting the liability of an employer to pay unemployment compensation contributions or the amount of such contributions is set forth in R.C. 4141.26(D)(2), which states in pertinent part that a common pleas court may affirm a decision of the commission "if it finds, upon consideration of the entire record, that the determination or order is supported by reliable, probative, and substantial evidence and is in accordance with law." This court's role in reviewing a decision of the commission appealed pursuant to R.C. 4141.26 is narrower than the role of the trial court. *Miracle Home Health Care, L.L.C. v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 12AP-318, 2012-Ohio-5669, ¶ 18. As to issues of fact appealed pursuant to R.C. 4141.26, this court determines only if the common pleas court abused its discretion. An abuse of discretion requires more than an error in judgment. To find an abuse of discretion, we must conclude that the trial

court's decision was without a reasonable basis and clearly wrong. *Id.* However, this court's review of questions of law is plenary. *Kate Corp. v. Ohio Unemp. Comp. Review Comm.*, 10th Dist. No. 03AP-315, 2003-Ohio-5668, ¶ 7.

#### **IV. Discussion**

{¶ 16} In its first assignment of error, BRT argues the trial court arbitrarily and unlawfully applied the standard for determining employment status under R.C. 4141.01(B)(1). In its second assignment of error, BRT argues the trial court arbitrarily and unlawfully ruled that individuals who performed no services for BRT and received gifts were employees under R.C. 4141.01(B)(1). Because BRT's two assignments of error are interrelated, we will address them together.

{¶ 17} Ohio law requires employers to make contributions into Ohio's unemployment compensation fund. R.C. 4141.09; R.C. 4141.23. ODJFS maintains a separate account for each employer's contributions and determines the rate at which an employer must make contributions into that account. R.C. 4141.24; R.C. 4141.25. The contribution rate is applied to the wages paid by the employer. *See* R.C. 4141.25. Thus, an important part of this process is determining whether individuals performing services for an employer are employees or independent contractors. For the purpose of contributions into Ohio's unemployment compensation fund, an employer includes a limited liability company that has "in employment at least one individual." R.C. 4141.01(A)(1)(a). R.C. 4141.01(B)(1) defines "employment" as follows:

[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. The director shall adopt rules to define "direction or control."

The alleged employer 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* at ¶ 21.

{¶ 18} Consistent with the statutory definition of employment, Ohio Adm.Code 4141-3-05(A) provides:

[A] worker is in employment when an "employer-employee" relationship exists between the worker and the person for whom the individual performs services and the director determines that:

- (1) The person for whom services are performed has the right to direct or control the performance of such services; and
- (2) Remuneration is received by the worker for services performed.

Ohio Adm.Code 4141-3-05(B) sets forth 20 factors as guides for determining whether sufficient direction or control exists to create an employer-employee relationship. The factors, which "must be considered in totality," are as follows:

- (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 for 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.

Ohio Adm.Code 4141-3-05(B)(1) through (20). "When present, each of these factors serves to indicate some degree of direction or control. The degree of importance of each

factor varies depending on the occupation and the factual context in which the services are performed." Ohio Adm.Code 4141-3-05(B).

{¶ 19} BRT argues the commission "pick[ed] out a couple of the factors" set forth in Ohio Adm.Code 4141-3-05(B) to support its decision finding individuals to be employed by BRT. (Nov. 11, 2014 BRT Brief, 14.) BRT argues the commission did not consider the totality of the facts and circumstances to determine who controls the manner or means of performing the work. According to BRT, none of the so-called "classes" of employees identified in the final audit report—the non-performing relatives, the performing relatives, and the lessee/drivers—were employees of BRT. (Nov. 11, 2014 BRT Brief, 15.)

{¶ 20} We will first address the classification of the drivers who provided services to BRT. Contrary to BRT's arguments, the evidence presented before the commission supported a finding that the drivers were employees of BRT. The record demonstrates that BRT is an interstate carrier, or "trucking company," in the business of transporting freight, and it provides hauling services for American Weld and Tank Company and Menards. BRT owns tractors, also commonly referred to as "trucks" or "semi-trucks," to which trailers can be attached for hauling purposes. BRT entered lease agreements with drivers in connection with providing the hauling services. Thus, the services provided by the drivers were part of the regular business of BRT.

{¶ 21} As noted by BRT, the lease provides as follows: "The Lessee shall determine the means and methods of the performance of all transportation services undertaken by the Lessee under the terms of this Agreement." (Equipment Lease, 2.) However, pursuant to other terms of the lease, the drivers were obligated to pay BRT an amount equal to 75 percent of the gross revenue generated by the equipment as rent, and BRT would collect all revenues generated by the drivers for use of the equipment and then pay the drivers the amounts collected, less the rent. The lease provided that BRT would pay for all licenses and permits, including base plate, fuel, and other permits and decals required for the lawful operation of the equipment. The lease required the drivers to provide BRT with "all delivery receipts, bills of lading, properly completed logs, vehicle inspection reports and such other evidence of proper delivery and such other documents as may be required by applicable law with regard to each trip." (Equipment Lease, 2.) The lease further

provided that the equipment was to be used solely for the purpose of transporting, loading and unloading, on behalf of BRT customers, or on behalf of other certified carriers as designated by BRT.

{¶ 22} Additional evidence supported the finding that the drivers were employees of BRT. Iwinski testified that the drivers had no control over their own work. The drivers were paid on a weekly basis, and, on the check stubs retained by BRT, payments to the drivers were identified as "payroll." The drivers did not provide invoices to BRT for payment for their services. The drivers had no investment in the equipment used to perform the work, and they could not experience a loss relating to the services provided to BRT. Moreover, the drivers were not working for other businesses because they were "fully occupied picking up and delivering loads" for American Weld and Tank Company and Menards. (Nov. 4, 2013 Tr. 19.)

{¶ 23} Therefore, considering the evidence in the record, we find the trial court did not abuse its discretion in finding reliable, probative, and substantial evidence supporting the determination of the commission with respect to the classification of the drivers as employees of BRT.

{¶ 24} Next, we address BRT's challenge relating to the classification of non-drivers who were associated with BRT. At the hearing before the commission, Dan Barnett testified that some of the individuals identified on the final audit report are related to him and, while he did provide money to them, they did not perform any services for BRT. Based on this testimony, BRT argues it was unlawful and unreasonable for the trial court to affirm the commission's finding that individuals, who performed no work for BRT, were employees of BRT. Thus, according to BRT, the trial court erroneously ruled that certain individuals, who performed no services for BRT, were employees of BRT. However, the issue of whether non-drivers, including certain office workers, were employees of BRT was effectively waived by BRT.

{¶ 25} Courts generally hold that a party waives the right to appeal an issue that could have been but was not raised in earlier proceedings. *Trish's Café & Catering, Inc. v. Ohio Dept. of Health*, 195 Ohio App.3d 612, 2011-Ohio-3304, ¶ 19 (10th Dist.). This principle has also been applied in appeals from administrative proceedings. *See, e.g., State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 81-83 (1997). Thus,

"[i]ssues not raised at the administrative level are waived." *Golden Christian Academy v. Zelman*, 144 Ohio App.3d 513, 516-17 (10th Dist.2001).

{¶ 26} As set forth above, ODJFS initiated an investigation of BRT upon receiving information suggesting that BRT was not properly classifying workers and reporting their wages pursuant to the requirements of Ohio unemployment compensation law. In September 2011, and based on the findings of the audit, ODJFS issued its Determination which identified the applicable contribution rates for years 2007 through 2011, and provided that the services of the individuals who had been misclassified as independent contractors must be reported. The associated final audit report stated the named truck drivers and office workers that were reclassified as employees. The matter proceeded through appeals within the administrative agency. Throughout the administrative process, BRT maintained that the truck drivers were not employees because BRT simply leased the trucks to the drivers, who then used those tractors to haul loads for BRT's clients. But nothing in the record before this court indicates BRT challenged, at the administrative level, the classification of non-drivers as employees.

{¶ 27} After the commission issued its decision, BRT appealed to the trial court, pursuant to R.C. 4141.26, by filing a notice of appeal. R.C. 4141.26(D)(2) requires a notice of appeal to "set forth the decision appealed and the errors in it complained of." As required, BRT's notice of appeal identified the grounds of the appeal to the trial court. The notice of appeal indicated the appeal was taken to challenge the determinations relating to the services of the truck drivers. The notice of appeal made no reference to non-drivers.

{¶ 28} It was not until the matter was briefed in the trial court that BRT presented arguments that separated the individuals listed in the final audit report into three categories or classes: "non-performing relatives," "performing relatives," and "lessee/drivers." Generally, BRT argued the commission misapplied the law and rules relating to the issue of the employment status of individuals identified in the final audit report. BRT presented separate arguments relating to each class.

{¶ 29} Although the trial court briefly addressed the non-driver employees in its decision, BRT's challenge to the identification and characterization of non-drivers in the

final audit report was not raised at the administrative level. Therefore, we decline to further address this issue. *See Golden Christian Academy.*

{¶ 30} For these reasons, BRT's first and second assignments of error are overruled.

**V. Disposition**

{¶ 31} Having overruled BRT's two assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

DORRIAN and HORTON, JJ., concur.

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