

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Valentine Contractors, Inc.,	:	
	:	
Appellant-Appellee/ Cross-Appellant,	:	
	:	
v.	:	No. 15AP-86
	:	(C.P.C. No. 14CVF-3012)
Director, Ohio Department of Job & Family Services,	:	(REGULAR CALENDAR)
	:	
Appellee-Appellant/ Cross-Appellee.	:	
	:	

D E C I S I O N

Rendered on December 24, 2015

Day Ketterer, Ltd., Matthew Yackshaw and Kristen S. Moore,
for appellee/cross-appellant.

Michael DeWine, Attorney General, and Eric A. Baum, for
appellant/cross-appellee.

APPEAL from the Franklin County Court of Common Pleas

DORRIAN, J.

{¶ 1} Appellant, Ohio Department of Job and Family Services ("ODJFS"), appeals the January 9, 2015 judgment of the Franklin County Court of Common Pleas reversing a decision of the Unemployment Compensation Review Commission ("the commission"), which found that appellee, Valentine Contractors, Inc. ("Valentine Contractors"), was a successor-in-interest to Northern Valley Contractors, Inc. ("Northern Valley"). For the reasons that follow, we affirm the judgment of the trial court.

I. Facts and Procedural History

{¶ 2} On May 27, 2010, ODJFS sent a letter to Valentine Contractors informing the company that it had been selected for review regarding the transfer of employees from Northern Valley to Valentine Contractors between 2005 and 2006. ODJFS instructed Valentine Contractors to provide, pursuant to R.C. 4141.20(A), the following information within 30 days: (1) a "detailed statement regarding the transfer of employees," (2) "documentation to support the employer's statement regarding the transfer of employees," (3) a "completed questionnaire," and (4) a "[c]ompleted JFS 66302." Valentine Contractors did not respond to the May 27, 2010 letter.

{¶ 3} On August 26, 2010, ODJFS issued a preliminary report regarding the compliance review of Valentine Contractors. In its report, ODJFS noted that Valentine Contractors failed to submit a written response to the May 27, 2010 letter despite several telephone calls to the employer. Therefore, the conclusions of the report were based on available information including "contribution reports, wage record reports, other documents provided by the employer and maintained by ODJFS, Secretary of State filings, and various internet resources." Based upon the available information, ODJFS concluded that the "workforce transfers beginning December 1, 2005 from [Northern Valley] to [Valentine Contractors] are subject to R.C. 4141.24(G)(1)." Further, ODJFS instructed Valentine Contractors to submit a written response within 14 days if it disagreed with the conclusions of the preliminary report.

{¶ 4} On December 14, 2010, having failed to receive a response from Valentine Contractors, ODJFS issued a final report based on available information finding that Northern Valley and Valentine Contractors "were under the common ownership, management, and/or control of James and/or Evelyn Valentine at the time of the workforce transfers." Further, the report found that "both businesses operate from the same address and perform similar type services" and that Valentine Contractors "continued to operate a portion of the business previously operated by [Northern Valley]." On December 30, 2010, ODJFS issued an unemployment tax notification determining Valentine's unemployment compensation contribution rates from 2007 until 2010. The unemployment tax notification specified that the determination "becomes final unless the

employer files an application with the Director for reconsideration of the Director's determination within thirty days."

{¶ 5} On February 2, 2011, Valentine Contractors filed a letter stating that it had not received notice of the determination of its liability and contribution rates. On February 9, 2011, Valentine Contractors filed its application for reconsideration of the director's determination. On June 22, 2012, ODJFS issued a director's reconsidered decision, finding that, pursuant to R.C. 4141.26(D)(2) and Ohio Adm.Code 4141-21-01, Valentine Contractors failed to file its application for reconsideration within 30 days of the mailing date of the director's determination. Therefore, ODJFS concluded that it was without jurisdiction to reconsider the determination and dismissed the application for reconsideration.

{¶ 6} On July 16, 2012, Valentine Contractors filed an application for review with the commission. On November 1, 2012, the commission issued a decision, finding that, because Valentine Contractors never received notice of the director's determination, Valentine Contractor's application for reconsideration was timely filed. Accordingly, the commission remanded the matter to the director for further proceedings.

{¶ 7} On February 25, 2013, the director of ODJFS issued a reconsidered decision affirming the December 30, 2010 determination and finding that, pursuant to R.C. 4141.24(G)(1) and Ohio Adm.Code 4141-17-04, Valentine Contractors was correctly determined to be a successor-in-interest to Northern Valley by operation of law. In support of this conclusion, the director found that, although Evelyn Valentine was listed as the owner of Valentine Contractors, the available information indicated that both Valentine Contractors and Northern Valley were "under the common management and control of James Valentine," Evelyn Valentine's husband. (Reconsidered Decision, 2.) Further, the director found that James Valentine was identified by employees of Valentine Contractors as the owner of the business and that he represented himself as the "General Manager" of Valentine Contractors. Additionally, wage record reports filed by the businesses "confirm[ed] that 7 of 14 employees transferred from [Northern Valley] to [Valentine Contractors] during the fourth quarter 2006, and that additional employees were transferred in the year prior to the disposition of [Northern Valley]." (Reconsidered

Decision, 2.) On March 25, 2013, Valentine Contractors filed with the commission an application for review of the director's reconsidered decision.

{¶ 8} On September 10, 2013, the commission conducted a telephone hearing at which Valentine Contractors presented testimony from Evelyn Valentine, the purported sole owner of Valentine Contractors. At the hearing, Evelyn Valentine identified James Valentine as her husband and stated that he was the owner of Northern Valley. Evelyn Valentine denied that James Valentine worked for Valentine Contractors but was unable to explain two payments of \$10,000 made to him by Valentine Contractors as shown on the company's quarterly wage reports. Evelyn Valentine further stated that she did not know why James Valentine's name was on a contract for Valentine Contractors if he was not participating in the business and that she did not know why an employee of Valentine Contractors referred an auditor to James Valentine to answer questions about the businesses. On February 14, 2014, the commission issued a decision affirming the February 25, 2013 reconsidered decision of the director, finding that, pursuant to R.C. 4141.24(F) and Ohio Adm.Code 4141-17-04, Valentine Contractors was a successor-in-interest to Northern Valley. The decision noted that it was limited to the specific issue of whether "Valentine Contractors Inc. [is] a successor-in-interest to Northern Valley." (Feb. 14, 2014 commission decision, 5.)

{¶ 9} On March 19, 2014, Valentine Contractors filed, pursuant to R.C. 4141.26(D)(2), a notice of appeal from the commission's decision with the trial court. On January 9, 2015, the trial court filed a decision and judgment entry reversing the decision of the commission.

II. Assignments of Error

{¶ 10} Appellant appeals assigning the following three errors for our review:

[I.] IF AN EMPLOYER TRANSFERS ALL ASSETS "INTEGRAL" TO ITS BUSINESS TO A SUCCESSOR ENTITY, THE SUCCESSOR FIRM IS A SUCCESSOR IN INTEREST TO THE PREDECESSOR ENTITY. HERE, (1) [Northern Valley] CEASED OPERATIONS, (2) HALF OF [Northern Valley's] EMPLOYEES TRANSFERRED TO [Valentine], (3) MR. VALENTINE BECAME [Valentine's] MANAGER AND RAN [Valentine], (4) BOTH FIRMS OPERATED FROM THE SAME ADDRESS, AND (5) MS. VALENTINE WAS UNABLE TO ANSWER BASIC QUESTIONS ABOUT [Valentine's]

OPERATIONS. [Valentine] WAS A SUCCESSOR IN INTEREST TO [Northern Valley].

[II.] IF AN EMPLOYER TRANSFERS A PORTION OF ITS TRADE OR BUSINESS TO ANOTHER EMPLOYER AND, AT THE TIME OF THE TRANSFER, BOTH EMPLOYERS ARE UNDER SUBSTANTIALLY COMMON OWNERSHIP, MANAGEMENT, OR CONTROL, THEN THE SUCCESSOR ENTITY IS SUCCESSOR-IN-INTEREST TO THE PREDECESSOR EMPLOYER. HERE, (1) [Northern Valley] CEASED OPERATIONS, (2) HALF OF [Northern Valley's] EMPLOYEES TRANSFERRED TO [Valentine], (3) MR. VALENTINE BECAME [Valentine's] MANAGER AND RAN [Valentine], (4) BOTH FIRMS OPERATED FROM THE SAME ADDRESS, AND (5) MS. VALENTINE WAS UNABLE TO ANSWER BASIC QUESTIONS ABOUT [Valentine's] OPERATIONS. [Valentine] WAS A SUCCESSOR-IN-INTEREST TO [Northern Valley].

[III.] THE DIRECTOR DETERMINED [Valentine's] UNEMPLOYMENT-TAX LIABILITY UNDER R.C. 4141.24(G)(1), WHICH PROVIDES THAT AN ENTITY IS A SUCCESSOR IN INTEREST TO A PREDECESSOR ENTITY IF BOTH ARE UNDER SUBSTANTIALLY COMMON OWNERSHIP, MANAGEMENT, OR CONTROL. BUT THE REVIEW COMMISSION ANALYZED THE MATTER UNDER R.C. 4141.24(F), WHICH PROVIDES THAT AN ENTITY IS A SUCCESSOR IN INTEREST IF THE PREDECESSOR ENTITY TRANSFERS ALL ITS TRADE OR BUSINESS TO IT. BECAUSE THE REVIEW COMMISSION ADDRESSED THE WRONG ISSUE, UNDER THE WRONG STATUTE, THE MATTER SHOULD BE REMANDED.

{¶ 11} Valentine Contractors raises a single cross-assignment of error for our review:

THE FRANKLIN COUNTY COURT OF COMMON PLEAS DECISION SHOULD ALSO BE AFFIRMED BECAUSE THE ONLY EVIDENCE SUPPORTING THE UCRC'S DECISION WAS UNSUBSTANTIATED AND INADMISSIBLE HEARSAY EVIDENCE LACKING IN FOUNDATION. TO ALLOW SUCH EVIDENCE WOULD DENY VALENTINE ITS DUE PROCESS UNDER THE LAW IN VIOLATION OF BOTH THE OHIO AND U.S. CONSTITUTIONS AS WELL AS VIOLATE ADMINISTRATIVE PRACTICE AND PROCEDURE.

III. First Assignment of Error

{¶ 12} In its first assignment of error, ODJFS asserts that the trial court erred by finding that the commission's decision was not supported by reliable, probative, and substantial evidence.

A. Standard of Review

{¶ 13} Valentine Contractors appealed the commission's decision, pursuant to R.C. 4141.26(D)(2), which provides the standard to be applied by the trial court:

The court may affirm the determination or order complained of in the appeal 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. In the absence of such a finding, it may reverse, vacate, or modify the determination or order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law.

Additionally, the trial court "may order additional evidence to be taken before the commission, and the commission, after hearing such additional evidence, shall certify such additional evidence to the court or it may modify its determination and file such modified determination, together with the transcript of the additional record, with the court." R.C. 4141.26(D)(2). "The Supreme Court of Ohio has held, 'the Court of Common Pleas must give due deference to the administrative resolution of evidentiary conflicts. For example, when the evidence before the court consists of conflicting testimony of approximately equal weight, the court should defer to the determination of the administrative body, which, as the fact-finder, had the opportunity to observe the demeanor of the witnesses and weigh their credibility.' " *All Star Personnel, Inc. v. Unemp. Comp. Rev. Comm.*, 10th Dist. No. 05AP-522, 2006-Ohio-1302, ¶ 21, quoting *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 111 (1980).

{¶ 14} The standard of review for an appellate court reviewing a decision of the commission appealed pursuant to R.C. 4141.26 is more limited. Regarding factual questions, an appellate court does not weigh the evidence but, rather, only determines whether the common pleas court abused its discretion. *All Star* at ¶ 13, citing *Kate Corp. v. Ohio State Unemp. Comp. Rev. Comm.*, 10th Dist. No. 03AP-315, 2003-Ohio-5668, ¶ 7; *Prime Kosher Foods, Inc. v. Admr., Bur. of Emp. Servs.*, 35 Ohio App.3d 121, 122 (10th

Dist.1987). "In successor-in-interest cases, 'this court has defined "abuse of discretion" as connoting more than an error in judgment, but implying a decision that is without a reasonable basis and clearly wrong.' " *Pennex Aluminum Co., L.L.C. v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 14AP-446, 2014-Ohio-5308, ¶ 11, quoting *All Star* at ¶ 13. See also *BRT Transport, L.L.C. v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 14AP-800, 2015-Ohio-2048, ¶ 15, citing *Miracle Home Health Care, L.L.C. v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 12AP-318, 2012-Ohio-5669, ¶ 18. However, an appellate court's review of questions of law is plenary. *BRT Transport* at ¶ 15, citing *Kate Corp.* at ¶ 7.

B. Applicable Law

{¶ 15} Ohio employers must pay contributions into Ohio's Unemployment Compensation Fund. R.C. 4141.09; R.C. 4141.23(A). "The unemployment compensation fund is a self-reporting system which relies on employer compliance." *Peter D. Hart Research Assocs. v. Admr., Ohio Bur. of Emp. Servs.*, 10th Dist. No. 95APE06-736 (Dec. 28, 1995).

{¶ 16} "Generally, R.C. 4141.24(F) provides two methods by which an employer may qualify as a successor-in-interest: (1) by operation of law or (2) through voluntary application." *Resource Natl. Title Agency, Inc. v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 14AP-39, 2014-Ohio-3427, ¶ 10. R.C. 4141.24(F) provides as follows:

If an employer transfers all of its trade or business to another employer or person, the acquiring employer or person shall be the successor in interest to the transferring employer and shall assume the resources and liabilities of such transferring employer's account, and continue the payment of all contributions, or payments in lieu of contributions, due under this chapter.

" 'Pursuant to [the] first method, successor-in-interest status arises automatically upon the transfer of the entire business of the predecessor.' " *Resource Title* at ¶ 10, quoting *All Star* at ¶ 16, citing *Makkas v. Unemp. Comp. Bd. of Rev.*, 18 Ohio St.3d 349, 350 (1985). See also *Kate Corp.* at ¶ 14 (finding that, "as soon as appellee purchased 100 percent of JB Medas' assets, it became a successor-in-interest to JB Medas and, by law, assumed all of the resources and liabilities of JB Medas' unemployment contribution account").

{¶ 17} Under the Ohio Administrative Code, the transferee is a successor-in-interest by operation of law where the following conditions are met: "(1) There is a transfer of all of the transferor's trade or business located in the state of Ohio; and (2) At the time of the transfer the transferor is liable under Chapter 4141. of the Revised Code." Ohio Adm.Code 4141-17-04(A)(1) and (2). Further, Ohio Adm.Code 4141-17-01(A) provides that, for purposes of R.C.4141.24, " '[t]rade or business' includes all real, personal and intangible property integral to the operation of the trade or business, and may include the employer's workforce as applicable." As a successor-in-interest, the transferee "shall assume all of the resources and liabilities of the transferor's account," and the "director shall revise the contribution rates of the transferee to reflect the result of the successorship." Ohio Adm.Code 4141-17-04(B).

C. Discussion

{¶ 18} ODJFS asserts that the trial court's decision should be reversed because "some competent, credible evidence [supports] the Review Commission's contrary decision." (ODJFS's Brief, 35.) In support of this assertion, ODJFS specifically contends that (1) Northern Valley ceased operations, (2) half of Northern Valley's employees transferred to Valentine Contractors, (3) James Valentine managed and ran Valentine Contractors, (4) both Valentine Contractors and Northern Valley operated from the same address, and (5) Evelyn Valentine was unable to answer basic questions about Valentine Contractors' operations. Thus, ODJFS's argument requires us to engage in a reweighing of the evidence to determine whether reliable, probative, and substantial evidence supports the commission's decision. However, our standard of review is limited to whether the trial court's decision was without a reasonable basis and clearly wrong. *Pennex* at ¶ 11; *BRT Transport* at ¶ 15; *Miracle* at ¶ 18-19. The determination of whether the commission's decision is supported by reliable, probative, and substantial evidence is the province of the trial court. *Miracle* at ¶ 19.

{¶ 19} Here, the trial court found that the commission's decision relating to successor-in-interest status under R.C. 4141.24(F) was not supported by reliable, substantial, and probative evidence. Finding that the trial court properly applied the standard of review as provided under R.C. 4141.26(D)(2), we cannot state that the trial court's determination was without a reasonable basis and clearly wrong. Therefore, we

decline to further examine ODJFS's contentions. *Miracle* at ¶ 19. Accordingly, we overrule appellant's first assignment of error.

IV. Second and Third Assignments of Error

{¶ 20} In its second and third assignments of error, ODJFS asserts that the commission applied the incorrect statutory section in determining whether Valentine Contractors was a successor entity. ODJFS argues that this court should consider whether Valentine Contractors is a successor under R.C. 4141.24(G)(1),¹ rather than under R.C. 4141.24(F), or, in the alternative, remand to the commission to apply R.C. 4141.24(G)(1).

{¶ 21} Courts generally hold that a party waives the right to appeal an issue that could have been but was not raised in earlier proceedings. *BRT Transport* at ¶ 25, citing *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." *BRT Transport* at ¶ 25, citing *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 81-83 (1997). "Errors which are not brought to the attention of the administrative agency by objection or otherwise are waived and may not be raised on appeal." *1609 Gilsey Invests., Inc. v. Liquor Control Comm.*, 10th Dist. No. 07AP-1069, 2008-Ohio-2795, ¶ 10.

{¶ 22} Here, although ODJFS considered whether Valentine Contractors was a successor-in-interest to Northern Valley in its December 14, 2010 final report and February 25, 2013 reconsidered decision, ODJFS concedes that it did not raise the issue of R.C. 4141.24(G) before the trial court. Furthermore, the commission specified in its notice of hearing sent on August 14, 2013 to both parties that it was considering the issue of whether "the employer purchase[d] substantially all of the assets of a liable business" under R.C. 4141.24(F). ODJFS raised no objection to this framing of the issue at the hearing before the commission. Because ODJFS failed to assert this issue before the

¹ R.C. 4141.24(G)(1) provides as follows:

If an employer transfers its trade or business, or a portion thereof, to another employer and, at the time of the transfer, both employers are under substantially common ownership, management, or control, then the unemployment experience attributable to the transferred trade or business, or portion thereof, shall be transferred to the employer to whom the business is so transferred. The director shall recalculate the rates of both employers and those rates shall be effective immediately upon the date of the transfer of the trade or business.

commission, in its response to Valentine Contractors' appeal to the trial court, or by raising such error in a cross-appeal from the decision of the commission, we find that ODJFS has waived the issue of whether the commission should have applied R.C. 4141.24(G)(1) in analyzing whether Valentine Contractors is a successor-in-interest to Northern Valley. Therefore, we decline to further address this issue. *BRT Transport* at ¶ 29. *See also 1609 Gilsey* at ¶ 10; *Brass Pole v. Ohio Dept. of Health*, 10th Dist. No. 08AP-1110, 2009-Ohio-5021, ¶ 11 (refusing to consider argument that was not advanced before the trial court).

{¶ 23} Accordingly, ODJFS's second and third assignments of error are overruled.

V. Cross-Assignment of Error

{¶ 24} In its cross-assignment of error, Valentine Contractors asserts that the trial court's decision should be affirmed because the commission improperly relied upon unsubstantiated and inadmissible hearsay evidence. Pursuant to R.C. 2505.22, " '[a]n appellee who has not filed a notice of appeal (cross-appeal) can file cross-assignments of error.' " *Byers v. Robinson*, 10th Dist. No. 08AP-204, 2008-Ohio-4833, ¶ 49, quoting *Chapman v. Ohio State Dental Bd.*, 33 Ohio App.3d 324, 327 (10th Dist.1986). Such cross-assignments of error can only be utilized in "defense of the trial court's judgment." *Byers* at ¶ 50. Here, pursuant to R.C. 2505.22, we need not address the merits of Valentine Contractors' cross-assignment of error because our resolution of ODJFS's assignments of error does not result in the trial court's judgment being reversed in whole or in part. *Byers* at ¶ 50; *Legacy Academy for Leaders v. Mt. Calvary Pentecostal Church*, 10th Dist. No. 13AP-203, 2013-Ohio-4214, ¶ 22. Therefore, Valentine Contractors' cross-assignment of error is rendered moot.

VI. Disposition

{¶ 25} Having overruled ODJFS's three assignments of error and rendered moot Valentine Contractors' cross-assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN, P.J., and HORTON, J., concur.
