

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Miracle Home Health Care, LLC,	:	
	:	
Plaintiff-Appellant,	:	
	:	
v.	:	No. 12AP-318
	:	(C.P.C. No. 11CVF-09-12278)
Ohio Department of Job and Family	:	
Services et al.,	:	(ACCELERATED CALENDAR)
	:	
Defendants-Appellees.	:	
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D E C I S I O N

Rendered on December 4, 2012

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*Saker Law Offices, and Theodore R. Saker, Jr., for appellant.*

*Michael DeWine, Attorney General, and David E. Lefton, for appellees.*

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APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶ 1} Appellant, Miracle Home Health Care, LLC ("Miracle"), appeals a judgment of the Franklin County Court of Common Pleas that affirmed a decision of the Unemployment Compensation Review Commission ("Commission") finding that the home caregivers who worked for Miracle were in Miracle's employment for unemployment compensation purposes. For the following reasons, we affirm.

{¶ 2} On December 15, 2006, the Ohio Department of Job and Family Services ("ODJFS") notified Miracle that it would have to contribute to the unemployment contribution fund for the home caregivers that it employed. Miracle had not previously

reported these employees to ODJFS. ODJFS set Miracle's contribution rate at 2.7 percent for 2003 through 2005 and 4 percent for 2006.

{¶ 3} Pursuant to R.C. 4141.26(D)(2), Miracle applied to the director of ODJFS for reconsideration of the contribution determination. Upon reconsideration, the director addressed whether the home caregivers were in Miracle's employment, thus triggering the statutory obligation that Miracle pay contributions to the unemployment compensation fund. The director determined that because Miracle retained the right to direct and control the home caregivers, they qualified as employees. Consequently, the director affirmed her initial determination requiring Miracle to contribute to the unemployment compensation fund.

{¶ 4} Miracle then applied to the Commission for a review of the director's reconsidered decision. The Commission provided Miracle with a hearing. According to the evidence presented at the hearing, individuals who need home health care engage the services of Miracle, which is a for-profit, Medicare/Medicaid-certified home-health agency. Miracle's director of nursing communicates with each client's physician to determine the type of services and number of hours of care needed. Once the director ascertains the scope of services the client needs, an administrative assistant contacts one of multiple home caregivers with whom Miracle contracts to match the client with a caregiver. The home caregiver can either accept or decline the assignment. If the home caregiver accepts the assignment, the caregiver and client determine when the caregiver will visit the client's home to provide the needed services. If the home caregiver declines the assignment, Miracle rotates him or her to the bottom of the call list.

{¶ 5} All of Miracle's home caregivers are either trained home-health aides or state-tested nursing assistants. If a person is not a state-tested nursing assistant, he or she may elect to complete a 75-hour training course offered by Miracle to become a home-health aide. Miracle does not charge for this course, but it does not pay individuals for the training time. Individuals are not obligated to provide services to Miracle's clients once they complete the training.

{¶ 6} Miracle's home caregivers must submit a weekly, written report for each client. The report states what services the home caregiver provided and when the caregiver provided those services. The client must initial or sign the report after every

visit to the client's home. Federal and state regulations require Miracle to collect such reports. Miracle reviews the reports to ensure that the home caregivers are complying with the client's case plan and actually providing all of the services the client's physician has ordered. Additionally, Miracle's assistant administrator visits clients' homes to check on the quality of care they received and how their caregivers conducted themselves.

{¶ 7} Miracle pays its home caregivers on an hourly basis, and it distributes paychecks every other week. For pay purposes, Miracle uses the weekly report to determine the amount of hours the home caregiver worked. Miracle does not withhold any taxes from its caregivers' paychecks, and it reports the caregivers' incomes on 1099 tax forms.

{¶ 8} Miracle may remove a home caregiver from a particular assignment, and a caregiver may quit an assignment. Home caregivers may work for other home-health agencies or have their own clients.

{¶ 9} Miracle does not require home caregivers to wear a uniform. Miracle does not provide home caregivers transportation to the residences of Miracle's clients, nor does it provide caregivers with supplies.

{¶ 10} All home caregivers sign a "Contractors Contract" before working for Miracle. In relevant part, that contract states:

- (2) The services to be furnished as directed by our office.
- (3) Contractors are to conform to all applicable agency policies, including personnel qualifications.

\* \* \*

- (5) You as a contractor will be under direct supervision by [Miracle], and will report to our management. [Miracle] management will have full control of coordinating and evaluating contractors [sic] work on daily [sic] basis. An Individual [sic] from [Miracle] will be appointed to direct and carefull [sic] supervision.

{¶ 11} After the hearing, the Commission issued a decision finding that Miracle's home caregivers were not employees covered under Ohio unemployment compensation law. In so finding, the Commission found persuasive: (1) the home caregivers' ability to work for other home-health agencies and have their own clients, (2) the lack of a training

requirement, other than training as a home-health aide or certification as a state-tested nursing assistant, and (3) Miracle did not have day-to-day supervision over its home caregivers and only exercised control as required by state and federal regulation and the directives of the clients' physicians.

{¶ 12} Pursuant to Ohio Adm.Code 4146-9-01(C), ODJFS moved to vacate the Commission's decision. ODJFS argued that the decision overlooked the high degree of control that the contracts between Miracle and the home caregivers gave Miracle. The Commission granted ODJFS' motion and set the matter for a new hearing. Neither party introduced additional evidence at the second hearing.

{¶ 13} In a second decision, issued September 15, 2011, the Commission reversed itself. Upon review of the applicable statute and regulation, as well as the contract and other evidence, the Commission concluded the home caregivers were Miracle's employees.

{¶ 14} Miracle appealed the Commission's September 15, 2011 decision to the trial court. The trial court affirmed that decision.

{¶ 15} Miracle now appeals to this court, and it assigns the following errors:

*I. Appellee's September Decision and the Court Below are Unsupported by Reliable, Probative and Substantial Evidence.*

*II. Appellee's September Decision and the Court Below are Unlawful, Unreasonable and Against the Manifest Weight of the Evidence.*

*III. Home Health Care Aides are not "Employees" within the meaning of O.R.C. § 4141.01 and O.A.C. § 4141-3-05.*

{¶ 16} By its first assignment of error, Miracle argues that we must reverse the trial court's decision because it is not supported by reliable, probative, and substantial evidence. Because we cannot review the trial court's decision under that standard, we reject this argument.

{¶ 17} Miracle relied on R.C. 4141.26(D)(2) for the right to appeal the Commission's decision to the trial court. That statutory provision sets the standard that a trial court must apply:

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.

{¶ 18} Our standard of review is narrower than the trial court's. As to factual issues, our review is limited to a determination as to whether the trial court abused its discretion. *All Star Personnel, Inc. v. State*, 10th Dist. No. 05AP-522, 2006-Ohio-1302, ¶ 12, quoting *Kate Corp. v. Ohio State Unemp. Comp. Rev. Comm.*, 10th Dist. No. 03AP-315, 2003-Ohio-5668, ¶ 7; *Eisenhour v. Ohio Unemp. Comp. Bd. of Rev.*, 10th Dist. No. 97APE03-349 (Aug. 12, 1997); *McConnell v. Ohio Bur. of Emp. Servs.*, 10th Dist. No. 95APE03-262 (Oct. 5, 1995); *Stouffer Hotel Mgmt. Corp. v. Ohio Unemp. Comp. Bd. of Rev.*, 87 Ohio App.3d 179, 183 (10th Dist.1993). An abuse of discretion requires more than an error in judgment. *Eisenhour; McConnell; Stouffer Hotel Mgmt. Corp.* at 183. To find an abuse of discretion, we must conclude that the trial court's decision is without a reasonable basis and clearly wrong. *Id.*

{¶ 19} As our review is restricted to whether the trial court abused its discretion, we refuse to determine whether the evidence is reliable, probative, and substantial. That was the trial court's job. Accordingly, we overrule Miracle's first assignment of error.

{¶ 20} Because they are interrelated, we will address Miracle's second and third assignments of error together. By those assignments of error, Miracle argues that the trial court erred in concluding that its home caregivers were in its employment. We disagree.

{¶ 21} Ohio employers must pay contributions into Ohio's unemployment compensation fund. R.C. 4141.23(A). The definition of "employer" includes limited liability companies that have "in employment at least one individual." R.C. 4141.01(A)(1)(a). "Employment" means:

[S]ervice performed by an individual for remuneration under any contract of hire, written or oral, express or implied \* \* \*, unless it is shown to the satisfaction of the director that such individual has been and will continue to be free from direction or control over the performance of such service, both under a contract of service and in fact.

R.C. 4141.01(B)(1). 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. *Peter D. Hart Research Assoc., Inc. v. Ohio Bur. of Emp. Servs.*, 10th Dist. No. 95APE06-736 (Dec. 28, 1995), citing *McConnell*.

{¶ 22} Ohio Adm.Code 4141-3-05 sets forth 20 factors as "guides" for determining whether sufficient direction or control exists to create an employer-employee relationship. These factors are drawn from the common law, where they are used to distinguish between employees and independent contractors. The factors, which must be considered in their totality, include:

- (1) The worker is required to comply with the instructions of the person for whom services are being performed, regarding when, where, and how the worker is to perform the services;
- (2) The person for whom services are being performed requires particular training for the worker performing services;
- (3) The services provided are part of the regular business of the person from whom services are being performed;
- (4) The person for whom services are being performed requires that services be provided by a particular worker;
- (5) The person for whom services are being performed hires, supervises or pays the wages of the worker performing services;
- (6) A continuing relationship exists between the person for whom services are being performed and the worker performing services that contemplates continuing or recurring work, even if not full time;
- (7) The person for whom services are being performed requires set hours during which services are to be performed;
- (8) The person for whom services are being performed requires the worker to devote himself or herself full time to the business of the person for whom services are being performed;

- (9) The person for whom services are being performed requires that work be performed on its premises;
- (10) The person for whom services are being performed requires that the worker follow the order of work set by the person for whom services are being performed;
- (11) The person for whom services are being performed requires the worker to make oral or written progress reports;
- (12) The person for whom services are being performed pays the worker on a regular basis such as hourly, weekly or monthly;
- (13) The person for whom services are being performed pays expenses for the worker performing services;
- (14) The person for whom services are being performed furnishes tools, instrumentalities, and other materials for use by the worker in performing services;
- (15) There is a lack of investment by the worker in the facilities used to perform services;
- (16) There is a lack of profit or loss to the worker performing services as a result of the performance of such services;
- (17) The worker performing services is not performing services for a number of persons at the same time;
- (18) The worker performing services does not make such services available to the general public;
- (19) The person for whom services are being performed has a right to discharge the worker performing services;
- (20) The worker performing services has the right to end the relationship with the person for whom services are being performed without incurring liability pursuant to an employment contract or agreement.

Ohio Adm.Code 4141-3-05(B)(1) – (20).

{¶ 23} Here, the trial court found that the contract between Miracle and the home caregivers provided Miracle with the right to direct and control the caregivers' work. Miracle, however, argues that it does not actually exercise the broad degree of direction

and control that it reserved in the contract. True or not, R.C. 4114.01(B)(1) requires an employer to show that its workers are free from direction or control "*both* under a contract of service *and* in fact." (Emphasis added.) Given the language of the contract at issue, Miracle possesses the ability to direct all aspects of how the home caregivers render services to Miracle's clients. Because the home caregivers are not free from Miracle's direction under the contract, they are in Miracle's "employment."

{¶ 24} The trial court also found that, even after excluding the contract from consideration, the record contained reliable, probative, and substantial evidence that supported the Commission's decision. The trial court relied on the Commission's findings that: (1) Miracle requires particular training for its home caregivers; (2) home health-care services—the services that the home caregivers provide—are part of Miracle's regular business; (3) Miracle hires and pays the wages of the home caregivers; (4) there is a continuing relationship between Miracle and the home caregivers that contemplates continuing or recurring work; (5) Miracle requires the home caregivers to make and submit written reports; (6) the home caregivers do not invest in the facilities used to perform the home health-care services; (7) the home caregivers do not experience profit or loss; (8) Miracle may discharge its home caregivers; and (9) the home caregivers may end their relationship with Miracle without incurring liability pursuant to an employment contract or agreement.

{¶ 25} With regard to the first and fifth findings, Miracle contends that it does not require anything of the home caregivers; rather, federal and state law imposes the requirements at issue. We, like the trial court, find this argument unavailing. Because federal and state law mandates particular training and documentation, Miracle imposes those requirements on its home caregivers. The fact that federal and state law motivated Miracle to adopt the requirements at issue does not negate the control and direction that Miracle exercises in enforcing the requirements.

{¶ 26} With regard to the second finding, Miracle contends that the services the home caregivers provide are not part of its regular business because the caregivers proceed pursuant to the directions of the clients' physicians. Although physicians may determine the exact services a home caregiver must provide, all services fall within the rubric of home health care. Miracle does not dispute that it is in the business of providing



home health care. Therefore, we conclude that the trial court did not abuse its discretion in concluding that the evidence supported the second finding.

{¶ 27} With regard to the third, fourth, eighth, and ninth findings, Miracle does not dispute their truth. Miracle instead argues that Ohio Adm.Code 4141-3-05(B)(5), (6), (19), and (20) required the trial court and Commission to examine the actions of the "person for whom services are being performed." Miracle asserts that that person is the client, not Miracle. We disagree. The home caregivers contract with Miracle, not the client, for work. If Miracle does not engage a home caregiver's services for a client, the home caregiver performs no services for that client. Consequently, Miracle is the entity for whom the home caregiver ultimately provides his or her services. We thus find that the trial court did not abuse its discretion in focusing on the home caregivers' relationship with Miracle in applying Ohio Adm.Code 4141-3-05(B)(5), (6), (19), and (20).

{¶ 28} With regard to the seventh finding, Miracle contends that the home caregivers incur profit and loss as a result of their work. However, the evidence demonstrates only that Miracle pays its home caregivers on an hourly basis. The home caregivers' incomes do not increase or decrease based on whether revenues exceed or fall short of expenses. Thus, the trial court did not abuse its discretion in concluding that the home caregivers do not enjoy the profits or suffer the losses of Miracle's home health-care business.

{¶ 29} With regard to the sixth finding, Miracle argues that the home caregivers invest in the facilities used to perform services because they undergo training and obtain certification to work as home caregivers. This argument misconstrues the meaning of "facilities." When the administrative code does not define a term used, courts accord that term its common, everyday meaning. *State ex rel. R. Bauer & Sons Roofing & Siding, Inc. v. Indus. Comm.*, 84 Ohio St.3d 62, 66 (1998); *Parker's Tavern v. Ohio Dept. of Health*, 10th Dist. No. 10AP-968, 2011-Ohio-5767, ¶ 8. "Facilities" are "the physical means or equipment required for doing something, or the service provide[d] by this; freq. with modifying word, as *educational facilities, postal facilities, retail facilities, etc.*" (Emphasis sic.) *Oxford English Dictionary* (3d Ed.2009). A home caregiver's training and certification are not the physical means or equipment used to provide home health-care services. We, therefore, reject Miracle's challenge to the sixth factual finding.

{¶ 30} We recognize that, absent the contract between Miracle and the home caregivers, whether the home caregivers are employees is a much closer question. However, on close questions—where the Commission might reasonably decide either way—courts have no authority to upset the Commission's decision. *Irvine v. State*, 19 Ohio St.3d 15, 18 (1985). When considering the contract and other indicia of employment together, we have no difficulty concluding that the trial court did not abuse its discretion in affirming the Commission's determination that the home caregivers are in Miracle's employment. Accordingly, we overrule Miracle's second and third assignments of error.

{¶ 31} For the foregoing reasons, we overrule all of Miracle's assignments of error, and we affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

BRYANT and FRENCH, JJ., concur.

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