CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

SAN DIEGO OFFICE OF APPEALS
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RUBEN ALDRETE RUIZ
ALMA CASTREJON LAANE
Claimant-Appellant

Case No. **6601467**

Issue(s): 621(a), 926

Date Appeal Filed: 07/22/2020

EDD: 0410 BYB: 04/12/2020

Date and Place of Hearing(s):
(1) 08/21/2020
(2) 09/23/2020

Parties Appearing:
Claimant, Department
Claimant, Department

DECISION

The decision in the above-captioned case appears on the following page(s).

The decision is final unless appealed within 30 calendar days from the date of mailing shown below. See the attached "Notice to Parties" for further information on how to file an appeal. If you are entitled to benefits and have a question regarding the payment of benefits, call EDD at 1-800-300-5616.

Esta decision es final a menos que sea apelada dentro de 30 dias consecutivos de la fecha de envio postal indicado abajo. Mire el documento titulado, "Notice to Parties/Aviso a las Partes Interesadas," para obtener mas informacion acerca de como registrar una apelacion. Si Usted tiene el derecho a beneficios y tiene una pregunta acerca del pago de beneficios, llame al EDD al 1-800-326-8937.

Armando M. Montes, Administrative Law Judge

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Date Mailed:
OCT 05 2020

ISSUE STATEMENT

The claimant appealed from a determination that held the claimant not eligible for benefits under Unemployment Insurance Code sections 621(a) and 926. The issue under code section 621(a) is whether remunerations payable to a corporate officer constitute wages. The issue under code section 926 is whether remuneration payable to an individual constitute wages for personal services payable to an employee.

FINDINGS OF FACT

The claimant is a commercial full-time truck driver for XPO Logistic Cartage, (hereinafter referred to as "XPO"). XPO operates a hauling business and has about 200 truck drivers in San Diego. During September 2016, the claimant commenced truck driving services for XPO. During March 2017, he obtained his own truck, under a lease-to-own program, and is making payments. During July 2017, XPO incentivized the clamant to form an LLC corporation, R&M Trucking Express, Inc. (hereinafter referred to as "R&M"). XPO offered to reduce the claimant's insurance rates by one-half. XPO paid the $800 costs. During November 2018, the claimant obtained a second truck and is making payments. The claimant signed contracts with XPO upon obtaining each truck and every 3 months. Contracts are completed in advance by XPO and not negotiable.

At hire, the claimant completed an XPO online employment application. The claimant underwent an interview, criminal background check, drug and medical examinations. The claimant received an orientation from XPO's safety manager. The claimant received training to perform his job duties. XPO provided books, rules and regulations to the claimant. The claimant watched training videos and took online tests. XPO gave the claimant logbooks and tablets. XPO instructed how to complete manifests, hand tickets, scan and return them. XPO instructed him when to start his logbook while he waited to be dispatched. He was instructed to start the logbook when dispatch assigned a load. He was instructed to drive 5 miles per hour in the yard with lights. The claimant receives regular quarterly safety instructions.

The claimant received regular texts from XPO titled "BTT Broadcasts." The claimant was texted to turn in his logbook to avoid a dispatch hold, a refusal to assign work. A text was sent to the claimant alerting that failure to wear vests, in

the yard, would incur a 24-hour dispatch hold. XPO texted drivers to bring their electronic tablets to the dispatch window when they checked in for work. XPO posted signage that drivers had to use gloves when checking in with dispatch for a load or they would not receive work. XPO notified drivers they would no longer give paper settlement statements. XPO notified drivers they would be following a schedule B for the San Diego area. The claimant had to call in to get paid for waiting for loads. He would not be paid the first hour. He had to call dispatch when waiting time ended.

The claimant was required to have a Class A Commercial driver's license and minimum 2 years of driving experience. The claimant works under XPO's operating authority from the Department of Transportation. He is not required to have his own operating authority from DOT. The claimant does not have specialized training. The claimant drives a commercial truck to move full or empty containers for XPO's customers. At times, he drives bobtail to another location to pick up a container. XPO supplies the cargo containers and chasses upon which containers are placed. The claimant does not advertise for his own customers. The claimant does not negotiate prices or terms with XPO customers. The claimant does not schedule pickup and delivery times, terms and conditions. The claimant does not handle complaints from customers. Customer complaints are referred to the XPO dispatcher. The claimant may not contact XPO's customers directly. The claimant primarily performs driving duties for XPO in California.

The claimant lacks authority to hire other drivers. The claimant must obtain XPO's permission to have other drivers for his two trucks. Other drivers must apply for employment directly to XPO and obtain their approval. The claimant's second truck was previously driven by two drivers approved by XPO. Currently, he has one driver for his second truck. Drivers applied to XPO and their employment applications are approved by XPO. Drivers are subject to the same working conditions and terms as the claimant. XPO incentivized the claimant to obtain a second truck. XPO paid the claimant a $4,000 bonus for getting a second truck. The claimant works exclusively for XPO. He is required to provide prominent XPO placards on his trucks, affixed specifically on his trucks' doors. XPO's signage must be displayed at all times while driving for XPO.

XPO requires updates about his truck's condition. The claimant is required to conduct a 90-day inspection of his truck's mechanical condition at mechanics of XPO's choosing. The claimant is required to conduct pre and post trip inspections of his truck. The claimant is required to inform XPO of his truck's working condition and if repairs are needed. The claimant is required to keep all maintenance receipts and provide them to XPO. The claimant is required to report all accidents, driving citations and roadside inspections results to XPO.

XPO determines assignments. The claimant receives detailed work assignments through a tablet provided by XPO. The claimant is required to use an XPO tablet. The tablet must be returned if he stops driving for XPO. Before, the claimant received assignments using his personal cellular telephone through an XPO required application. XPO gives the claimant one assignment at a time. He receives a second assignment after completing the first. He must contact dispatch to obtain a new assignment. XPO tracks his whereabouts since the electronic logbook automatically knows when he arrives at a destination.

XPO requires daily completion of their electronic logbook. He must record the number of hours worked and details. He is required to record trip inspections. He is not permitted to drive until repairs are completed. The claimant is required to spend his own time re-fueling his truck. The claimant is required to daily scan manifests and tickets to XPO using their scanner and yard. Upon arriving to a destination, his return load is automatically displayed

XPO enforces driving time, speed and working conditions. The claimant is not allowed to drive more than 11 hours per day, be on duty over 14 hours, or drive more than 70 hours per week. The claimant cannot speed and must wear a safety vest. He cannot bring his truck home when he has a load. He cannot have a passenger in his truck while driving for XPO. The claimant can be subject to a dispatch hold or termination upon violation of XPO rules and procedures.

XPO determines driving schedules. Drivers receive instructions from XPO dispatchers. The claimant works a full-time schedule, five days per week, 55 to 60 hours per week. Upon arriving to work he checks in with XPO's dispatch for his first load. At times, he has to wait up to three hours for an assignment. XPO makes a list of waiting drivers and gives out assignments in order. When dispatched, work assignments are issued, and he is instructed to check his electronic logbook containing details of the load and delivery. The claimant is afraid to refuse a load to avoid a dispatch hold. He has been refused loads.

XPO determines pay schedules and payrates. The claimant is paid on a weekly basis. He is paid by XPO based on the number of containers he moves and rates XPO sets for specific routes they assign. Pay is based on XPO's rate schedule attached to the initial contract and amended contracts he signs every 90 days. Rates are unilaterally set by XPO and not negotiable. The claimant receives payment for his driving services for XPO, together with payments for other drivers. XPO does not pay all waiting time for new assignments. XPO does not pay for time spent completing paperwork, electronic logbook, inspections, refueling, drug test, meetings and safety calls.
From his lump sum, XPO deducts lease payments on the trucks, repairs, maintenance, fuel and insurances. XPO routinely deducts from paychecks the costs of tablets and administrative fees. Deductions are usually made at the end

of the pay period since the claimant does not have the funds to pay upfront costs. XPO issues settlement statements to show earnings and deductions. XPO does not provide worker's compensation coverage. XPO does not provide meal and rest breaks.

XPO can discipline drivers for failing to perform required inspections, repairs and properly completing logbooks. XPO has a point system for discipline. The claimant is assessed points for violations and excessive points result in termination. He could get points for not properly attaching pins on chassis and containers. He could get points for improper flat tire procedures. Other drivers have been fired for excessive points violations. The claimant is subject to random drug tests. A refusal will result in a suspension or termination. The claimant considers his job with XPO long term despite the 90-day amended independent contract agreements he is required to sign. XPO may terminate services at will and without cause. R&M may stop providing services to XPO without notice and liability. On 4/12/20, the claimant was laid off due to a substantial reduction of work caused by Covid-19. The clamant believes he is an employee of XPO. XPO issued 1099s for R&M.

The department determined the claimant is a statutory employee of R&M. The claimant is the sole officer. R&M corporation is not capitalized, lacks assets and stocks. The claimant does not draw a salary as an officer. R&M's sole source of revenue is the claimant's driving services for XPO. The claimant does not advertise to obtain customers for R&M. The claimant does not perform driving services for R&M. The claimant spends minimal time in the administration of corporate duties.

REASONS FOR DECISION

An officer of a corporation is an employee. (Unemployment Insurance Code, section 621(a).)

In Precedent Decision P-T-358 the petitioners were five separate businesses in which the same individual was an officer and shareholder. That individual also was the sole shareholder and president of a sixth company which provided management services to the petitioners. Although the individual was treated as an employee by the management company, the department contended that as an officer he was an employee of each of the petitioners. The appeals board held that as the individual was performing only minor ministerial services as an officer, and as the management company was a distinct corporation, the individual was not the petitioners' employee.

In this case, the claimant performed minor ministerial services as an officer for R&M. The claimant's primary and substantial job duties entailed performing

driving job duties for XPO. It is concluded, it would be against equity and good conscience to determine the claimant is an employee of R&M. The claimant does not have the status of an employee with R&M under section 621(a).

For any services performed prior to January 1, 2020, "Employee" includes any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee. (Unemployment Insurance Code, section 621(b).)

In *Empire Star Mines Co., Ltd. v. California Employment Commission* (1946) 28 Cal.2d 33, the Supreme Court of California stated:

". . . In determining whether one who performs services for another is an employee or an independent contractor, the most important factor is the right to control the manner and means of accomplishing the result desired. If the employer has the authority to exercise complete control, whether or not that right is exercised with respect to all details, an employer-employee relationship exists. Strong evidence in support of an employment relationship is the right to discharge at will, without cause. [Citations]"

In addition to the primary factor of the right to control the manner and means by which the work is completed, the following secondary factors are considered in determining whether or not an employment relationship exists (*Tieberg v. California Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 950):

(a) The extent of control which may be exercised over the details of the work;

(b) Whether or not the one performing services is engaged in a distinct occupation or business;

(c) Whether the work is usually done under the direction of an employer or by a specialist without supervision;

(d) The skill required in the particular occupation;

(e) Who supplies the instrumentalities, tools and place of work for the one performing services;

(f) The length of time for which the services are to be performed;

(g) The method of payment, whether by time or by the job;

(h) Whether or not the work is part of the regular business of the principal;

(i) Whether or not the parties believe they are creating a relationship of master and servant; and

(j) Whether the principal is or is not in business.

In determining whether service was rendered in employment, the primary test is the right of the alleged employer to control the manner and means of accomplishing the desired results. (*Empire Star Mines Company, Ltd. v. California Employment Commission* (1946) 28 Cal.2d 33.)

In *S.G.Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, a workers' compensation case, a grower engaged agricultural laborers to harvest cucumbers under written "sharefarmer" agreements. The grower exercised pervasive control over the agricultural operation as a whole. The harvest was an integrated step in the operation. The grower controlled the harvest by means of worker incentives in the contract rather than by direct supervision. The Supreme Court held that the grower retained "all *necessary* control over the harvest portion of its operations." (*Id.* at p. 357; italics in original.) Although the court considered the remedial purposes of the workers' compensation statutes, it declined to adopt detailed new standards and applied the usual common law rules in reaching its conclusion that the harvesters were employees.

In Precedent Decision P-T-511, the petitioner was an interstate motor carrier utilizing "owner-operator" tractor drivers. Petitioner directed drivers where to pick up and drop off produce, and by when; subjected drivers to a twice-daily check-in requirement; required drivers to submit paperwork containing information beyond what was required of petitioner by federal regulations; and mandated the use of certain stations via which drivers had to transmit that paperwork, which was required to complete the job and to receive payment. The Board concluded petitioner had retained the right to control the manner and means by which its tractor drivers accomplished the desired result of delivering produce and other goods to petitioner's customers.

"The modern tendency is to find employment when the work being done is an integral part of the regular business of the employer and the worker does not furnish an independent business or professional service relative to the employer." (*Santa Cruz Transportation, Inc. v. Unemployment Ins. Appeals Bd.* (1991) 235 Cal.App.3d 1363, 1376, citing *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 357.)

In *Air Couriers International v. Employment Development Department* (2007) 150 Cal.App.4th 923, the company was in the business of delivery of packages. The drivers used their own vehicles and paid their own driving expenses. They delivered to the company's customers under the direction of the company's dispatchers. They could select their own routes, but the company established pick-up and delivery deadlines and required the drivers to use company-furnished forms in order to receive payment. The company billed its customers and collected payment. The drivers generally worked continuously for the company and were paid at regular intervals. Although the drivers could turn down jobs, this was done infrequently because of the fear that the company would stop providing work. The drivers did not have their own businesses or work in a separate profession. The court held the drivers were employees because the company "exerted control over the drivers to coordinate and supervise the company's basic function: timely delivery of packages." (*Id.* at p. 939.)

In *Santa Cruz Transportation Inc. v. Unemployment Ins. Appeals Bd.* (1991) 235 Cal.App.3d 1363, the court held that cab drivers were employees. The taxicab company set the hours of work, coordinated meal breaks, required the drivers to complete trip sheets and maintained a dress code. The work performed by the drivers was part of the company's regular business. The drivers' livelihoods depended on the company's dispatchers. The court looked beyond the form agreements, which stated the drivers were independent contractors, concluding that the substance of the relationship was employment. It found that the company controlled the behavior of the drivers by retaining an implicit threat that it would make less work available if the drivers refused work too often.

In the case of *JKH Enterprises, Inc. v. Department of Industrial Relations* (2006) 142 Cal.App.4th 1046, the court held that delivery drivers were employees under workers' compensation law. It held that the company was in the delivery business and that the delivery drivers performed the work of this business. It concluded that the individual factors utilized to evaluate employment status were not to be mechanically applied and that, "[T]he functions performed by the drivers, pick-up and delivery of papers or packages and driving in between, did not require a high degree of skill. And the functions constituted the integral heart of JKH's courier service business. By obtaining the clients in need of the service and providing the workers to conduct it, JKH retained all *necessary* control over the operation as a whole." (*Id.* at p. 1064.)

A strong factor tending to show the relationship of employer and employee is the employer's right to terminate the work at will. (*Riskin v. Industrial Accident Commission* (1943) 23 Cal.2d 248.)

A right to discharge at will without cause is convincing evidence of an employment relationship in those situations where a workman would feel a

sufficient threat from the possibility of discharge and its consequences to yield to the pressure of the principal in regard to performing the details of the work. (*Tomlin v. California Employment Commission* (1947) 30 Cal.2d 118.)

A contractual provision that a workman is an independent contractor is persuasive evidence of the intended relationship, but it is not controlling and the legal relationship may be governed by the subsequent conduct of the parties. (*Brown v. Industrial Accident Commission* (1917) 174 Cal. 457.)

The fact that the parties may have mistakenly believed that they were entering into the relationship of principal and independent contractor is not conclusive. (*Max Grant v. Director of Benefit Payments* (1977) 71 Cal.App.3d 647.)

Of the analysis of factors to be considered in determining whether an individual is an employee or an independent contractor, the American Law Institute's Restatement of Agency states that "it is for the triers of fact to determine whether or not there is a sufficient group of favorable factors to establish the relation." (Rest.2d Agency, section 220, pp.486-487.)

Section 621(b) of the Unemployment Insurance Code and section 2750.3(a) of the Labor Code provide that any individual providing labor or services for remuneration after January 1, 2020, has the status of an employee rather than an independent contractor unless the hiring entity demonstrates all of the following conditions:

(1) The individual is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.

(2) The individual performs work that is outside the usual course of the hiring entity's business.

(3) The individual is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

If a court of law rules that the three-part test in Labor Code, section 2750.3(a)(1) cannot be applied to a particular context based on grounds other than an express exception to employment status as provided under section 2750.3(a)(2), then the determination of employee or independent status in that context shall instead be governed by the decision in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 341.* (Labor Code, section 2750.3(a)(3).)

In this case, from the evidence in the record it is found there is a sufficient group of favorable factors to establish an employer-employee relationship with XPO. The claimant and XPO entered into unilaterally imposed contracts to create the impression of arm's length dealing. XPO incentivized and paid the costs for claimant to form R&M for the benefit of XPO. XPO determined assignments, schedules, payrates and they were not negotiated. XPO determined working conditions for drivers and they were not negotiated. XPO incentivized the claimant to purchase two trucks to perform driving duties exclusively for XPO. The claimant's sole source of income was from the driving services performed for XPO. XPO provided dispatchers, yard, trailers, chassis, tablets, manifests, tickets and tablets. XPO provided instructions and ongoing training to drivers.

The claimant hauled trailers exclusively for XPO and its customers under the close supervision of XPO dispatchers. XPO negotiated with customers, retained, billed and collected payment from customers. XPO established pick-up and delivery deadlines. The claimant had no dealings with customers. Customers complaints were directed to XPO dispatchers.

The claimant worked continuously and paid at regular intervals. The claimant was subject to discipline for turning down jobs, maintenance, repair and traffic violations. The claimant did not advertise. The claimant did not have his own customers. The claimant was not permitted to work elsewhere. XPO could terminate the claimant due to mechanical violations, tickets, accidents and policy violations. The claimant's job ended since he was laid off due to lack of work caused by Covid.19.

XPO had the right to terminate the claimant at will. The claimant did not operate his own separate business or profession. Little skill or experience was required, and no particular education was needed to perform driving duties. The manner and means of rendering those services were primarily controlled by XPO. It is determined the claimant is an employee of XPO since they exerted control over the claimant to coordinate and supervise the company's basic function of hauling trailers. The claimant performed an integral function of XPO in a dependent role. The substance of the work relationship was that of employer and employee.

After careful consideration of all of the evidence in the record, it is held section 621(a) does not apply since the claimant performed ministerial duties. The claimant does not have the status of an employee with R&M under section 621(a). It is concluded the claimant is an employee of XPO under 621(b) of the code. Remuneration payable to the claimant does not constitute wages for personal services payable to an employee under code section 926. The district court placed a hold on Labor Code 2750.3(a) pending further judicial review.

DECISION

The determination under code sections 621(a) and 926 is reversed.

SD:amm1/6