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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

CHAO MOUA,

Plaintiff and Appellant,

v.

CALIFORNIA OVERNIGHT, INC.,

Defendant and Respondent.

C073235

(Super. Ct. No. 155712)

In this bench trial de novo from the Labor Commissioner's decision that awarded plaintiff Chao Moua certain mileage expenses as a courier employee, the trial court found Moua to be an independent contractor not entitled to such expense reimbursement. (Lab. Code, §§ 98.2 [appeal of Labor Commissioner decision is a de novo hearing]; 2802, subd. (a) [employer must indemnify its employee for all necessary expenditures employee incurs in doing the job].)¹

¹ Undesignated statutory references are to the Labor Code.

We conclude the trial court's decision is supported by substantial evidence, and the court applied the law properly. Consequently, we shall affirm the judgment.

We will proceed straight to our discussion of the issues, which are closely related to one another, setting forth the pertinent facts there.

DISCUSSION

I. Facts

Moua performed services as a package delivery driver for defendant California Overnight, Inc., dba OnTrac (OnTrac), through an independent contractor contract with Tom Sayles, dba Critical Express (Sayles); Sayles recruited these drivers. Moua worked in this arrangement from October 2007 until April 2010, when he suffered a job injury.

Each weekday morning, Moua would meet an OnTrac truck in Chico, and obtain the packages to be delivered that day. Sayles had determined this meeting site and Moua's delivery area (Oroville area).

In delivering the packages, Moua used a scanner he leased from OnTrac and daily route sheets he obtained from OnTrac. Evidence showed that the scanner was used to track packages for the benefit of OnTrac's customer-senders, and not to track Moua. The daily route sheets indicated the number of stops and packages Moua delivered, by specifying the package sender, the receiver, the receiver's address, and whether the delivery required a signature; Moua would note the time he delivered the packages on these sheets. Sayles testified that he used these route sheets to determine Moua's pay, which Sayles paid on a piece-rate basis (i.e., number of deliveries).

There were three price levels of daily delivery time periods (earlier to later) that had to be met; each of these periods comprised a few hours. Other than these time periods, Moua was free to deliver the packages in any order, at any time, and on any route he chose throughout the day.

Moua provided his own van, and paid for his own insurance, vehicle maintenance and vehicle license. Moua also had his own business license and motor carrier permit. Moua could have, although he did not, hire subcontractors, take time off, or take on other clients (Moua had his own delivery business at some point); Moua essentially worked full-time exclusively delivering OnTrac packages during the two and a half years in question. Moua also could decline to deliver packages, although he did so only once. Moua filed his taxes as an independent business owner using a 1099 tax form (rather than a W-2), and apparently took an annual mileage deduction on his tax returns as any independent business owner in the delivery field would.

Moua signed three contracts with OnTrac: (1) the scanner lease; (2) a confidentiality agreement; and (3) a “marketing contract.” The scanner lease was not mandatory; a worker could use his own equivalent equipment (e.g., smart phone with compatible software). Under the marketing contract, Moua wore OnTrac clothing (hat, shirt, badge) and affixed magnetic OnTrac signs to his van, for which he was paid a small daily rate. Conflicting evidence was presented on whether the clothing constituted a required uniform, or only an encouraged look. The 1099 tax form noted above was issued by OnTrac and Sayles jointly, with OnTrac’s portion covering the marketing contract payments less the scanner rental, and Sayles’s portion covering Moua’s piece-rate based payment.

The only real training OnTrac provided was an annual session to satisfy federal Transportation Security Administration requirements. OnTrac never reviewed Moua’s performance.

Moua testified that he believed he was an independent contractor, and that he had worked previously with three other delivery services as an independent contractor.

II. Substantial Evidence

On appeal, Moua principally argues that the trial court's finding that he was an independent contractor for OnTrac is not supported by substantial evidence.²

The legal test for determining who is an “employee” under section 2802, subdivision (a) (“employee” expense reimbursement), is centered on “the ‘control of details’—that is, whether the principal has the right to control the manner and means by which the worker accomplishes the work—but there are a number of additional factors in the modern equation, including (1) whether the worker is engaged in a distinct occupation or business, (2) whether, considering the kind of occupation and locality, the work is usually done under the principal’s direction or by a specialist without supervision, (3) the skill required, (4) whether the principal or worker supplies the instrumentalities, tools, and place of work, (5) the length of time for which the services are to be performed, (6) the method of payment, whether by time or by job, (7) whether the work is part of the principal’s regular business, and (8) whether the parties believe they are creating an employer-employee relationship. [Citations.] The parties’ label is not dispositive and will be ignored if their actual conduct establishes a different relationship.” (*Estrada v. FedEx Ground Package System, Inc.* (2007) 154 Cal.App.4th 1, 10-11, fn. omitted (*Estrada*); *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 350–351 (*Borello*).

“The determination (employee or independent contractor) is one of fact and thus must be affirmed if supported by substantial evidence.” (*Estrada, supra*, 154 Cal.App.4th at p. 11; *Borello, supra*, 48 Cal.3d at p. 349.) When the record contains substantial evidence, an appellate court is without power to substitute its own view for that of the fact finder (here, the trial court in this bench trial de novo), even if there is

² Prior to trial (de novo), Sayles and his companies had been dismissed as defendants.

contrary evidence that could support a different conclusion. (*Montoya v. McLeod* (1985) 176 Cal.App.3d 57, 62.)

We find there is substantial evidence that Moua was an independent contractor for OnTrac. Moua controlled many of the details of his workday, subject to the general requirement that he deliver the packages within the three rather broad time periods OnTrac set and within the geographic area Sayles selected. Thus, Moua could, in a substantive way, set his own hours, and his own delivery route. Given this evidence, Moua's emphatic argument that the daily route sheets evidenced OnTrac's control of Moua, down to the minute, comes up short in the substantial evidence review equation.

Moua also had his own business license and motor carrier permit, and had his own delivery business at some point. Moua could have, although he did not, hire subcontractors, take time off, or take on other clients. Moua also could decline to deliver packages.

Moua supplied many of the basic tools to do the job (vehicle; its maintenance, insurance, and license), and there was evidence his OnTrac clothing, which he was paid a daily rate to wear, was not a required uniform.

Moua, who was experienced in the package delivery business, believed he was an independent contractor, filed his taxes as such, and apparently took an annual mileage deduction as such. Sayles paid Moua on a piece-rate basis.

We conclude that substantial evidence supports the trial court's determination that Moua was an independent contractor for OnTrac.

III. Applying the Law

Moua raises two issues in this respect.

First, Moua claims the trial court misapplied the burden of proof. OnTrac appealed the Labor Commissioner's decision (finding Moua to be an employee for

section 2802, subdivision (a) purposes). Such an appeal involves a de novo hearing in the superior court. (§ 98.2, subd. (a).) In its statement of decision, the trial court concluded, “[T]he court finds that [OnTrac] has met its burden to establish by a preponderance of the evidence that Moua was an independent contractor and not an employee of [OnTrac].” Thus, the trial court correctly allocated the burden to OnTrac.

Second, Moua contends the trial court misinterpreted relevant case law; Moua purportedly cites to “the last five cases that have been published regarding this area of law.” Moua maintains these cases “all support the fact that delivery drivers who are bound by delivery times and windows, wear the employer uniform, use their forms and packages, and work for them exclusively, are in fact employees.” Only two of these cited cases are relevant here; the others involve irrelevant legal contexts or have been granted review. The two relevant cases—both from the Court of Appeal, Sixth Appellate District—are *Estrada, supra*, 154 Cal.App.4th 1 and *JKH Enterprises, Inc. v. Department of Industrial Relations* (2006) 142 Cal.App.4th 1046. Both cases found that substantial evidence supported the relevant lower tribunal’s conclusion that the courier drivers in question were employees. In *Estrada*, the appellate court found that FedEx had “control over every exquisite detail of the drivers’ performance, [down to] the color of their socks and the style of their hair.” (*Estrada, supra*, 154 Cal.App.4th at pp. 11-12.) And in *JKH*, the appellate court found the courier company “retained all necessary control over the operation as a whole.” (*JKH, supra*, 142 Cal.App.4th at p. 1064, italics omitted.) As we have seen, there is substantial evidence that this is not the level of control that OnTrac exercised.

We conclude the trial court properly applied the law here.

DISPOSITION

The judgment is affirmed. OnTrac is awarded its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)³

BUTZ, J.

We concur:

HULL, Acting P. J.

ROBIE, J.

³ To the extent Moua asserts on appeal (and apparently he does not) that the trial court erred in foreclosing him from adding certain wage claims in the trial de novo (the Labor Commissioner proceeding involved only employee mileage expenses and waiting time penalties), he has failed to provide a heading on this point in his brief and consequently we deem the point forfeited. (Cal. Rules of Court, rule 8.204(a)(1)(B); *Provost v. Regents of University of California* (2011) 201 Cal.App.4th 1289, 1294.)

We grant OnTrac's request for judicial notice of the Workers' Compensation Appeals Board's (WCAB) decision finding Moua to be an independent contractor in the workers' compensation context. We also grant Moua's request for judicial notice of the trial court's denial of OnTrac's motion for summary judgment (the motion was based on the purported collateral estoppel effect here of this WCAB decision). In light of our resolution of this matter, we do not determine any collateral estoppel issue.