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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MD TOX LABORATORY, INC., Plaintiff and Appellant, v. CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD et al., Defendants and Respondents.	G050832 (Super. Ct. No. 30-2013-00685012) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Robert D. Monarch, Judge. (Retired Judge of the Orange County Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Stocker & Lancaster and Michael J. Lancaster for Plaintiff and Appellant.

Kamala D. Harris, Attorney General, Paul D. Gifford, Assistant Attorney General, Diane S. Shaw and Brian D. Wesley, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

MD Tox Laboratory, Inc. (MD Tox) appeals from the trial court's denial of its petition for a writ of administrative mandate (Code Civ. Proc., § 1094.5; all further undesignated statutory citations are to this code) to overturn a decision of the California Unemployment Insurance Appeals Board (Appeals Board or Board) of the California Employment Development Department. The Board found that a worker MD Tox terminated, Vanessa Jimenez, was entitled to unemployment insurance benefits because MD Tox failed to rebut the presumption she was an employee, not an independent contractor. MD Tox challenges the sufficiency of the evidence to support the trial court's conclusion upholding the Board's determination Jimenez qualified as an employee. We affirm the trial court's order denying MD Tox's request for a writ of mandate.

I

FACTUAL AND PROCEDURAL BACKGROUND

Jimenez began her work for MD Tox as a DNA technician in Deceomber 2012, swabbing inside patients' mouths to collect DNA samples at physician's offices specified by MD Tox, and mailing the samples to MD Tox using forms and delivery services authorized by MD Tox. Jimenez was not authorized to develop an independent business enterprise to locate and collect new patient sources of DNA or other biological material for MD Tox to test. Instead, MD Tox set the days Jimenez could visit certain physician's offices, though she had some flexibility in arranging appointment times with each physician's office and could choose the route and means to get herself to those offices. MD Tox supplied Jimenez with the materials to collect the samples and paid for Jimenez's time on a per diem basis, rather than pro rata for her output in collecting and mailing each sample. In other words, MD Tox paid Jimenez $120 per day whether she collected one or more samples; there was no evidence Jimenez set this rate or negotiated other employment terms. She did, however, sign an agreement that designated her as an "independent contractor."

Michelle White, MD Tox's president, testified in the administrative proceedings that she believed Jimenez sought the "independent contractor" assignment because of the flexibility the DNA technician position afforded. While the parties' agreement stated Jimenez possessed certain skills and expertise as an independently contracted DNA technician, White acknowledged that no particular licensing, certification, training, or skill was required for the work Jimenez performed. White admitted the hearing officer could perform the tasks Jimenez completed, without any knowledge of the profession. The parties' written contract noted it was not an exclusive engagement; Jimenez was free to seek other employment or compensation opportunities, presumably if it did not interfere with her work for MD Tox, but there was no evidence she ever did so. No evidence suggested she offered DNA technician services to the public or to other entities besides MD Tox, or that she operated a going concern in that field, or engaged in any other business activities. She could refuse at her discretion daily assignments and MD Tox's accompanying per diem payment, but there was no evidence she exercised that right. The evidence instead suggested MD Tox was her sole source of income. White testified MD Tox did not provide Jimenez with an office or any office supplies, but MD Tox made no attempt to show Jimenez operated a business, had secured a business license, or performed the same or similar services for hire.

The parties' agreement did not provide that it ceased upon Jimenez completing any particular project or upon providing any particular batch of samples to MD Tox. Rather, like an at-will employment contract, it specified that either party with 30 days' notice could terminate the contract without cause.

MD Tox terminated Jimenez just three months into the contract, in February 2013, and she filed a claim with the Employment Development Department (EDD) for unemployment benefits. The EDD audited MD Tox's putative independent contracting arrangement with Jimenez as a DNA technician, and concluded she was eligible for unemployment insurance benefits as an employee within the meaning of the

Unemployment Insurance Code. MD Tox appealed according to the applicable administrative agency procedures, and a hearing was held before an administrative law judge (ALJ) in July 2013. The EDD did not receive notice of the hearing and did not appear. The ALJ reversed the EDD's employment determination, concluding instead that Jimenez was an independent contractor. The ALJ relied on the terms of the parties' contract, which labeled Jimenez an "independent contract" and also specified that she had independent expertise to offer in her role as a DNA technician. The ALJ noted other factors, including the ALJ's conclusion Jimenez was paid "by job" and not for her time on an hourly basis like other employees.

The EDD appealed the ALJ's ruling to the Appeals Board, the last step in the administrative process. The Appeals Board rejected as unsubstantiated the ALJ's factual finding that Jimenez's position entailed special expertise for which a business might engage an independent contractor, noting that "at the hearing [MD Tox] acknowledged that there was no special training or expertise required to collect specimens." The Appeals Board also observed that Jimenez "relied on calls or emails from the employer in order to have assignments. The hearing record discloses that [MD Tox] failed to provide evidence as to whether the claimant [i.e., Jimenez] had a business license, business cards, worked for others performing the same services, or operated her own business."

The Appeals Board rejected the ALJ's finding that Jimenez was an independent contractor. The Board explained its contrary conclusion that Jimenez was an employee entitled to unemployment insurance benefits in a written decision, as follows:

"The courts have long held that the burden of proof generally is on the party attacking the employment relationship. [Ciation.] [¶] '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.)

"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. [Citation.] [¶] The fact that the parties may have mistakenly believed that they were entering into the relationship of principal and independent contractor is not conclusive. [Citation.] [¶] The fact that one is performing work and labor for another is prima facie evidence of employment and such an individual is presumed to be a servant in the absence of evidence to the contrary. [Citation.]

"In this case, there were criteria supporting both independent contractor and employee status. The administrative law judge in his decision gives a great amount of weight to the claimant's request to be an independent contractor and to the fact that she signed a contract to that effect. [¶] However, that is but one factor and it has not been established that the claimant requested to work as an independent contractor, rather than being faced with a 'take it or leave it' condition to sign the agreement prior to working. The Board may look broadly at the numerous aspects of the employment relationship and decide there is an employer/employee relationship despite the existence of such a contract."

The Appeals Board concluded: "What is controlling for us in this case is that the claimant needed no special training, certification or expertise to take a saliva swab and mail it to the employer via Fed Ex. While the claimant may have had the option of refusing to take an assignment, she was reliant on [MD Tox] for the assignments. It is also noted that the claimant was paid on a per diem basis, not on a per sample basis. [¶] . . . [¶] We do not find that [MD Tox] has met its burden of proof to establish that the claimant was an independent contractor, given the modern trend in favor of a finding that she was an employee. [MD Tox] did not establish indicia to

support a finding that the claimant was an independent contractor, such as that she had her own business, had a business license, business cards, and worked for others performing the same services."

After the Appeals Board rendered its decision, MD Tox filed in the superior court a petition for a writ of mandate to overturn it. The trial court denied the petition because "[t]he weight of the evidence supports the determination by the California Unemployment Insurance Appeals Board that the claimant was Petitioner's employee rather than an independent contractor."

The trial court explained in its written order: "While the evidence in the record shows the claimant performed her actual tasks without [the] immediate supervision of Petitioner and that Petitioner did not control the claimant's work hours, the other evidence, which supports the Appeals Board's determination is: (i) the claimant's work was an integral part of the regular business of Petitioner, a company that markets and manages laboratory services . . . ; (ii) she was essentially terminable at will — upon 30 days' notice . . . ; (iii) there was no particular licensing, certification, training, or skill required for the work performed by the claimant; and (iv) so far as the record reflects, Petitioner was the claimant's sole source of assignments, meaning Petitioner ultimately controlled the claimant's work and the claimant cannot be said to have been operating as a distinct business or occupation. [Citations.] [¶] As noted by the Appeals Board, there are factors in this case weighing both ways. Nonetheless, more factors weigh more heavily toward the claimant being an employee rather than an independent contractor."

II

DISCUSSION

A. *Timeliness*

MD Tox contends as it did before the Appeals Board and the trial court that the EDD's appeal to the Appeals Board was untimely, and therefore the ensuing proceedings are moot or void, and the ALJ's ruling must be reinstated. But MD Tox

offers no explanation or authority for its contention the administrative appeal was tardy. The Appeals Board explained in its ruling that the "EDD faxed its appeal on August 7, 2013[,] and the appeal was due on August 8, 2013[,] so the appeal was timely." An appellant must support each contention on appeal by pertinent authority and cogent argument (Cal. Rules of Court, 8.204(a)(1)(B)), but MD Tox fails to do either.

MD Tox makes no effort to locate applicable rules governing administrative appeals, or to suggest how the EDD's appeal was untimely under those rules. The appellate court may not be tasked with developing arguments for an appellant or to formulate or piece together a basis for reversal, nor to scour the record or governing law on the appellant's behalf. (See, e.g., *Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852; *REO Broadcasting Consultants v. Martin* (1999) 69 Cal.App.4th 489, 500.) Accordingly, MD Tox fails to meet its burden to demonstrate error and overcome the presumption that the decision below is correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; see *People ex rel. Dept. of Alcoholic Beverage Control v. Miller Brewing Co* (2002) 104 Cal.App.4th 1189, 1200 ["appellant must present a factual analysis and legal authority on each point made or the argument may be deemed waived"]; *In re S.C.* (2006) 138 Cal.App.4th 396, 408 ["conclusory claims of error will fail"].) Consequently, MD Tox's unexplained timeliness challenge is forfeited.[1]

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[1] In an 11th-hour request for judicial notice after the matter was submitted following oral argument, MD Tox finally suggests authority for the 20-day period to appeal an ALJ's ruling. In a separate order, we denied the request for judicial notice because it is moot. The request is moot because, as noted above, the Board expressly determined the EDD's appeal was timely filed by fax within the applicable deadline. Nothing in the record or our independent research on Board procedures precludes a faxed appeal, nor does MD Tox address the issue in its briefing or in its request for judicial notice. MD Tox's timeliness challenge therefore fails.

B. *Standard of Review*

We review the trial court's denial of a petition for writ of administrative mandate for substantial evidence. (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 824 ["Even when, as here, the trial court is required to review an administrative decision under the independent judgment standard of review, the standard of review on appeal of the trial court's determination is the substantial evidence test"].) Under section 1094.5, the standard of review the trial court employs depends on the nature of the right affected by the administrative decision. (*MHC Operating Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, 217 (*MHC Operating*).) The benefits provided by the Unemployment Insurance Act are fundamental, vested rights. (*Cooperman v. Unemployment Ins. Appeals Bd.* (1975) 49 Cal.App.3d 1, 7.) If the decision affects a fundamental vested right, the trial court exercises its independent judgment to determine whether the weight of the evidence supports the administrative decision. (*MHC Operating, supra,* at p. 217; §1094.5, subd. (c).) When the trial court independently reviews an administrative agency's factual findings, the appellate court in turn reviews the trial court's decision to determine whether it is supported by substantial evidence. (*Ibid.*)

"'When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. *If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion*.' [Citation.]" (*Jameson v. Five Feet Restaurant, Inc.* (2003) 107 Cal.App.4th 138,143.) In considering the totality of the evidence, we resolve all conflicts favorably to the

prevailing party, and draw all reasonable inferences in support of the judgment. (*Lacy v. California Unemployment Ins. Appeals Bd.* (1971) 17 Cal.App.3d 1128, 1134.) The burden rests on the challenging party to establish that persons rendering services were independent contractors rather than employees. (*Messenger Courier Assn of Americas v. California Unemployment Ins. Appeals Bd.* (2009) 175 Cal.App.4th 1080, 1086.)

C. Substantial Evidence Supports the Trial Court's Denial of the Writ Petition

MD Tox contends the "weight of the evidence" did not support the trial court's ruling upholding the Appeals Board's decision. Viewed properly under the standard of review, MD Tox's argument is inherently flawed. As noted, the appellate court does not reweigh the evidence. To the contrary, consistent with the standard of review, the facts must be viewed in the light most favorable to the order or judgment on appeal. (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 229; see 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 370, pp. 427-428 ["'All of the evidence most favorable to the respondent must be accepted as true, and that unfavorable discarded as not having sufficient verity to be accepted by the trier of fact'"].)

By statute, employees — but not independent contractors — are entitled to unemployment benefits if their employment is terminated and they otherwise qualify. (Unemp. Ins. Code, §§ 1251, 1253.) The label placed by the parties on their relationship is not dispositive. (*Gonzalez v. Workers' Comp. Appeals Bd.* (1996) 46 Cal.App.4th 1584, 1594.) "The principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired. [Citation]." (*Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 946 (*Tieberg*).) Additional factors include: (1) the right to discharge at will; (2) whether the person performing services is engaged in a distinct occupation or business; (3) the type of occupation, including its locality and whether it is usually done under the direction of the principal or by a specialist without supervision; (4) the

skill required by the occupation; (5) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time required for performance of the services; (7) the method of payment, e.g., whether by time or by job; (8) whether the work is a part of the principal's regular business; and (9) whether the parties believe they have created an employment relationship. (*Id.* at p. 949; *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 349-355; see, e.g., *Air Couriers Internat. v. Employment Development Dept.* (2007) 150 Cal.App.4th 923, 937 [rejecting contention that delivery drivers for a package service were independent contractors rather than employees].)

The trial court reasonably could conclude these factors weighed in favor of upholding the conclusion Jimenez qualified as an employee for unemployment insurance purposes, particularly given the liberal purpose of the insurance program and that it was MD Tox's burden to rebut employment. (See *Gibson v. Unemployment Ins. Appeals Board* (1973) 9 Cal.3d 494, 499.) The Unemployment Insurance Code broadly defines who is an employee. Employment includes "service . . . performed by an employee for wages or under any contract for hire . . . ." (Unemp. Ins. Code, § 601.) In contrast, an "independent contractor" is "'one who renders service in the course of an independent employment or occupation, following his employer's desires only in the results of the work, and not the means whereby it is to be accomplished.'" (*S. A. Gerrard Co. v. Industrial Acc. Com.* (1941) 17 Cal.2d 411, 413.)

MD Tox asserts as to the principal *Tieberg* factor that it did not control Jimenez's work, but instead paid only for the swab sample results she independently obtained, in the time and manner of her choosing. The trial court, however, reasonably could conclude otherwise because substantial evidence demonstrated MD Tox controlled the meaningful aspects of the time and manner in which Jimenez engaged in her work. She could not seek out or obtain samples of her choosing and forward them to MD Tox for a bounty. Rather, MD Tox directed her precisely as to which offices and on what

days she could obtain samples. MD Tox provided the instruments for Jimenez to obtain the samples, and MD Tox dictated both the forms she was required to fill out to accompany the samples and acceptable means of dispatching them to MD Tox. It is also noteworthy tht the rote and simple nature of Jimenez's work for MD Tox did not afford *her* any meaningful control in the manner in which she conducted the work, as one would expect of an independent contractor.

The remainder of the factors similarly supported the trial court's denial of the writ petition. MD Tox was entitled to discharge Jimenez essentially at will; there was no evidence Jimenez operated a distinct business enterprise or offered DNA technician services as a distinct occupation, nor that her type of work in her locality was generally performed by contractors instead of employees. No independent skill was required and she added nothing of independent importance to the work she performed for MD Tox, but instead her contribution, while rote and simple, was such an integral part of the regular business of the employer that one could expect it would be performed by an employee. She was employed for a period of time, with 30 days' notice to terminate her, rather than for a discrete project, event, or delivery of any particular batch of goods or services. Additionally, "per diem" is a measure of time, not output or results, and Jimenez was paid for her time on a per day basis, rather than "by job" for each sample she collected and mailed. The trial court also reasonably could discount MD Tox's self-interested, hearsay contention that Jimenez wanted independent contractor employment, and infer instead that her signature on a contract with those terms was a condition of employment. In any event, substantial evidence supports the trial court's conclusion, and that is all that is required.

III

DISPOSITION

The trial court's order denying MD Tox's request for a writ of mandate is affirmed. Respondents are entitled to their costs on appeal.

ARONSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.