CALIFORNIA SUPERIOR COURT

CITY AND COUNTY OF SAN FRANCISCO

DEPARTMENT NUMBER EIGHT

JOSEPH TRACY, et al.,

Plaintiffs,

vs.

YELLOW CAB COOPERATIVE, et al.,

Defendants.

NO. 938786
ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND TO ADD CLASS REPRESENTATIVE; ORDER DENYING DEFENDANTS' MOTION TO DISMISS OR DECERTIFY CLASS

Plaintiffs' motion for Summary Judgment came on regularly in Department Eight of this Court on July 24, 1996, the Honorable William Cahill, Judge Presiding. Plaintiffs' Motion to Add Class Representative and defendants' motion to dismiss or decertify the class aspect of this case came on regularly in Department Eight of this Court on August 8, 1996. After reviewing all the papers submitted and the file in this matter the court issues the following ruling:

On August 7, 1995, this case was singly assigned by the Presiding Judge to Judge William Cahill for all purposes. In early February 1996, this court, after consulting with counsel set July 11, 1996 as a hearing date for the parties cross-motions for summary judgment. After setting the above schedule, there were at least three and maybe more Status Conferences and hearings, at which the progress on these cross summary judgment motions was discussed. On May 30, 1996, this Court, after consultation with both Plaintiffs' and Defendants' counsel, re-calendared the hearing dates for the cross-motions for July 24, 1996, as well as dates for filing the pleadings. The court is unaware of any requests for continuances or any objection to any date on which a pleading was required to be filed.

Despite all of this advance planning, all of which involved consultation with counsel for both sides, defendants chose not to file any summary judgment motion, and did not contest any of plaintiffs' 56 undisputed facts.[1] In addition, defendants' counsel did not set the named plaintiff Joseph Tracy's deposition until April 22, 1996, then canceled it, even though Mr. Tracy was available. Subsequently, the deposition was not even started until July 22, 1996, two days before the long scheduled summary judgment

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[1]Under CCP § 437c(b) the opposition papers "shall include a separate statement which responds to each of the material facts contended by the moving party to be undisputed, indicating whether the opposing party agrees or disagrees that those facts are undisputed." "Failure to comply with this requirement of a separate statement may constitute a sufficient ground, int he court's discretion, for granting the [summary judgment] motion." Buehler v. Alpha Beta Co. (1990) 224 Cal.App.3d 729, 735.

hearing, over four and one-half years after the complaint was filed (for some period of time there was a stay in effect for settlement discussions) and days after defendants' opposition to the motion was due.

In contrast, the record shows that plaintiffs completed the necessary discovery, responded to all of defendants' discovery in a timely manner and filed and served their motion timely.

This court is concerned that such a significant issue as the employment status of many San Francisco taxicab drivers will be decided under these procedural circumstances, but the court also finds that the record before it is sufficient to do so. For instance, virtually all of the plaintiffs' undisputed facts comes from testimony of the taxicab company officials, people who certainly know how their industry operates. In addition, defense counsel has submitted, well after the hearing, deposition excerpts from Mr. Tracy. Plaintiffs have objected to the consideration of this evidence, and the objection is sustained, however the court, because the issues are so significant, did review this late evidence to insure that it did not contain any facts which would alter a finding for plaintiffs. Finding none, and finding that plaintiffs' have met their burden of proof under CCP § 437c, this court will grant summary judgment for Plaintiffs.

I. PROCEDURAL ISSUES.

Defendants' request for a continuance is denied. In order to get their continuance, defendants must meet the requirements of

CCP §437c(h). Defendants have had more than ample opportunity to conduct discovery. As early as the status conference in January 1996, defendants knew of the upcoming summary judgment motion, yet failed to conduct even Mr. Tracy's deposition.

Defendants argue that plaintiffs' summary judgment motion must be denied because the briefing schedule agreed upon on May 30, 1996, in chambers did not provide defendants with the usual twenty-eight day notice pursuant to CCP § 437c. Defendants ignore the fact that the dates were not unilaterally imposed on them, but were set, by agreement, after consultation between the attorneys and the court and at no time before filing their opposition did defendants object to the briefing schedule. In addition, the defendants fail to state in their papers that they had the full 14 days required under CCP §437c to file their opposition. (Moving papers were to be served by July 3 and opposition was not due until July 17. Reply papers were due July 22 and the hearing was held on July 24.) Under the court's schedule, all parties had the usual amount of time for briefing a summary judgment motion. The only time that was shortened was the court's preparation time, which was shortened to two days instead of the usual five days; (the last day for filing a reply brief is usually five days before the hearing under CCP §437c(b)).

The court was frankly surprised to learn for the first time when it read the defendants opposing papers that counsel would object to the less than 28 days notice of this motion. Considering the history of discussions regarding cross summary judgment

motions, dated virtually from the time of single assignment to Judge Cahill, as well as the fact that defense counsel knew the briefing schedule for more than a month before the motion was to be filed, to seriously consider this objection, would be to permit defense counsel to "sand bag" the opposing party and this court. Obviously, this is unacceptable and the court denies counsel's 28 day notice objection.

The next procedural objection raised by defendants is that defense counsel received service of the moving papers after "6:00 p.m. and was not delivered to a person in charge of that office." This argument is also unavailing and defendant was not prejudiced. According to the Declaration of Christopher Ho filed with the plaintiffs' reply brief, his office gave the summary judgment motion and moving papers to a messenger at 4:35 p.m., on July 3, 1996, the date service was to be made on defendants' counsel. The papers were delivered and signed for at defense counsel's office at about 6:05 p.m., but after a secretary in that office called and told Mr. Ho that "I've been instructed to tell you that we haven't received the motion yet and our office is closed". In addition, Mr. Ho faxed the points and authorities directly to Mr. Bennett, lead counsel for defendant, in his offices in San Diego on July 3 at 6:45 p.m.

Plaintiffs caused themselves problems by failing to serve their motion earlier, however, their actions did not prejudice defendants in any significant way. Defense counsel had the papers in their possession in time to adequately respond, or to ask the

court for a short extension of time to file their opposition. Also, when they did file their opposition defendants did not dispute any of the 56 facts presented by plaintiffs. This court denies defendants' request to deny the motion because it was served at 6:03 p.m.

Next, defendants argue that summary judgment motions in a class action case can not be considered by the court until after the class opt-out period is over. Defendants rely on Home Savings & Loan v. Superior Court (1974) 42 Cal.App.3d 1006 and Home Savings & Loan v. Superior Court (1976) 54 Cal.App.3d 208 to support this argument. Under the so-called Home Savings rule, a court cannot decide the merits of a claim in a class action suit before the opt out period expires in order to protect against one-way intervention (where class members can opt out if the decision on the merits is adverse to their interests, thereby avoiding the court's decision and preserving their rights).

Plaintiffs, relying on Frazier v. City of Richmond (1986) 184 Cal.App.3d 1491 and Rule 23(b)(2) of the Federal Rules of Civil Procedure (used by California courts), argue that the Home Savings rule does not apply in this case because plaintiffs primarily seek injunctive and declaratory relief, and not damages. In Rule 23(b)(2) actions, (actions for injunctive relief), notice to class members is not mandatory but merely discretionary. In Frazier, the court "decline[d] to expand the scope of Home Savings" to Rule 23(b)(2) actions finding that the rationale of Home Savings was inapplicable to actions for injunctive relief. Frazier, 184

Cal.App.3d at 1502. Under this and other authority cited by plaintiffs, this court finds that plaintiffs' summary judgment motion may be decided prior to the completion of the opt-out period.

Even if the Home Savings rule applied to actions seeking injunctive relief, and the court could not decide plaintiffs' summary judgment motion until after the opt-out period is complete, there is no reason to delay the actual hearing as long as the ruling is made after the opt-out period is complete. In this case the opt-out period expired on August 21, 1996, therefore ruling on this motion at this time is appropriate.

In addition, defendants have never shown any indication that they would defend this case any less vigorously depending on the number of class members ultimately determined. Indeed, the injunctive relief sought by the current drivers would bind the defendants regardless of the members of the class.

Next, defendants argue that they are entitled to stop the decision on this motion because they want to file new affirmative defenses. They have however, failed to cite any case that permits a defendant to get a continuance on a summary judgment motion because a party is intending to file some more affirmative defenses. In addition, after the revisions of CCP § 437c, plaintiffs no longer have to disprove affirmative defenses before meeting their burden of proof on a summary judgment motion. Therefore this is not a basis upon which the court will deny summary judgment.

Finally, since the hearing on this motion, the court has learned that defendant Taxi Service, Inc. (dba City Cab) has filed bankruptcy. The automatic bankruptcy stay is in effect as to that defendant and nothing in this order applies to that defendant. The automatic stay does not affect the remaining defendants.

II. SUMMARY JUDGMENT ANALYSIS

Plaintiffs' motion asks this court to decide the legal issue on which this entire case is based: are taxicab drivers independent contractors or are they employees under California law entitled to workers' compensation insurance and unemployment insurance?

A. 17200 Claims

Business and Professions Code § 17200 ("17200") permits this court to enjoin "any unlawful, unfair or fraudulent business act or practice." In this case all elements of a 17200 claim are met. Defendants are in the "business" of transporting members of the public for hire. Separate Statement of Undisputed Facts, ("UF"), ¶¶ 1-4. The conduct complained of constitutes a "practice" within the meaning of 17200. From November 1987 virtually until the present, defendants have required thousands of people seeking to drive their taxicabs to do so under the Taxicab Lease Agreement. UF ¶5; Yellow Cab Co-Operative, Inc. V. Workers' Compensation Appeals Board (1991) 226 Cal.App.3d 1288, 1293. The Taxicab Lease Agreement used under defendants new "choice of status" system (implemented by all defendants within the last year) does not differ from the previous

system in any material respect. UF ¶7; see Exhibits A-D (exhibits A and B thereto) and Exhibit E to Declaration of Christopher Ho in support of plaintiffs' summary judgment motion; (see also discussion infra).

Under statute and case law, the practices complained of are "unlawful" and "unfair" for purposes of 17200. Labor Code § 3357 provides that any person rendering service to another is presumed to be an employee, except as specifically excluded from that status by law. Similarly, Labor Code § 5705 establishes that where an injured worker was performing service for a putative employer, the employer has the burden of proving that the worker was not an employee. Labor Code § 3353 further defines an independent contractor as "any person who render service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished." The Unemployment Insurance Code adopts the "usual common law rules applicable in determining the employer-employee relationship." Unempl. Ins. Code §621(b).

Based on these statutory tenets, the courts have further elucidated the employee-independent contractor distinction. S.G. Borello & Sons v. Department of Industrial Relations (1989) 48 Cal.3d 341 ("Borello")(holding that employment relationship established where the principal "retains all necessary control" over the manner in which the work is accomplished, and also citing to "secondary indicia" of employment status); Yellow Cab Co-Operative, Inc. v. Workers' Compensation Appeals Board (Edwinson) (1991) 226

Cal.App.3d 1288 ("Edwinson") (reaffirming presumptions contained in Labor Code §§ 3357 and 5705(a), following Borello, and finding taxicab driver was employee notwithstanding his being signatory to a "lease agreement" where, *inter alia*, he was instructed by the taxicab company where to pick up passengers and on use of the radio, where the company assigned his shifts, and where he was subject to unilateral termination by the company); and Santa Cruz Transportation, Inc. v. Unemployment Insurance Appeals Board (1991) 235 Cal.App.3d 1363 ("Santa Cruz") (following Borello, and finding taxicab driver was employee where, *inter alia*, taxicab company was able to terminate its drivers and unilaterally designate shift times, and where no special skill required to drive a taxicab).

(1.) Plaintiffs' Evidence of Employer-Employee Relationship

In support of their motion, plaintiffs submitted extensive, undisputed and material facts based on admissible and reliable evidence generally describing the operation of the San Francisco taxicab industry and the extent to which defendants retain all necessary control over the manner in which plaintiffs perform the work of driving defendants' taxicabs. Plaintiffs' evidence consists almost entirely of the materially identical versions of the "Taxicab Lease Agreement" utilized by each defendant throughout the relevant time period, which specifies certain of the terms and conditions of drivers' work, other documents obtained from defendants in the course of discovery, and the deposition testimony of defendants' officers and agents. Additionally, plaintiffs

submitted declarations from individuals who have driven or still drive taxicabs for defendants under the "Taxicab Lease Agreement." The latter declarations were limited to the questions of marketing and promotional skill, if any, utilized by individual taxicab drivers, and the extent of drivers' reliance on the dispatch services provided by defendants. In this case, the undisputed facts leave no doubt that the plaintiffs are employees under the authority cited above.

(a) "All Necessary Control" exercised by Defendants

Defendants exercise "all necessary control" over their drivers. The defendants control all significant terms of the taxicab cab drivers work. From the manner in which drivers are hired to the conditions of their work, defendants exercise the prototypical types of "pervasive" control indicative, under the cases, of an employer-employee relationship.

Defendants evaluate those who seek to drive their taxicabs, requiring applications, collecting background information, conducting interviews, and checking references. UF ¶9. If they are approved by defendant, prospective lease drivers sign the Taxicab Lease Agreement, the terms of which are non-negotiable. UF ¶ 10. Defendants unilaterally define the material conditions of working as a taxicab driver, including without limitation the rental fees for their vehicles, any modifications to the "Taxicab Lease Agreement," the amount of "security deposits" which must be posted by lease drivers and the amounts chargeable thereto in the

event of accidents, and the vehicles drivers are assigned and the hours that drivers work. UF ¶¶10-14; 20-23. Defendants conduct "orientation programs" for those who are approved to become lease drivers. These instruct the drivers about defendants' operation, and may also include information about use of the radio and the taximeter, the defendant's dispatch system, the proper method of filling out waybills, how to redeem company scrip and vouchers, police code requirements, and procedures to follow in case of accidents. At the same time, defendants supply their drivers with city maps, tips on driving, safety information, and copies of police and airport regulations governing taxicab operations. UF ¶¶ 15-18. In addition, defendants enter into "paratransit" and other contracts that require them to train and discipline their drivers. UF ¶19. Other controls exercised by defendants over drivers' daily work include requiring their drivers to inspect their taxicabs before their shift and to report any defects (UF ¶26), return their taxicabs to the company gas station for inspection at the end of a shift (UF ¶27), and advertise their status as "self-employed lessees" (UF ¶28). Defendants also maintain and operate dispatch systems. Through those systems, defendants collect requests from the public for taxicab rides. UF ¶¶ 30,31. Defendants' dispatchers or dispatch computers allocate passengers to driver, and control which drivers are notified of potential customers. UF ¶32. Drivers utilized the dispatch service to locate passengers. UF ¶¶31-32.

Defendants keep files on each of their drivers which include

personal information and may include driver evaluations, accident reports, records of complaints or compliments about the driver, and even records of the drivers' disputes with defendants or other drivers. UF ¶35. "Liability to discharge for disobedience or misconduct is strong evidence of control." Edwinson 226 Cal.App.3d at 1298. Defendants also retain the right to terminate drivers' leases at will. UF ¶36. "[S]trong evidence in support of an employment relationship is the right to discharge at will, without cause." Borello, 48 Cal.3d at 350; Santa Cruz, 235 Cal.App.3d at 1372.

(b) "Secondary Indicia" of Control are Manifest in Defendants' Relationship With Their Drivers

The secondary indicia of control identified in the case law are manifest in defendants' relationship with their drivers. Drivers are an integral part of defendants' business. As in Edwinson, "the enterprise could no more survive without them than it could without working cabs." Edwinson, 226 Cal.App.3d at 1294. Indeed, the duration of the relationship between defendants and their drivers is indefinite, unlike the typical independent contractor relationship; absent notice by either party, the Taxicab Lease Agreement is presumed to be automatically renewed. UF ¶37.

Drivers neither possess special skills, nor engage in a distinct trade or occupation. UF ¶38-39. Taxicab drivers do not engage in a skilled profession which could be characterized as a "distinct trade or calling" warranting true independent contractor status. Borello, 48 Cal.3d at 356-57 (work involved no peculiar

skills; workers engaged in no distinct trade or calling); Edwinson, 226 Cal.App.3d at 1292-94 ("[t]he work did not involve the kind of expertise that requires entrustment to an independent professional").

The nature of the defendants' taxicab operations is such that drivers have no meaningful way to influence how much profit they make in the course of their work. Nor do drivers face a significant risk of financial loss. UF ¶¶46-47. For example, drivers have no control over the amount they charge passengers in fares. UF ¶40. Nor do drivers use marketing skills to publicize their personal availability to provide taxicab services. UF ¶41. They do not use personalized business cards or place advertisements in newspapers or telephone directories as a means of promoting themselves. UF ¶¶41-43. Through the voucher and scrip systems, defendants structure the financial arrangements between the drivers and certain of defendants' customers. Drivers must accept such forms of payment from those passengers and redeem them for cash at the end of their shifts. UF ¶¶44,45. The lack of opportunity for profit or loss mirrors that found in the cases of Borello, 48 Cal.3d at 355-58 (share farmers "incur[red] no opportunity for "profit" or "loss"); Edwinson, 226 Cal.App.3d at 1301 ("drivers did not set their own rates but were paid according to the number and distance of fares that they carried. . . . There is no evidence that earnings varied with the drivers' skills, entrepreneurial or otherwise."); Santa Cruz, 235 Cal.App.3d at 1368, 1375-76 (driver charged fares approved by city, no indication that earnings varied

with drivers' skills).

Plaintiffs' evidence establishes that defendants' relationship with their drivers is an employer-employee relationship. Under the statutory and case law, defendants' business practice of categorizing plaintiffs as independent contractors is unlawful and may be enjoined by this court.

In addition, this court finds that defendants' business practice is unfair under 17200. A practice is "unfair" if "it offends an established public policy." People v. Casa Blanca Convalescent Homes (1984) 159 Cal.App.3d 509, 530. In identifying what constitutes a "public policy" the Casa Blanca court looked to "statutes, the common law or . . . other established concepts of unfairness." Id. Because the practices complained of are "unlawful" within the meaning of 17200 based on the directly applicable case law, they violate the public policy of this state and are "unfair" as well.

(2) The Implementation of Defendants' "Choice of Status" System Does Not Enable Them To Avoid Summary Judgment

Within the last year, defendant cab companies have implemented a "choice of status" system, giving drivers the choice of leasing a taxicab as an independent contractor or signing an employer-employee agreement. However, all but six to eight of the over 1900 drivers continue to drive under essentially the same Taxicab Lease Agreement, and do so under the same actual conditions of work that existed before the "choice of status" system was implemented. UF ¶¶7,55,56.

The presence of defendants' "choice of status" system has little bearing upon the core analysis of the drivers' employee status. Nothing in the relevant decisions suggests that the presence of a true choice would have been a primary, let alone dispositive, factor in the ultimate determination of a workers' status. Indeed, the California Supreme Court noted in Borello that the alleged voluntariness of an election of independent contractor status hardly obviates public policy concerns over permitting parties to contract around statutory protections:

> The growers suggest that by signing the printed agreement after full explanations, the share farmers expressly agree they are not employees and consciously accept the attendant risks and benefits. However, the protections conferred by the [Workers' Compensation] Act have a public purpose beyond the private interests of the workers themselves. Among other things, the statute represents society's recognition that if the financial risk of job injuries is not placed upon the businesses which produce them, it may fall upon the public treasury.

Borello, 48 Cal.3d at 358. In any event, the discussions of "choice" in the cases are *dicta*; in none of the cases did the courts find that the employer offered any meaningful choice of status, and thus the "choice" issue was never reached.

B. Whether the Taxicab Drivers are Employees or Independent Contractors Is the Only Issue that Need Be Decided to Grant Summary Judgment in this Case

Defendants' argue that this court cannot grant summary judgment in this case because plaintiffs' motion is directed only to the issue of whether the drivers are employees or independent contractors and does not dispose of the entire action because

plaintiffs' complaint alleges twelve separate unfair and/or unlawful business practices. Defendants argue that the pleadings play a critical role in a motion for summary judgment and urge that, in a summary judgment motion, the factual submission must track the averments in the pleadings so that it is clear to what the opposing party must respond.

Summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law (C.C.P. Sec. 437c (c)). In plaintiffs' complaint they allege twelve separate unfair and/or unlawful business practices. They have, to this court's satisfaction, shown they are entitled to judgment because they have prevailed on the issue that the taxicab drivers are employees. This finding alone is enough to find that the practice of classifying the drivers otherwise is a unfair business practice under Sec. 17200 that should be enjoined. There is simply no need to take evidence or require the court to make findings on the remainder of the allegations. If plaintiffs, at trial, had simply submitted the evidence it did and nothing else, while defendants did not contest any of these facts at all, a judgment under Sec. 17200 would be appropriate. Evidence on the other issues is simply not needed.

In this motion, plaintiffs attack defendants' characterization of the drivers as independent contractors. This misclassification of drivers is the core practice from which all other tangible wrongs described in the complaint emanate. An order

enjoining defendants from classifying their drivers as independent contractors will, *a fortiori*, also preclude them from engaging in the practices illustrated in the complaint and its two causes of action. Therefore, this court finds that plaintiffs' motion does dispose of this action in its entirety and is appropriately treated as one for summary judgment.

Defendants also argue that plaintiffs' motion does not dispose of the entire case, (and therefore is not an appropriate summary judgment motion), because the class action portion of the case does not have an adequate class representative and therefore cannot be granted. This argument is addressed below.

III. CLASS ACTION PORTION OF THIS CASE

On May 13, 1996, this court certified a class of all taxicab drivers, current and former, who drove under a Taxical Lease Agreement for defendants at any time since November 25, 1987. The court designated lead plaintiff Joseph Tracy, a current lease driver with defendant Luxor Cab Company, as the representative of that class.

On July 16, 1996, this court recertified the class to include only "drivers who drove under a taxicab Lease Agreement with any of the four defendant taxicab companies at any time from November 25, 1987 through the present, and who are no longer currently driving under any Taxicab Lease Agreement with any defendant company." This recertification of the class excluded current drivers, allowing their claims to proceed under 17200 et

seq.[2]

On August 8, 1996, Defendants moved to dismiss the class aspects of the case, or in the alternative to decertify the class for want of a representative plaintiff, and plaintiffs moved to add Brian Gaffney as a class representative. Plaintiffs also maintain that Joseph Tracy remains an adequate class representative and may be allowed to continue in that capacity.

A. Plaintiffs' Motion to Add Brian Gaffney as a Class Representative

Trial courts "maintain some measure of flexibility in the trial and pretrial of a class action," to modify orders as litigation proceeds. Vasquez v. Superior Court (1971) 4 Cal.3d 800, 821. The court's order changing the definition of the class in this case makes addition of a new class representative appropriate at this time.

From September through December 1989, Brian Gaffney drove a taxicab for defendant Taxi Service, Inc. (dba City Cab). Mr Gaffney was a signatory to a lease agreement and posted a cash bond with City Cab. Further, Mr. Gaffney has been a named party to this action since the day the complaint was filed so Mr. Gaffney may be added as a class representative without the need for further discovery.

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[2]The court recognizes that the status in this lawsuit of so-called "medallion holder" drivers may be in need of clarification. The court clarifies that its decision and judgment do not apply to those of defendants' taxicab drivers who hold their own medallions.

After review of all papers filed in connection with this motion and plaintiffs' original motion for class certification, this court finds that the addition of Brian Gaffney as a class representative will serve the interests of drivers whose interests will be adjudicated in this action by providing a typical and able class representative for former drivers. Accordingly, plaintiffs' motion to add Brian Gaffney as a class representative is GRANTED.

As stated, supra, subsequent to the hearings on these motions, defendant Taxi Service, Inc. (dba City Cab) has filed a petition for bankruptcy. Defendants filed a Supplemental Memorandum of Point and Authorities in Opposition to Motion to add Brian Gaffney as a Designated Class Representative arguing that City Cab's bankruptcy petition is an additional reason to deny plaintiffs' motion to add Mr. Gaffney as a class representative. This court finds that even while the bankruptcy stay for City Cab is in effect, Mr. Gaffney remains entirely qualified to act as a class representative. City Cab's notice of bankruptcy has no impact whatever on his ability to represent the class. Although Mr. Gaffney's individual monetary claims may now have to be pursued in the bankruptcy forum, it is nonetheless clear that a named plaintiff may continue to represent a class even if her individual claims may no longer be advanced therewith. See Sosna v. Iowa (1975) 419 U.S. 393, 402-03; Franks v. Bowman Transportation Co., Inc. (1976) 424 U.S. 747, 754-55; Kagan v. Gibraltar Savings & Loan Ass'n (1984) 35 Cal.3d 582, 594; LaSala v. American Savings & Loan Ass'n (1971) 5 Cal.3d 864, 872.

B. Defendants' Motion to Dismiss or Decertify the Class Portion of this Case for Want of a Class Representative

In accord with the court's ruling regarding plaintiff's motion to add Brian Gaffney as a class representative, defendants' motions to dismiss or, in the alternative, decertify the class action portion of this case for want of an adequate representative are DENIED.

THE COURT HEREBY ORDERS as follows:

1. THE COURT FURTHER FINDS AND DECLARES that defendants' classification of plaintiffs and similarly situated drivers as independent contractors, whether pursuant to the "Taxicab Lessee Agreement" in use from November 25, 1987, until late 1995 or early 1996, or pursuant to the "choice of status" system in effect from the latter dates through the present time (which utilizes the "Taxicab Lease Agreement" as one of the "choices" offered drivers), has constituted and continues to constitute an unfair and unlawful business practice within the meaning of Business and Professions Code § 17200 et seq. insofar as such misclassification has had the purpose or effect of denying such drivers any benefit under California law with respect to (1) workers' compensation insurance, (2) unemployment insurance, and (3) paying a cash bond to defendants as a condition of driving a taxicab.

2. THE COURT PERMANENTLY ENJOINS defendant, their agents and representatives, from classifying plaintiffs and similarly situated drivers as independent contractors for purposes of denying

such drivers any benefit under California law with respect to (1) workers' compensation, (2) unemployment insurance, and (3) paying a cash bond to defendants as a condition of driving a taxicab, and PERMANENTLY ENJOINS defendants, their agents and representatives, from classifying plaintiffs as employees for such purposes in any and all representations, whether oral, written or otherwise.

3. THE COURT FURTHER ORDERS defendants to restore, to all plaintiffs who have been required to post bonds or "security deposits" with defendants, any such monies held by defendants in violation of Labor Code §§ 402 and 403. Restitution of such monies shall be effected pursuant to a claims procedure to be established by the court and administered by counsel for plaintiffs, with the assistance and cooperation of defendants and their counsel.

IT IS SO ORDERED.

DATED: October 22 1996

William Cahill

Judge William Cahill
San Francisco Superior Court

Yellow Cab Cooperative, Inc. v. Workers' Comp. Appeals Bd.(1991) 226 Cal.App.3d 1288 , 277 Cal.Rptr. 434

[No. A046628. First Dist., Div. One. Jan 16, 1991.]

YELLOW CAB COOPERATIVE, INC., et al., Petitioners, v. WORKERS' COMPENSATION APPEALS BOARD and RICHARD EDWINSON, Respondents.

(Opinion by Racanelli, P. J., with Newsom and Stein, JJ., concurring.)

COUNSEL

Joseph D'Andre and Jeffrey E. D'Andre for Petitioners. **[226 Cal.App.3d 1291]**

William B. Donohoe, Needham, Hull & Dykman and Craig Dykman for Respondents.

OPINION

RACANELLI, P. J.

Petitioners Yellow Cab Cooperative, Inc. (Yellow) and Golden Eagle Insurance Co. challenge a decision by the Workers' Compensation Appeals Board (Board) holding that Yellow was the employer, for workers' compensation purposes, of applicant Richard Edwinson, a cabdriver. We have concluded that the Board did not err.

I. Background

Prior to 1976, the drivers of Yellow cabs were unionized employees. In 1976 the company went into bankruptcy. In 1979 it adopted a system under which drivers leased cabs and were no longer deemed employees of the company.

Applicant first drove a Yellow cab for about seven years starting in the mid-1960's. When the company went into bankruptcy, he quit and tried various other endeavors. In 1986, he went to Yellow's front office and applied for work as a driver. He attended a meeting between prospective drivers and a representative of Yellow. The drivers were tested on their familiarity with the city, and the Yellow spokesman "explained some of what the job required of us."

During or after this meeting applicant executed a written "Taxicab Lease Agreement" designating him as "Lessee" and Yellow Leasing Co., a division of Yellow Cab Cooperative, Inc., as "Lessor" or "Leasing Company." The lease provided in part that applicant would lease a cab for 10-hour shifts; that he would pay $56 per shift; that the lease would be automatically renewed at the end of each week; that it could be terminated by either party on prior notice; that it could be cancelled for breach without notice; that applicant was not required to render any service to Yellow; that no employment relationship existed between them; that the relationship was strictly one of lessor and lessee; that applicant was a self-employed person "free from authority and control of Leasing Company"; that applicant was not eligible for workers' compensation insurance and Yellow was not obliged to provide it; that "once Lessee takes possession of the taxicab, he or she will exercise complete discretion in its operation"; that he would not share his fares with Yellow or account to it for them; that he was not restricted in any **[226 Cal.App.3d 1292]** way in the area where he could operate and was not required to use any stand, answer radio calls, or report his location; that he would display a sign in or on the cab identifying him as a self-employed lessee; that Yellow Cab would provide telephone call service, radio service, and repair and maintenance

service; that it would furnish all necessary supplies except that applicant had to purchase his own gasoline; and that it would furnish liability insurance and would pay for all licenses, taxes, and fees on the cab.

Applicant testified that he signed the lease without negotiation because he was in a financial bind and needed work. He saw that there would be no workers' compensation; it was too expensive for him to get; it was not important to him then. He could have sought employment elsewhere, but he had worked for Yellow before; if he wanted to work for them he had to sign. After he started work under the lease, there was hardly any difference from when he had worked for Yellow before. The only differences were that in the old days he received fringe benefits, he was on commission with a guaranteed wage from which taxes were withheld, and he could not go to the airport.

Applicant was injured on March 3, 1988, when he was pinned between two cabs at a taxi stand. He filed a claim for workers' compensation, naming Yellow as his employer. Yellow denied that it was applicant's employer, alleging that he was a "lessee/independent contractor." After an evidentiary hearing, the workers' compensation judge (WCJ) ruled that Yellow was applicant's employer for workers' compensation purposes. The Board denied reconsideration. [1] Yellow and its compensation insurer brought this proceeding for a writ of review.fn. 1

II. Rendition of Service

By statute, any person rendering "service" to another is presumed to be an employee except as excluded from that status by law. (Lab. Code, **[226 Cal.App.3d 1293]** § 3357.)fn. 2 Where an injured worker was "performing service" for a putative employer, the latter has the burden of affirmatively proving that the worker was not an employee.fn. 3 (§ 5705.) In ruling that applicant was Yellow's employee, the WCJ cited both of these sections. Petitioners assert that this was error because applicant was not rendering or performing "service" for Yellow when he was injured.

In Laeng v. Workmen's Comp. Appeals Bd. (1972) 6 Cal.3d 771, 783 [100 Cal.Rptr. 377, 494 P.2d 1], the court held that a job applicant injured during a tryout was "in the service of the employer" for compensation purposes because his conduct was undertaken for the employer's benefit and was under the employer's direction and control. [2a] It appears that both these elements-"control" and "benefit"-were amply demonstrated here. The question of control is discussed in detail below. (See post, pt. V.) We here address the question whether applicant's efforts as a cab driver were undertaken for Yellow's benefit.

Contrary to Yellow's portrayal here, the essence of its enterprise was not merely leasing vehicles. It did not simply collect rent, but cultivated the passenger market by soliciting riders, processing requests for service through a dispatching system, distinctively painting and marking the cabs, and concerning itself with various matters unrelated to the lessor-lessee relationship. Applicant testified that he and other drivers were instructed in "service" and "courtesy," i.e., "being properly presented in our dress, keeping the cabs clean, going on calls that we were sent on and being courteous and helpful to the public." Written radio regulations provided, among other things, "Never just sit there waiting and/or blasting your horn unless you have been told to do so by the dispatcher. [¶] In case of disputes with other drivers about who should get the call, never argue about it in front of customers."

We follow courts elsewhere in holding that Yellow's enterprise consists of operating a fleet of cabs for public carriage. (See Central Management v. Industrial Com'n (1989) 162 Ariz. 187 [781 P.2d 1374, 1377-1378]; Globe Cab Co. v. Industrial Commission (1981) 86 Ill.2d 354 [55 Ill.Dec. 928, 427 **[226 Cal.App.3d 1294]** N.E.2d 48, 52]; Hannigan v. Goldfarb (1958) 53 N.J.Super. 190 [147 A.2d 56, 62].) The drivers, as active instruments of that enterprise, provide an indispensable "service" to Yellow; the enterprise could no more survive without them than it could without working cabs. Thus the factual predicate was laid for application of sections 3357 and 5705, subdivision (a).

III. Presumption of Employment

[3] Petitioners object to the WCJ's reliance on section 3357 on the further ground that the statutory presumption of employment is inapplicable by its terms when the putative employer asserts that the worker was an independent contractor. For this proposition they cite Mission Ins. Co. v. Workers' Comp. Appeals Bd. (1981) 123 Cal.App.3d 211 [176 Cal.Rptr. 439], where the court said that the statute "does not apply to a person rendering service for another as an independent contractor" and "[w]hether the applicant ... was an independent contractor or an employee is the very issue to be decided." (123 Cal.App.3d at p. 226.)

Concededly, the statute is somewhat tautological. However, we know of no other authority which holds it entirely inapplicable where the injured worker is contended to be an independent contractor. Several cases have cited the statute in such a context. (E.g., S. G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 341 [256 Cal.Rptr. 543, 769 P.2d 399] (Borello); Germann v. Workers' Comp. Appeals Bd. (1981) 123 Cal.App.3d 776, 783 [176 Cal.Rptr. 868]; Johnson v. Workmen's Comp. Appeals Bd. (1974) 41 Cal.App.3d 318, 321 [115 Cal.Rptr. 871].) It is best understood

as creating a presumption that a service provider is presumed to be an employee unless the principal affirmatively proves otherwise.

Indeed the supposed inapplicability of section 3357 is of little significance given the meaning generally attributed to section 5705, subdivision (a), ante, footnote 3. The Supreme Court recently described that section as creating "a general presumption that any person 'in service to another' is a covered 'employee.' " (Borello, supra, 48 Cal.3d at p. 354.) In the same opinion it cited section 3357 in connection with the burden of proof. (Id. at p. 349.) Whether these statutes are described in terms of a presumption, an affirmative defense, or an allocation of the burden of proof, the effect is the same: the employer must show that the applicant is not entitled to the benefits of the act. (See § 3202; Laeng v. Workmen's Comp. Appeals Bd., supra, 6 Cal.3d 771, 777.) Therefore if the WCJ erred in citing section 3357, the error was harmless.

IV. Effect of Common Law Authorities

[4a] The traditional definition of "employment" evolved at common law to delineate the hirer's vicarious liability for the tortious acts of the **[226 Cal.App.3d 1295]** person hired. (Borello, supra, 48 Cal.3d at p. 350.) Although a number of "secondary" indicia were considered, the primary factor in drawing the distinction was the degree of "supervisory power" possessed by the principal. (Ibid.) Traditionally, employment was found only if the principal possessed "the right to direct the details of the work" (McFarland v. Voorheis-Trindle Co. (1959) 52 Cal.2d 698, 704 [343 P.2d 923]) or "complete and authoritative control of the mode and manner in which the work is performed" (Perguica v. Ind. Acc. Com. (1947) 29 Cal.2d 857, 859 [179 P.2d 812]; see Empire Star Mines Co. v. Cal. Emp. Com. (1946) 28 Cal.2d 33, 43 [168 P.2d 686], overruled on another point in People v. Sims (1982) 32 Cal.3d 468, 479-480, fn. 8 [186 Cal.Rptr. 77, 651 P.2d 321].)

Early cases applied these same criteria to define "employment" for workers' compensation purposes. (E.g., Perguica v. Ind. Acc. Com., supra, 29 Cal.2d 857.) More recently, however, the Supreme Court has declared that the scope of compensation coverage "cannot be determined simply from technical contractual or common law conceptions of employment but must instead be resolved by reference to the history and fundamental purposes underlying the Work[ers'] Compensation Act." (Laeng v. Workmen's Comp. Appeals Bd., supra, 6 Cal.3d at p. 777.)

This principle was reaffirmed in Borello, supra, 48 Cal.3d 341, where the court held that a group of migrant "share farmers" were employees for workers' compensation purposes despite an apparent absence of direct supervision and a written agreement purporting to make them independent contractors. The court said that "the concept of 'employment' embodied in the Act is not inherently limited by common law principles." (Id. at p. 351, see pp. 352, fn. 6, 353, citing Truesdale v. Workers' Comp. Appeals Bd. (1987) 190 Cal.App.3d 608, 617 [235 Cal.Rptr. 754]; Germann v. Workers' Comp. Appeals Bd., supra, 123 Cal.App.3d 776, 784; Johnson v. Workmen's Comp. Appeals Bd., supra, 41 Cal.App.3d 318, 322-323.) It identified a number of "useful" tests for defining employment in compensation cases, noting that the relevant factors "may often overlap those pertinent under the common law." (48 Cal.3d at p. 354.) Most importantly, it held that the statutory test of "control" may be satisfied even where "complete control" or "control over details" is lacking-at least where the principal retains pervasive control over the operation as a whole, the worker's duties are an integral part of the operation, the nature of the work makes detailed control unnecessary, and adherence to statutory purpose favors a finding of coverage. (Id. at pp. 355-358.)

In contending that applicant was not Yellow's employee, petitioners rely almost entirely on cases which explicitly apply common law employment criteria. In Mission Ins. Co. v. Workers' Comp. Appeals Bd., supra, 123 **[226 Cal.App.3d 1296]** Cal.App.3d 211, the court applied what Justice Kaufman described as "well established" principles to reverse a finding that a security alarm agent was the alarm company's employee. (123 Cal.App.3d 217, 218-219, 226-227.) These principles included the traditional requirement of " 'complete control.' " (Id. at p. 221, quoting Western Indemnity Co. v. Pillsbury (1916) 172 Cal. 807, 811 [159 P. 721], italics in Western.)fn. 4 Similarly, the court in Local 777, Democratic U. Organizing Com. v. N. L. R. B. (D.C. Cir. 1978) 603 F.2d 862, 904, held that lessee cabdrivers in Chicago were within "the common law definition of independent contractors" and therefore were not employees covered by the National Labor Relations Act (NLRA).fn. 5

Petitioners cite four sister-state cases holding that lessee cabdrivers are not employees for workers' compensation purposes.fn. 6 All of those decisions expressly or impliedly rest on common law definitions of employment; for that reason alone they are not persuasive authority under California law. Furthermore they represent a minority view. Courts in 10 other states have held that lessee cabdrivers are or may be employees of the cab company for compensation purposes.fn. 7

Petitioners' reliance on common law criteria, and cases applying them, is misplaced. The dispositive question is whether the criteria and principles **[226 Cal.App.3d 1297]** identified in Borello, when applied to the facts presented here, warrant the Board's determination that applicant was Yellow's employee for workers' compensation purposes.

V. Control

By statute, the question of control remains highly pertinent to the distinction between employees and independent contractors. (See § 3353.) Under Borello, however, the control test "must be applied with deference to the purposes of the protective legislation." (48 Cal.3d at p. 353.) The putative employer there presented evidence that it exercised no control over the actual performance of the work. The court noted, however, that the employer "exercised pervasive control over the operation as a whole"; it owned and cultivated the land for its own account; it supplied various instrumentalities in support of the work; the work involved no peculiar skill beyond that expected of any employee; it was this simplicity, rather than superior expertise, which made detailed supervision unnecessary; and productivity was adequately ensured by the piecework payment system. (48 Cal.3d at pp. 356-357.) "Under these circumstances," the court reasoned, "Borello retains all necessary control over the harvest portion of its operations. A business entity may not avoid its statutory obligations by carving up its production process into minute steps, then asserting that it lacks 'control' over the exact means by which one such step is performed by the responsible workers. [Citations.]" (48 Cal.3d at p. 357, italics in original.)

[2b] In determining the applicability of this reasoning to the present case, we first observe that the provisions of the lease agreement between applicant and Yellow do not distinguish Borello and are not persuasive evidence that Yellow lacked the requisite control. The "share farmers" in Borello signed a similar agreement, but the court deemed it ineffectual to create an independent contract relationship. (48 Cal.3d at pp. 346-347, 358-359, see id. at p. 351, fn. 5.) As the court observed, "The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced." (Borello, supra, 48 Cal.3d at p. 349.) Even in the common law setting, a formal agreement characterizing the relationship as independent contractorship "will be ignored if the parties, by their actual conduct, act like 'employer-employee.' [Citations.] Indeed, the attempt to conceal employment by formal documents purporting to create other relationships [has] led the courts to disregard such terms whenever the acts and declarations of the parties are inconsistent therewith. [Citations.]" (Toyota Motor Sales U.S.A., Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 877 [269 Cal.Rptr. 647].)

Despite its recital to the contrary, the lease here did not fully and accurately define the parties' relationship. Drivers had to pay $1 per shift for **[226 Cal.App.3d 1298]** insurance, in seeming conflict with lease provisions fixing the rental rate and requiring Yellow to furnish insurance. Although the lease is silent about working for other companies, applicant testified without contradiction that drivers were prohibited from doing so. And while the lease recites that drivers will be charged $10 per hour for late returns, applicant testified that they could either be terminated or charged for an entire additional shift if the cab was returned more than two hours late.

The actual conduct of the parties indicates that, by means both direct and indirect, Yellow controlled various aspects of the work. Applicant testified that the dispatchers "had control over [his] work" and that "he would get instructions on what to do such as to go to the airport or a hospital." As already noted, drivers were instructed on matters of behavior toward the public, personal appearance, and keeping their cabs clean. They were also given "advice as to how you should conduct yourself," including "general rules of good driving behavior."

Drivers were extensively controlled with respect to use of the radio. Applicant testified that if he refused one call from a dispatcher and another assignment was available, he could not go pick up that customer. This was apparently designed to coerce drivers into accepting assignments whether or not they found them profitable enough to deserve their attention. The evidence suggested other forms of direct control. If drivers violated the radio rules they could be "written up."

Dispatchers could demand that a driver return to the yard; applicant heard dispatchers saying "to bring it in right now or you're history"; and leases could be terminated if such instructions were refused. Leases could also be terminated based on write-ups or complaints by passengers. [4b] Liability to discharge for disobedience or misconduct is strong evidence of control. (See Toyota Motor Sales U.S.A., Inc. v. Superior Court, supra, 220 Cal.App.3d at p. 875.)

[2c] Yellow exercised control over various other aspects of the relationship. Perhaps most significant was the prohibition on driving cabs for other companies. A mere lessor has no interest in restricting the lessee's freedom to render service to another. Nor is the paradigmatic independent contractor bound to serve one principal exclusively. By imposing such a restriction, Yellow exerted a form of control typical of employment and not of other relationships.

Yellow controlled drivers' hours by assigning shifts. Yellow imposed this control so that it could lease each cab to more than one driver in one day. **[226 Cal.App.3d 1299]** This practice resembled a paradigmatic employment relationship and significantly restricted applicant's independence.

As the foregoing evidence indicates, the parties' relationship contemplated more than the performance of their formal agreement. If Yellow were only contracting for the "particular result" set out in the lease, it would be concerned with little more than collecting rent and protecting the leased property. Instead, it had an obvious interest in the drivers' performance as

drivers. To protect that interest, it treated them as employees.

Petitioners emphasize applicant's supposed independence under the lease and his testimony that he could go wherever he wanted with the cab, did not have to take radio calls, could run personal errands, and could use the cab to carry family members instead of paying passengers. Applicant testified that he did not have to show up for work at all, although failure to do so would cost him $56 a day.

This evidence has little weight as proof of independent contractorship. The work did not involve the kind of expertise which requires entrustment to an independent professional; it "is usually done without supervision whether the arrangement was lessee or employee, and the skill required on the job is such that it can be done by employees rather than specially skilled independent workmen." (Employers Ins. v. Greater Omaha Transp. Co., supra, 303 N.W.2d at pp. 283-284; see Borello, supra, 48 Cal.3d at pp. 356-357 ["It is the simplicity of the work, not the harvesters' expertise, which makes detailed supervision and discipline unnecessary."].) Indeed applicant had enjoyed a similar degree of freedom as a unionized employee during the 1960's. Even then he could see a doctor, disregard a radio call, or arrange for his own customers. It is thus apparent that a good deal of freedom was "inherent in the nature of the work." (See Toyota Motor Sales U.S.A., Inc. v. Superior Court, supra, 220 Cal.App.3d at p. 875.)

Furthermore, to the extent applicant's freedom might appear to exceed that of a typical employee, it was largely illusory. If he wanted to earn a livelihood he had to work productively, and that meant carrying paying passengers. (See Hannigan v. Goldfarb, supra, 147 A.2d at p. 63 ["this alleged freedom not to work is fanciful. It is refuted by a simple economic fact-the driver's need to eat."]; Borello, supra, 48 Cal.3d at p. 357 [piecework payment formula ensured diligence and quality control].) There is no evidence that he could accomplish this without sacrificing his theoretical independence and subjecting himself to Yellow's control. (See Hannigan v. Goldfarb, supra, 147 A.2d at p. 63.)

In sum, Yellow exercised pervasive control over the enterprise as a whole; it exercised at least some direct control over applicant's work; **[226 Cal.App.3d 1300]** indirect control was effected through the payment system and the threat of termination; and such actual independence as applicant enjoyed was inherent in the work and was not the product of any specialized skill or expertise. It thus appears that Yellow exercised "all necessary control" over the work, and the test applied in Borello was satisfied here.

VI. Other Factors

It appears that most of the other factors held to warrant a finding of employment in Borello have close parallels here. Like the "share farmers" there, the drivers here are "a regular and integrated portion" of the principal's business operation. (48 Cal.3d at p. 357; see Central Management v. Industrial Com'n, supra, 781 P.2d at p. 1378 [cabdriver's work was "not only an integral part" but "the essential core" of cab company's business]; Local 777, Democratic U. Organizing Com. v. N. L. R. B., supra, 603 F.2d 862, 898.) "This permanent integration of the workers into the heart of [the] business is a strong indicator that [the principal] functions as an employer under the Act." (Borello, supra, 48 Cal.3d at p. 357, italics added.)

[5] Petitioners seek to distinguish Borello on the ground that the leasing arrangement adopted here involved a reversal of the normal "flow of payment."fn. 8 Certainly it is atypical for an employee to pay the employer. The manner of payment, however, is not a decisive test of employment. (Burlingham v. Gray (1943) 22 Cal.2d 87, 100 [137 P.2d 9].) One may be an employee for workers' compensation purposes even when the service is uncompensated. (See Laeng v. Workmen's Comp. Appeals Bd., supra, 6 Cal.3d at p. 777.) An employment relationship may also exist notwithstanding the presence of a "lease" or other arrangement calling for payments to the principal. (E.g., S. A. Gerrard Co. v. Industrial Acc. Com. (1941) 17 Cal.2d 411 [110 P.2d 377] [farmer under "lease" requiring $3,200 in rent was in effect owner's employee]; Brose v. Union-Tribune Publishing Co. (1986) 183 Cal.App.3d 1079 [228 Cal.Rptr. 620], review den. [triable issue presented whether newspaper carrier who paid for papers was publisher's employee for purposes of respondeat superior liability]; Burlingham v. Gray, supra, 22 Cal.2d 87 [same].) Furthermore, a "flow of payment" from worker to principal is also atypical of independent contractorship. This is therefore at most an equivocal consideration.

Petitioners suggest that the drivers' payments to Yellow created greater entrepreneurial risk and made the workers more like independent business- persons than was the case in Borello.fn. 9 The court there found little **[226 Cal.App.3d 1301]** entrepreneurial character in the work because the workers were paid according to the size and grade of their crop, they did not set the price, and the risk that the crop might be unharvestable was no different from the risk they would run if they were employees. (48 Cal.3d at pp. 357-358.) In the first two respects the cabdrivers' work here is closely analogous: drivers did not set their own rates but were paid according to the number and distance of fares they carried. The only risk they ran beyond that in Borello was that in the worst case they might lose money on a given shift. There was no evidence that this ever occurred; applicant testified that he averaged $82.50 per shift in earnings, after paying rent on the cab. In any event there is no basis for characterizing this risk as "entrepreneurial." There is no evidence that earnings varied with the drivers'

skills, entrepreneurial or otherwise. The evidence on this point does not tip the balance far enough to warrant a result different from that in Borello.

Petitioners assert that whereas the workers in Borello supplied nothing but hand tools, the drivers here supplied the cabs. In Toyota Motor Sales U.S.A., Inc. v. Superior Court, supra, 220 Cal.App.3d 864, the court held that a pizza delivery driver appeared to be an employee of the pizzeria for respondeat superior purposes. The fact that he provided his own car, expenses, and insurance was described as "at most ... a 'secondary element' and, without more, worthy of little weight." (Id. at p. 876.) Here the drivers did not provide their own cars, but paid for the privilege to use Yellow's. Except for gasoline and individual permits to operate, Yellow furnished everything: services (dispatching, towing, repair, and maintenance), liability insurance, and the requisite medallion. At most, therefore, the evidence on this point was equivocal.

Petitioners assert that applicant voluntarily assumed an independent and unprotected status, as indicated by his recognition that Yellow disclaimed any responsibility for workers' compensation, and his description of himself as "self-employed" to hospital personnel and taxing authorities. They also note that he was required to display a sign on or in the cab stating that he was a self-employed lessee.

[6] The Supreme Court pointed out in Borello that the Workers' Compensation Act serves public as well as private interests and that a waiver of its protections is not to be lightly inferred. (48 Cal.3d at p. 358.) "Among other things, the statute represents society's recognition that if the financial risk of job injuries is not placed upon the businesses which produce them, it may fall upon the public treasury." (Ibid.) Where the principal offers no real choice of terms, but imposes a particular characterization of the relationship as a condition of employment, the workers' acquiescence in that **[226 Cal.App.3d 1302]** characterization does not by itself establish a forfeiture of the act's protections. (See id. at p. 359.)

[2d] Applicant here did nothing more than the workers in Borello to waive the act's protections. He merely acquiesced in a characterization and purported forfeiture imposed as a condition of employment. The only apparent purpose of that condition was to achieve the very objective which the statute seeks to prevent-to place on injured workers and the public the inevitable costs of injuries generated by Yellow's enterprise.

When this matter was heard by the Board, it appeared that the public was going to absorb a great portion of the considerable costs of applicant's injuries. Given applicant's pretax earnings of $82.50 per shift, it is not surprising that personal health insurance and private disability coverage were "too expensive" for him. As of November 1988 he had spent 35 days in the hospital and had undergone 6 surgical procedures. He had received $10,000 in medical payments under the insurance policy on the cab. All other medical expenses were going to be absorbed either by the public hospital where he was treated, or by Medi-Cal. He was also receiving state disability payments and had applied for social security. But for the fortuity of his apparent settlement with a third party, acceptance of Yellow's contentions here would have made the public the ultimate insurer of this aspect of Yellow's enterprise.

We are satisfied that the analysis mandated under Borello amply supports the order under review. Accordingly, the writ heretofore issued is discharged.fn. 10

Newsom, J., and Stein, J., concurred.

FN 1. Shortly before oral argument petitioners filed a request to "abandon" their "appeal." It stated that applicant had entered into a settlement of a third-party action, the proceeds of which are a credit against workers' compensation benefits, and that the settlement was large enough to eclipse any award which might be entered against petitioners. Applicant opposed dismissal.

We denied the request. Petitioners have no absolute right to abandon an appellate proceeding after the record has been filed and the matter has been fully briefed. (See 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, §§ 505, 506, pp. 491-493.) We doubt that the matter is technically moot; the question of Yellow's liability remains justiciable even if, as Yellow asserts, there is little practical likelihood that it will actually pay benefits. (See id., § 519, p. 502.) Further, this case involves issues of continuing public interest which are likely to recur; therefore we have discretion to decide it on the merits even if it is otherwise subject to dismissal. (Okuda v. Superior Court (1983) 144 Cal.App.3d 135, 137, fn. 1 [192 Cal.Rptr. 388]; see 9 Witkin, op. cit. supra, §§ 506, 526, pp. 491-493, 509-513.) We have concluded that such a decision is necessary here to provide guidance and avoid unwarranted delay in the payment of compensation in other cases presenting the same issues.

FN 2. Labor Code section 3357 provides: "Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee."

All further statutory references are to the Labor Code.

FN 3. Section 5705 provides in part: "The following are affirmative defenses, and the burden of proof rests upon the employer to establish them: (a) That an injured person claiming to be an employee was an independent contractor or otherwise excluded from the protection of this division where there is proof that the injured person was at the time of his injury actually performing service for the alleged employer."

FN 4. Later, while sitting on the Supreme Court, Justice Kaufman dissented from Borello because he found the majority opinion irreconcilable with "[t]he law ... [which] has been uniformly followed ... throughout the years." (48 Cal.3d at p. 368.)

FN 5. Indeed the court acknowledged cases holding that such cabdrivers are employees under Illinois workers' compensation law. (603 F.2d at pp. 876-877, fn. 38, citing Morgan Cab Co. v. Industrial Commission (1975) 60 Ill.2d 92 [324 N.E.2d 425], and Penny Cab Co. v. Industrial Commission (1975) 60 Ill.2d 217 [326 N.E.2d 393].) The court was unpersuaded by those cases, in part because the NLRA required it to adhere to common law conceptions of employment. (Ibid.)

FN 6. Cole v. Peachtree Cab Co. (1970) 121 Ga.App. 177 [173 S.E.2d 278]; Industrial Commission v. Warren Zone Cab Co. (Ohio Ct.Com.Pleas 1963) 191 N.E.2d 852; LaGrande v. B & L Services, Inc. (Fla.Dist.Ct.App. 1983) 432 So.2d 1364; Alford v. Victory Cab Co., Inc. (1976) 30 N.C.App. 657 [228 S.E.2d 43]. Not cited by petitioners, but to the same effect, is Safety Cab., Inc. v. Indiana Employment Security Bd. (1968) 143 Ind.App. 572 [242 N.E.2d 25].

FN 7. Central Management v. Industrial Com'n, supra, 162 Ariz. 187 [781 P.2d 1374]; Globe Cab Co. v. Industrial Commission, supra, 86 Ill.2d 354 [55 Ill.Dec. 928, 427 N.E.2d 48]; White Top and Safeway Cab Co. v. Wright (1965) 251 Miss. 830 [171 So.2d 510]; Shinuald v. Mound City Yellow Cab Co. (Mo.Ct.App. 1984) 666 S.W.2d 846; Employers Ins. v. Greater Omaha Transp. Co. (1981) 208 Neb. 276 [303 N.W.2d 282]; Hannigan v. Goldfarb, supra, 53 N.J.Super. 190 [147 A.2d 56]; Ziegler v. Fillmore Car Service, Inc. (1981) 83 A.D.2d 692 [442 N.Y.S.2d 276]; Nesbit v. Powell (Tenn. 1977) 558 S.W.2d 436; Department of Labor v. Tacoma Yellow Cab Co. (1982) 31 Wn.App. 117 [639 P.2d 843]; Employment Sec. Comm'n v. Laramie Cabs (Wyo. 1985) 700 P.2d 399.)

Another court has reached the same result on a narrower ground. (See Worrell v. Yellow Cab Co. (1978) 146 Ga.App. 748 [247 S.E.2d 569], appeal after remand Yellow Cab Co. v. Worrell (1980) 155 Ga.App. 41 [273 S.E.2d 410] [where ordinance restricted operation to permittee's employees and agents, cab company could not avoid compensation liability by delegating duties via lease].)

FN 8. Petitioners incorrectly state that the workers in Borello were paid "directly by the employer." In fact the buyer issued checks which the grower handed out. (48 Cal.3d at p. 348.)

FN 9. Petitioners state that the workers in Borello were paid "a fixed rate for their production." In fact payment was determined by the buyer based on its own criteria. (48 Cal.3d at p. 346.)

FN 10. Applicant has requested an award of attorney's fees under section 5801. Under that statute we may impose fees on an employer who files a petition for review for which we find "no reasonable basis." Although we have rejected petitioners' contentions, we are not persuaded that the petition lacked a reasonable basis. Accordingly, the request for fees under section 5801 is denied.

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(Cite as: 235 Cal.App.3d 1363)

Court of Appeal, Sixth District, California.
SANTA CRUZ TRANSPORTATION, INC.,
Plaintiff and Respondent,
v.
UNEMPLOYMENT INSURANCE APPEALS BOARD, Defendant and Appellant;
Ed GALLEGOS, Real Party in Interest.
No. H007461.

Oct. 11, 1991.

Employer appealed decision of **Unemployment Insurance** Appeals Board that claimant was employee and therefore was entitled to increased disability benefits. The Superior Court, Santa Cruz County, No. 113011,Thomas A. Black, J., set aside Board's decision and held that claimant was independent contractor and was therefore precluded from receiving increased benefits. Board appealed. The Court of Appeal, Capaccioli, Acting P.J., held that: (1) evidence that claimant signed lease for **cab** and believed he was independent contractor did not establish that he was independent contractor; (2) evidence that claimant was not required to work for 12 hours, customarily did not work for 12 hours, and was free to refuse referrals from dispatcher did not establish that he was independent contractor; and (3) evidence that claimant made fixed lease payment did not establish that he was engaged in entrepreneurial enterprise as independent contractor.

Reversed.

West Headnotes

[1] Administrative Law and Procedure 15A 793

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(E) Particular Questions, Review of
15Ak784 Fact Questions
15Ak793 k. Weight of Evidence. Most Cited Cases

Unemployment Compensation 392T 488

392T Unemployment Compensation
392TIX Judicial Review
392Tk469 Scope of Review
392Tk488 k. Weight of Evidence. Most Cited Cases
(Formerly 356Ak661)
Function of superior court in reviewing decisions granting or denying **unemployment insurance** benefits is to exercise its independent judgment on evidence and inquire whether administrative agency's findings are supported by weight of evidence.

[2] Unemployment Compensation 392T 374

392T Unemployment Compensation
392TVIII Proceedings
392TVIII(F) Evidence in General
392Tk372 Burden of Proof
392Tk374 k. Employment Relationship, Existence Of. Most Cited Cases
(Formerly 356Ak562.5)
In unemployment compensation case, burden of establishing independent contractor relationship is upon party attacking determination of employment.

[3] Unemployment Compensation 392T 28

392T Unemployment Compensation
392TII Employments, Employees, and Employers Covered
392Tk21 Particular Employments, Employees, and Employers
392Tk28 k. Independent Contractors and Their Employees. Most Cited Cases
(Formerly 356Ak340)
Evidence that unemployment compensation claimant signed lease for **cab** and believed he was

independent contractor did not establish that he was independent contractor; lease gave **cab** company right to terminate claimant for failure to maintain good public relations and to assign shifts and meal breaks, and **cab** company maintained dress code and required claimant to account for his fares on trip sheet.

[4] Unemployment Compensation 392T ⚿28

392T Unemployment Compensation
392TII Employments, Employees, and Employers Covered
392Tk21 Particular Employments, Employees, and Employers
392Tk28 k. Independent Contractors and Their Employees. Most Cited Cases
(Formerly 356Ak340)
Evidence that unemployment compensation claimant who drove **cab** was not required to work for 12 hours, customarily did not work for 12 hours, and was free to refuse referrals from dispatcher did not establish that claimant was independent contractor; although claimant once refused dispatch because customer was drunk and used his **taxicab** for personal business, claimant's goal of making money made him totally dependent upon dispatcher for his livelihood.

[5] Unemployment Compensation 392T ⚿27

392T Unemployment Compensation
392TII Employments, Employees, and Employers Covered
392Tk21 Particular Employments, Employees, and Employers
392Tk27 k. Schools and Colleges. Most Cited Cases
(Formerly 356Ak340)
Evidence that unemployment compensation claimant made fixed lease payment to **cab** company did not establish that claimant was engaged in entrepreneurial enterprise as independent contractor; earnings did not vary with drivers' skills, claimant did not have potential to make more money than **cab** company's other employees because he was lessee, and work performed by claimant was part of regular business of **cab** company.

**64 *1366 Daniel E. Lungren, California Atty. Gen., Charlton Holland, Asst. Atty. Gen., Stephanie Wald, Supervising Deputy Atty. Gen., and John C. Porter, Deputy Atty. **65 Gen., for appellant California Unemployment Ins. Appeals Bd.

Robert E. Bosso and Alyce E. Prudden, Santa Cruz, for respondent Santa Cruz Trans., Inc.

Elliott Wax, Los Gatos, for real party in interest Gallegos.

CAPACCIOLI, Acting Presiding Justice.

In a proceeding initiated to obtain disability benefits by real party in interest Ed Gallegos, California **Unemployment Insurance** Appeals Board (Board) appeals from a judgment ordering issuance of a peremptory writ of mandate. The writ commands it to set aside a decision holding that Gallegos was an employee of Santa Cruz Transportation, Inc., dba Yellow **Cab** Company (Yellow **Cab**), and therefore entitled to increased disability benefits. The writ further orders reinstatement of the decision of an administrative law judge which held that Gallegos drove a **taxicab** owned by Yellow **Cab** as an independent contractor and was therefore precluded from increased benefits. We conclude that the judgment is not supported by substantial evidence and reverse.

SCOPE OF REVIEW

[1] The function of the superior court in reviewing decisions granting or denying **unemployment insurance** benefits is to exercise its independent judgment on the evidence and inquire whether the administrative agency's findings are supported by the weight of the evidence. (*Interstate Brands v. Unemployment Ins. Appeals Bd.* (1980) 26 Cal.3d 770, 774-775, 163 Cal.Rptr. 619, 608 P.2d 707.) " While the superior court exercises its independent judgment on the administrative evidence, California law accords the appellate court a much narrower scope of review, confining it to an inquiry whether the superior court's findings are supported by substantial evidence. [Citation.] The appellate court's review of the superior court ***1367** judge's gleanings from the administrative transcript is just as circumscribed as its review of a jury verdict or judge-made finding after a conventional trial. On appeal, after the superior court has applied its

independent judgment to the evidence, all conflicts must be resolved in favor of the respondent and all legitimate and reasonable inferences made to uphold the superior court's findings; moreover, when two or more inferences can be reasonably deduced from the facts, the appellate court may not substitute its deductions for those of the superior court." (*Lacy v. California Unemployment Ins. Appeals Bd.* (1971) 17 Cal.App.3d 1128, 1134, 95 Cal.Rptr. 566.)

"Substantial evidence, of course, is not synonymous with 'any' evidence, but is evidence which is of ponderable legal significance. It must be ' reasonable in nature, credible, and of solid value; it must actually be "substantial" proof of the essentials which the law requires in a particular case. ' [Citations.] Thus, the focus is on the quality, not the quantity of the evidence. Very little solid evidence may be 'substantial,' while a lot of extremely weak evidence might be 'insubstantial.' " (*Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871-872, 269 Cal.Rptr. 647.)

[2] The burden of establishing an independent contractor relationship is upon the party attacking the determination of employment. (*Isenberg v. California Emp. Stab. Com.* (1947) 30 Cal.2d 34, 38, 180 P.2d 11; see *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 951, 88 Cal.Rptr. 175, 471 P.2d 975.) Thus, in this case, Yellow **Cab** carried its burden and proved to the trial court that Gallegos was an independent contractor. In examining whether the judgment in this case is supported by substantial evidence, we therefore focus upon the sufficiency of the evidence to sustain a finding of independent contractor status.

The facts of this case are undisputed, although some are subject to different inferences.

BACKGROUND

Yellow **Cab** is the only **taxicab** business in Santa Cruz, having purchased all of the licenses of competing companies. Prior to **66 January 1988, the drivers for Yellow **Cab** were employees paid on a commission basis. In January 1988, Yellow **Cab** adopted a system under which most drivers leased **cabs** and were no longer deemed employees. It retained two drivers as employees who were available to take fares that were refused by lessee-drivers.

Gallegos was between jobs and drove a **taxicab** for approximately three months in the autumn of 1988. The disability he asserted in the administrative proceedings predated this tenure.

*1368 Gallegos signed a lease agreement designating him as "Lessee" and Yellow **Cab** as " Lessor." The lease provided that Gallegos would lease a **cab** for a 12-hour period specified by Yellow **Cab** for $55-$60 per shift (plus $2.50 per shift, if elected, for Yellow **Cab's** waiver of liability for collision damage not the fault of Gallegos) depending upon the day and time of the shift; that the lease period would be considered renewed for like periods unless terminated by either party; that the lease could be terminated or not renewed at any time by either party but that specific cause for Gallegos's termination would be his failure to abide by laws governing the operation of **taxicabs**, motor vehicles, and radios or his failure to maintain good public service relations; that a **taxicab** could be used on two shifts per day and therefore Gallegos could be charged up to the amount for one full shift if he was more than one-half hour late in returning his **taxicab**; that Yellow **Cab** would maintain the **taxicab**, except for repairs due to Gallegos's negligence, and pay for all licenses, taxes, ownership fees, and third-party liability insurance; that Gallegos would pay for all gasoline used during a shift and personal licenses and traffic tickets; that Gallegos was not restricted as to an area in Santa Cruz County in which he could operate; that Yellow **Cab** would refer business on a nondiscriminatory basis by radio and Gallegos had the right to refuse referrals; that the relationship was one of lessor and lessee, Gallegos was not the employee of Yellow **Cab** but an independent contractor, and Yellow **Cab** would not make income tax withholding payments or contributions for **unemployment insurance** and the like on Gallegos's behalf; that Gallegos was not required to report or account to Yellow **Cab** for his fares, but

that he would charge fares approved by the City of Santa Cruz; that Gallegos was required to accept customer charge slips as fares and submit them for reimbursement as a credit upon future lease payments or in cash provided he pay $.10 per charge slip; that Gallegos would schedule meal breaks through Yellow **Cab** to provide adequate **taxicab** service; that Gallegos was not assigned any fixed hours during the lease period; and that Gallegos was prohibited from using the **taxicab** for personal use.

Gallegos testified that he customarily worked a 10-hour day beginning at 6 a.m. on the 6 a.m. to 6 p.m. shift, could have chosen either the daytime or evening shift, but that Yellow **Cab's** owner, Jim Bosso, determined the hours and days that he had a **taxicab**. In response to a question whether, on a Monday, he could have then elected not to work the rest of the week, Gallegos stated that he supposed he could have, but he also indicated that he was told he might not be given a lease if he declined a lease too many times and he wanted to make money and therefore would not "go off and play."

***1369** Gallegos indicated that he used his **taxicab** for personal business to look for another job when he had time between calls; that he knew he could refuse referrals and, in fact, did refuse one referral because he knew the customer to be drunk at the time; and that his fares were given to him by the dispatcher over the radio and his livelihood depended upon the dispatcher.

Gallegos also related that he was required by Yellow **Cab** to maintain a daily trip sheet which listed for each fare the number of passengers, the amount of the fare, and the pick-up and delivery places. A typical trip sheet was introduced in evidence at the administrative hearing. The sheet also provided for specification of the total mileage driven during the day.

Gallegos further stated that when he wished to take a meal he would call the ***67** dispatcher and ask whether taking a meal break was convenient for the dispatcher and, if there were too many **cab** drivers out, he was required to delay his break. He also indicated that he learned that the lease meant that he was working for himself after he had signed the lease.

Bosso admitted that he required his drivers to wear caps identifying them as **cab** drivers to comply with a requirement of the City of Santa Cruz that **taxicab** drivers wear some article of clothing with such an identification. Other evidence indicated that Yellow **Cab** also prohibited its lessees from wearing printed tee shirts unless they said "Yellow **Cab**" on them, Levi's, beards, and hair below the collar. Bosso stated these later requirements were recommendations, but Gallegos understood that he risked being refused a lease unless he abided by the dress code. Bosso also indicated that he believed he was required to maintain trip sheets by the City of Santa Cruz for the benefit of its Police Department. The superior court admitted into evidence a declaration of Santa Cruz Deputy Chief of Police Steven Belcher which stated that Belcher had found no municipal requirement that **taxicab** drivers maintain a log of fares and to the best of Belcher's knowledge "this issue has never come up."

THE FINDINGS MADE IN THE STATEMENT OF DECISION

The superior court concluded that Gallegos was an independent contractor based upon the following facts:

1. Gallegos signed the lease acknowledging he was an independent contractor and agreeing to be responsible for all tax withholdings or contributions, knew he was an independent contractor during the time he drove a ***1370 taxicab**, and stated that he was an independent contractor in his application for benefits;

2. Gallegos was free to use the **taxicab** for as much as he wished during the 12-hour shift and customarily used it for less than 12 hours;

3. Gallegos was free to use the **taxicab** for personal use;

4. The lease payment to Yellow **Cab** was fixed and therefore amounted to an entrepreneurial risk to

Gallegos;

5. Gallegos was free to refuse referrals by the dispatcher and did so;

6. There was no company requirement that **taxicab** drivers report fares and no evidence that any fare information, other than charged fares, had ever been used by Yellow **Cab**;

7. Yellow **Cab** maintained two employees who were not permitted to refuse referrals;

8. There was no evidence that Gallegos ever was or applied to be an employee of Yellow **Cab**;

9. Fare rates were set by municipalities and not Yellow **Cab**; and,

10. There was no evidence that **taxicab** driving is an unskilled occupation.

The superior court concluded: "In summary, [Gallegos] had the ability to use the **taxicab** to earn a living in whatever manner he chose during the lease period, free from Company intervention which would constitute control."

DISCUSSION

Under the **Unemployment Insurance** Code and as relevant to this case, an employee is "[a]ny individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee." (Unemp. Ins. Code, § 621, subd. (b).)

"The distinction between independent contractors and employees arose at common law to limit one's vicarious liability for the misconduct of a person rendering service to him. The principal's supervisory power was crucial in ***1371** that context because '... [t]he extent to which the employer had a right to control [the details of the service] activities was ... highly relevant to the question whether the employer ought to be legally liable for them....' [Citations.] Thus, the 'control of details' test became the principal measure of the servant's status for common law purposes. [¶] Much 20th-century legislation for the ****68** protection of ' employees' has adopted the 'independent contractor ' distinction as an express or implied limitation on coverage. The [Workers' Compensation] Act plainly states the exclusion of 'independent contractors' and inserts the common law ' control-of-work' test in the statutory definition. The cases extend these principles to other ' employee' legislation as well. Following common law tradition, California decisions applying such statutes uniformly declare that '[t]he 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....' [Citations, including cases from **unemployment insurance** law.]" (*S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 350, 256 Cal.Rptr. 543, 769 P.2d 399.)

"The right to control the means by which the work is accomplished is clearly the most significant test of the employment relationship...." (*Tieberg v. Unemployment Ins. App. Bd., supra,* 2 Cal.3d at p. 950, 88 Cal.Rptr. 175, 471 P.2d 975.) We therefore examine the superior court's findings insofar as they identify evidence that Yellow **Cab** did not have the right to control the manner and means of accomplishing the result desired.

We observe that findings # 4, # 8, and # 10 do not directly pertain to the issue of control but are more properly characterized as "[a]dditional factors ... derived principally from the Restatement Second of Agency." (*S.G. Borello & Sons, Inc. v. Department of Industrial Relations, supra,* 48 Cal.3d at p. 351, 256 Cal.Rptr. 543, 769 P.2d 399.) "[T]he cases which have recognized the Restatement's multiple factor enumeration have emphasized that employer control is clearly the most important and the others merely constitute ' secondary elements.' [Citations.]" (*Toyota Motor Sales U.S.A., Inc. v. Superior Court, supra,* 220 Cal.App.3d 864, 875, 269 Cal.Rptr. 647.) [FN1] We therefore address findings # 4, # 8, and # 10 separately.

FN1. The elements "include (a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee. [Citations.] 'Generally, ... the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations.' [Citation.]" (*S.G. Borello & Sons, Inc. v. Department of Industrial Relations, supra,* 48 Cal.3d at p. 351, 256 Cal.Rptr. 543, 769 P.2d 399.)

**1372 Finding # 1*

[3] That Gallegos signed the lease and believed he was an independent contractor is not solid evidence in support of the superior court's conclusion.

An "agreement characterizing the relationship as one of 'client-independent contractor' will be ignored if the parties, by their actual conduct, act like 'employer-employee.' [Citations.]" (*Toyota Motor Sales U.S.A., Inc. v. Superior Court, supra,* 220 Cal.App.3d at p. 877, 269 Cal.Rptr. 647 [holding that no substantial evidence supported trial court's determination of independent contractor status in context of an order finding good faith settlement].) Stated another way, "where compelling indicia of employment are otherwise present, we may not lightly assume an individual waiver of the protections derived from that status." (*S.G. Borello & Sons, Inc. v. Department of Industrial Relations, supra,* 48 Cal.3d at p. 358, 256 Cal.Rptr. 543, 769 P.2d 399.)

Here, the lease itself contains many indicia of control by Yellow **Cab** over Gallegos. It allows Yellow **Cab** to terminate Gallegos. This is strong evidence in support of an employment relationship. (*Isenberg v. California Emp. Stab. Com., supra,* 30 Cal.2d at p. 39, 180 P.2d 11.) More particularly, the lease cites failure to maintain good public relations as a specific reason for ****69** termination. This is an unquestionable control upon Gallegos's behavior as a **taxicab** driver. (Cf. (*Yellow Cab Cooperative, Inc. v. Workers' Comp. Appeals Bd.* (1991) 226 Cal.App.3d 1288, 1298, 277 Cal.Rptr. 434 [that **taxicab** drivers were instructed on matters of behavior toward the public indicated control].) In addition, under the lease Yellow **Cab** designates the time period when a daily shift begins and ends. (Cf. *Id.* at pp. 1298-1299, 277 Cal.Rptr. 434 [" Yellow controlled drivers' hours by assigning shifts. Yellow imposed this control so that it could lease each **cab** to more than one driver in one day. This practice resembled a paradigmatic employment relationship and significantly restricted applicant's independence."].) The lease also gives Yellow **Cab** the right to coordinate when Gallegos may take a meal break; it prohibits Gallegos from using the **taxicab** for personal purposes; and it requires Gallegos to accept charge slips from certain customers. These provisions are unquestionably directives by Yellow **Cab** as to the manner and means of accomplishing the result desired. (*S.G. Borello & Sons, Inc. v. Department of Industrial Relations, supra,* 48 Cal.3d at p. 350, 256 Cal.Rptr. 543, 769 P.2d 399.)

Moreover, the parties' actual conduct displayed many indicia of control by Yellow **Cab** over Gallegos. Yellow **Cab** maintained a dress code. Bosso's ***1373** statement that most of the code was voluntary does not negate that Yellow **Cab** had rules telling its drivers how to dress and that Gallegos took the rules seriously. A belief that one will not be rehired if he fails to follow instructions is relevant to show submission to control. (*Isenberg v. California Emp. Stab. Com., supra,* 30 Cal.2d at p. 40, 180 P.2d 11.) Despite the contrary provision in the lease, Yellow **Cab** required Gallegos to account for his fares via the trip sheet. "[T]he

presence of a trip sheet requirement militates strongly in favor of employer control." (*City Cab Co. of Orlando, Inc. v. N.L.R.B.* (D.C.Cir.1980) 628 F.2d 261, 264.) Bosso's statement that he believed the City of Santa Cruz required **taxicab** drivers to maintain trip sheets does not detract from this aspect of control since Bosso's belief had no basis.

In addition, as we explain in connection with findings # 2, # 3, and # 5, Gallegos was dependent upon Yellow **Cab** for his livelihood.

Under these circumstances, we disregard the lease as weak evidence that Yellow **Cab** did not exercise control over Gallegos and conclude that it does not constitute substantial evidence of independent contractor status. (*Toyota Motor Sales U.S.A., Inc. v. Superior Court, supra,* 220 Cal.App.3d at pp. 877-878, 269 Cal.Rptr. 647.)

Findings # 2, # 3 and # 5

[4] That Gallegos was not required to work for 12 hours, customarily did not work 12 hours, and was free to refuse referrals from the dispatcher does not tend to support a finding of no control by Yellow **Cab** over Gallegos.

We agree that, in the abstract, one could infer independent contractor status from facts suggesting that a **taxicab** driver was free to work or not work, refuse work, and use the **taxicab** for personal business. The reality of this case, however, is that Gallegos was not blessed with this freedom. Gallegos testified that he wanted to make money and this goal depended upon the dispatcher. Since Yellow **Cab** was the only **taxicab** business in Santa Cruz, Gallegos was totally dependent upon Yellow **Cab**'s dispatcher for his livelihood.

That Gallegos once refused a dispatch because the customer was drunk illustrates a circumstance where any **taxicab** driver would justifiably refuse a fare rather than of Gallegos's freedom to refuse work. That Gallegos used his **taxicab** for personal business illustrates a circumstance for which he could have been terminated rather than of his freedom to not work.

1374** The point that Gallegos's freedom was illusory was laid to rest in *Yellow Cab Cooperative, Inc. v. Workers' Comp. Appeals Bd., supra,* 226 Cal.App.3d 1288, 277 Cal.Rptr. 434. There, the court reviewed and agreed with a decision by the Workers' Compensation Appeals Board holding that Yellow **Cab** was the employer of a cabdriver*70** for workers' compensation purposes under facts similar to those presented here. Among other claims urged in support of its writ petition, Yellow **Cab** argued that the lease and cabdriver's testimony demonstrated the cabdriver's actual independence. The court concluded that the evidence was of little value as proof of independent contractor status. The court's analysis of the issue is equally applicable to the facts of this case. The court explained as follows: "Petitioners emphasize applicant's supposed independence under the lease and his testimony that he could go wherever he wanted with the **cab**, did not have to take radio calls, could run personal errands, and could use the **cab** to carry family members instead of paying passengers. Applicant testified that he did not have to show up for work at all, although failure to do so would cost him $56 a day. [¶] This evidence has little weight as proof of independent contractorship. The work did not involve the kind of expertise which requires entrustment to an independent professional; it 'is usually done without supervision whether the arrangement was lessee or employee, and the skill required on the job is such that it can be done by employees rather than specially skilled independent workmen.' [Citations.] Indeed applicant had enjoyed a similar degree of freedom as a unionized employee during the 1960's. Even then he could see a doctor, disregard a radio call, or arrange for his own customers. It is thus apparent that a good deal of freedom was 'inherent in the nature of the work.' [Citation.] [¶] Furthermore, to the extent applicant's freedom might appear to exceed that of a typical employee, it was largely illusory. If he wanted to earn a livelihood he had to work productively, and that meant carrying paying passengers. [Citations.] There is no evidence that he could accomplish this without sacrificing his theoretical independence and subjecting himself to Yellow's control." (*Yellow Cab Cooperative, Inc. v. Workers' Comp. Appeals Bd., supra,* 226

Cal.App.3d at p. 1299, 277 Cal.Rptr. 434.)

At best, the facts recited in findings 2, 3, and 5 support a weak inference of no control. The evidence of the reality of Gallegos's circumstance, however, supports a solid contrary inference. We therefore conclude that the facts recited in findings 2, 3, and 5 are insubstantial evidence to support the superior court's conclusion.

Finding # 6

The superior court was simply incorrect in finding that there was no known company requirement that Gallegos maintain a trip sheet. Both Gallegos and Bosso affirmed the existence of the requirement.

*1375 That there was no evidence that Yellow **Cab** used the trip sheet as a means of holding Gallegos accountable for his income is of no value in this case. We reiterate that Gallegos was not required to prove control; Yellow **Cab** was required to prove no control. Thus, the failure of proof that Yellow **Cab** used the trip sheet to control Gallegos is of no consequence.

Finding # 7

That Yellow **Cab** acknowledged having two employees so as to accept dispatches refused by Gallegos has no tendency to prove Yellow **Cab's** lack of control over Gallegos given that Gallegos's freedom to refuse referrals was illusory.

Finding # 9

That the City of Santa Cruz set **taxicab** fare rates has no tendency in reason to prove Yellow **Cab's** lack of control over Gallegos.

Thus, our analysis of the superior court's findings on the most important factor in determining whether a person acting for another is an employee or independent contractor exposes the findings as flawed and, at best, insubstantial evidence in support of the superior court's conclusion.

Secondary Elements

[5] Finding # 4 was that the nature of the fixed lease payment "constituted an entrepreneurial contribution by [Gallegos] and constitutes a substantial financial risk."

We agree with the court in **71*Yellow Cab Cooperative, Inc. v. Workers' Comp. Appeals Bd., supra,* 226 Cal.App.3d 1288, 277 Cal.Rptr. 434 which rejected this proposition as follows: " Petitioners suggest that the drivers' payments to Yellow created greater entrepreneurial risk and made the workers more like independent businesspersons than was the case in *Borello.* The court there found little entrepreneurial character in the work because the workers were paid according to the size and grade of their crop, they did not set the price, and the risk that the crop might be unharvestable was no different from the risk they would run if they were employees. [Citation.] In the first two respects the cabdrivers' work here is closely analogous: drivers did not set their own rates but were paid according to the number and distance of fares they carried. The only risk they ran beyond that in *Borello* was that in the worst case they might lose money on a given shift. There was no evidence that this ever occurred; applicant testified that he averaged $82.50 per shift in *1376 earnings, after paying rent on the **cab.** In any event there is no basis for characterizing this risk as ' entrepreneurial.' There is no evidence that earnings varied with the drivers' skills, entrepreneurial or otherwise. The evidence on this point does not tip the balance far enough to warrant a result different from that in *Borello.*" (*Id.* at pp. 1300-1301, 277 Cal.Rptr. 434.)

Similarly, there is no evidence in this case that earnings varied with the drivers' skills. In addition, there is no practical difference in the manner Gallegos earned his livelihood and the manner Yellow **Cab's** employees on commission earned their livelihood. Each was referred customers and earned according to the number and distance of fares carried. There was no evidence that Gallegos had the potential to make more money than Yellow **Cab's** employees because he was a lessee.

Moreover, Yellow **Cab** is not merely in the business of leasing **taxicabs** and collecting rent akin to Hertz Rent-A-Car and like enterprises. It owns the **taxicabs** and municipal **taxicab** license; customers call it for **taxicab** service, and it arranges for performance of the service; and the **taxicabs** bore Yellow **Cab's** identity. In sum, the public deals with Yellow **Cab**. There is no evidence that Gallegos advertised his individual services. "We follow courts elsewhere in holding that Yellow's enterprise consists of operating a fleet of **cabs** for public carriage." (*Yellow **Cab** Cooperative, Inc. v. Workers' Comp. Appeals Bd., supra,* 226 Cal.App.3d at p. 1293, 277 Cal.Rptr. 434.) In other words, the work performed by the lessees in this case is part of the regular business of Yellow **Cab**. 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. (*S.G. Borello & Sons, Inc. v. Department of Industrial Relations, supra,* 48 Cal.3d at p. 357, 256 Cal.Rptr. 543, 769 P.2d 399.)

The fixed leased payment is simply weak evidence that Gallegos was engaged in an entrepreneurial enterprise and insufficient to tip the scales given the absence of substantial evidence on the principal issue of control.

Finding # 8 was that there was no evidence that Gallegos ever was or applied to be an employee.

The significance of this point escapes us. Had there been evidence that Yellow **Cab** offered Gallegos a choice of status, an inference might be drawn that Gallegos understood and voluntarily undertook independent contractor status. (See *S.G. Borello & Sons, Inc. v. Department of Industrial Relations, supra,* 48 Cal.3d at p. 359, 256 Cal.Rptr. 543, 769 P.2d 399.) That there was no evidence on the issue only ***1377** suggests that Gallegos had no choice and did not voluntarily undertake independent contractor status.

Finding # 10 was that there was no evidence that **taxicab** driving is an unskilled occupation. This finding is not affirmative evidence that **taxicab** driving is a skilled occupation, which might justify an inference of independent contractor status.

The judgment is reversed. The trial court is directed to recall the peremptory writ of mandate issued on August 7, 1990, ****72** and enter a judgment denying Yellow **Cab's** petition. Costs are awarded to Board.

PREMO and BAMATTRE-MANOUKIAN, JJ., concur.
Cal.App. 6 Dist.,1991.
Santa Cruz Transportation, Inc. v. Unemployment Ins. Appeals Bd.
235 Cal.App.3d 1363, 1 Cal.Rptr.2d 64

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CITY AND COUNTY OF
SAN FRANCISCO

TAXI COMMISSION
MAYOR GAVIN NEWSOM

COMMISSIONERS TELEPHONE (415) 554-7737

PAUL GILLESPIE, PRESIDENT, ext. 3
PATRICIA BRESLIN, VICE PRESIDENT
RICHARD BENJAMIN, COMMISSIONER, ext. 1
MALCOLM HEINICKE, COMMISSIONER, ext. 4
MICHAEL KWOK, COMMISSIONER, ext. 5
TOM ONETO, COMMISSIONER, ext. 6
MIN PAEK, COMMISSIONER, ext. 7

HEIDI MACHEN, EXECUTIVE DIRECTOR

Taxi Availability Form - Hotel

Date:_____

Name of Hotel and Address/Intersection_____

Time of Observation:_____

Number of Parties Waiting for Taxis:_____

Number of Taxis Waiting for Passengers:_____

Wait time for first taxi to arrive (if at least one party is waiting):_____

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Number of Taxis Waiting for Passengers:_____

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email: sftaxi.commission@sfgov.org * www.sfgov.org/taxicommission

CITY AND COUNTY OF
SAN FRANCISCO

TAXI COMMISSION
MAYOR GAVIN NEWSOM

COMMISSIONERS TELEPHONE (415) 554-7737

PAUL GILLESPIE, PRESIDENT, ext. 3
PATRICIA BRESLIN, VICE PRESIDENT
RICHARD BENJAMIN, COMMISSIONER, ext. 1
MALCOLM HEINICKE, COMMISSIONER, ext. 4
MICHAEL KWOK, COMMISSIONER, ext. 5
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