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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

LEXINGTON INSURANCE COMPANY, Petitioner, v. WORKERS' COMPENSATION APPEALS BOARD and SHEIK ZAHID ALI et al., Respondents.	A142340 (WCAB No. ADJ6808581)

The question presented in this writ of review is whether a truck driver injured while unloading latex paint from a trailer owned by a transportation company was an employee of the company within the meaning of the Workers' Compensation Act. As our Supreme Court has held, this issue is heavily fact dependent, turning on findings relating to an array of factors derived from both common law and the Restatement. In reviewing the Workers' Compensation Appeals Board's (WCAB) determination of the facts, including the inferences to be derived from them, this court's role is limited to determining whether there is substantial evidence, in light of the record as a whole, to support the WCAB findings. The ultimate conclusion as to whether an individual was an employee or independent contractor is one of law. However, that conclusion turns on analysis of the totality of the circumstances, and in reviewing it we afford considerable deference to the WCAB. Here, the WCAB adopted the report and recommendation of the arbitrator, who issued two thorough, carefully considered and well-reasoned opinions. We conclude there is substantial evidence in the record supporting the WCAB's findings

and that its determination that the driver was an employee was correct. We therefore deny the writ.

I.

Petitioner, Respondent and Interested Non-Parties

The Petitioner seeking writ relief in this court is Lexington Insurance Company (Lexington), and Respondent is the injured worker, Sheik Zahid Ali (Sheik). Trimac Transportation Services Western, Inc. (Trimac), the party found by the WCAB to be Sheik's employer, has not been a party to these proceedings although it has agreed to be bound by the final determination of the WCAB.

At the time of the injury, Trimac was insured by Lexington, which had issued a Truckers Occupational Accident Insurance policy providing coverage for drivers engaged in hauling activities for Trimac.[1] Although some benefits were provided to Sheik, apparently under that policy, it is not workers' compensation insurance and does not provide the same array of benefits. Zurich American Insurance Company, the workers' compensation insurer for Trimac, joined Lexington as a party to the WCAB proceedings including the petition for reconsideration, but has not joined Lexington in seeking writ review of the WCAB's decision denying reconsideration.

Finally, Intaz Ali (Intaz) and his business, Ali's Trucking,[2] which the WCAB found to be a co-employer of Sheik, are not parties to these proceedings.

II.

Factual Background

Preliminarily, we observe that notwithstanding that it has challenged the WCAB decision in part based on arguments that the decision is not supported by substantial

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[1] According to its verified writ petition, Lexington also issued a "Contingent Liability Policy" to Trimac.

[2] Respondent Sheik Zahid Ali is unrelated or at most distantly related to Intaz Ali. In view of the common last name, we will refer to them by their first names. As will be seen, there is a third Ali, Iftikar Ali, who apparently is also unrelated to Sheik or Intaz, and was a witness in the case, and we will refer to him by his first name as well; as with the others, no disrespect is intended.

evidence, Lexington submitted a record that fails to provide all of the relevant material evidence, thus violating California Rule of Court, rule 8.495(a)(2). Lexington also failed to provide a fair statement of that evidence as required by the same rule, instead presenting a selective and one-sided statement of facts. It is well established that " '[a] party who challenges the sufficiency of the evidence to support a particular finding must summarize the evidence on that point, favorable and unfavorable, and show how and why it is insufficient. [Citation.]' [Citation.] Where a party presents only facts and inferences favorable to his or her position, 'the contention that the findings are not supported by substantial evidence may be deemed waived.' " (*Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 738, italics omitted; see, e.g., *Nwosu v. Uba* (2007) 122 Cal.App.4th 1229, 1247 [insufficient evidence claim waived on appeal].) Just as this court, "[i]n examining the entire record, . . .'may not simply isolate evidence which supports or disapproves the board's conclusions and ignore other relevant facts which rebut or explain the supporting evidence' " (*County of Kern v. Workers' Comp. Appeals Bd.* (2011) 200 Cal.App.4th 509, 517), so Lexington may not focus on a limited subset of the evidence and ignore the rest. By failing to provide a fair statement of the evidence and all the relevant material evidence, Lexington has waived its substantial evidence arguments. But rather than dispose of those parts of this case on waiver grounds, we address Lexington's substantial evidence challenge on its merits.

In the absence of a fair summary of the evidence and a complete record, we rely primarily but not exclusively on the WCAB arbitrator's statements of facts in his two reports, one labeled "Finding of Fact, Conclusion of Law, and Opinion on Decision" and the other labeled "Report and Recommendation on Petitions for Reconsideration," both of which were ultimately adopted by the WCAB.[3] We state the facts in the light most favorable to the WCAB decision, "indulg[ing] all reasonable inferences which may be drawn from the record to sustain the commission's findings." (*Leonard Van Stelle, Inc. v. Industrial Accident Com.* (1963) 59 Cal.2d 836, 839; see also *Judson Steel Corp. v.*

[3] We quote at various places the arbitrator's findings as well as testimony and documents in the record.

Workers' Comp. Appeals Bd. (1978) 22 Cal.3d 658, 664; *Andersen v. Workers' Comp. Appeals Bd.* (2007) 149 Cal.App.4th 1369, 1374–1375.)

A. The Injury

Sheik was seriously injured on July 19, 2006, after having driven a tractor-trailer rig filled with latex paint from Hayward, California to Spokane, Washington. In the process of unloading the trailer at the end customer's facility, Sheik was on the top of the trailer when a pressurized cap came off the trailer and struck him in the head resulting in serious injury. The truck was owned by Ali's Trucking; the trailer was owned by Trimac. The injury was industrial.

B. Trimac, Ali's Trucking, Sheik and Their Agreements

Trimac is a multi-national corporation that specializes in transporting liquid latex and latex-based products from producer to buyer. The latex products it transports are delivered in tractor-trailers. The trailers are owned or supplied by Trimac, but the tractors (also referred to as "trucks") are in some instances owned by Trimac and in other instances by third parties who lease them to Trimac. To carry out its transportation services, Trimac used approximately four tractors it owned driven by about six employee-drivers[4] and about 14 tractors leased to it by about 32 "independent contractors," which it also referred to as "owner/operators" or "independents."

One such owner/operator was Ali's Trucking, a business owned by Intaz Ali. Intaz owned two tractors he had purchased from Trimac. He leased the tractors back to Trimac for its business, sometimes driving one himself and using other drivers for the second and sometimes for both. Ali's Trucking had no business premises apart from Trimac's Hayward location, where Ali's Trucking kept its tractors. Ali's Trucking used Trimac's address as its business address.

Ali's Trucking entered into a contract with Trimac, entitled "Lease Agreement Independent Contractor" (Lease Agreement) which designates Trimac as "Carrier" and Ali's Trucking as "Independent Contractor." The contract is dated January 20, 2006, and

[4] Trimac paid the "employees" directly and provided them benefits.

was signed by Trimac Branch Manager Scott Turpin and by Intaz on behalf of Ali's Trucking. Under that form Lease Agreement, provided to Intaz by Trimac, Ali's Trucking agreed to lease Trimac a tractor and provide it with drivers, who "shall be employees of [Ali's Trucking] and not [Trimac]." Trimac "may furnish . . . one or more trailers or other equipment or accessories, including but not limited to safety equipment, hoses and fittings ('Carrier's Equipment') for use by [Ali's Trucking] in the performance of this Agreement." Besides transportation services, Ali's Trucking was responsible "for loading and unloading the cargo onto and from the trailers, and the payment of the compensation, if any, to be paid for these services."

The Lease Agreement provided that Trimac would pay Ali's Trucking either a flat rate or per mile rates, depending on the destination, plus an amount for hours spent loading, unloading and training, plus a fuel surcharge, a layover payment, toll reimbursement, border crossing fees and a fee for use of a pump and compressor if the tractor was equipped with such equipment and it was used. Mileage payments were based on routes determined by Trimac rather than actual miles traveled.

Ali's Trucking was responsible for "determin[ing] the method, means and manner of providing services under this Agreement," "direct[ing] and control[ling] its drivers, . . . including the selecting, hiring, firing, supervising, disciplining, training, setting wages and working conditions for such drivers" and "provid[ing] drivers to operate the leased equipment who are qualified under all applicable laws and regulations." The Lease Agreement stated that Trimac "shall have no direction or control of [Ali's Trucking or its] drivers or other employees or agents, except in the results to be obtained." Ali's Trucking was also responsible to pay drivers' wages and provide any employee benefits and to "make all necessary filings with state, local, federal and foreign agencies, including tax, payroll and insurance filings pertaining to [Ali's Trucking's] business or operations hereunder."

The Lease Agreement also provided that Trimac would "maintain insurance coverage for the protection of the public"[5] but required Ali's Trucking to "procure and maintain statutory Workers' Compensation Insurance for all drivers and other employees of [Ali's Trucking]" and to provide evidence of such coverage to Trimac. For "itself," Ali's Trucking had the option of providing either workers' compensation insurance or occupational accident insurance and employer's liability insurance in lieu of workers' compensation insurance.[6] If it provided the latter, the Lease Agreement provided that Trimac would deduct the premiums and fees from Ali's Trucking's settlement checks and remit them directly to the insurance company, broker or agency from which Trimac obtained such insurance. There was no reference to Sheik in this document.

Ali's Trucking entered into a separate contract with Sheik entitled "Independent Contractor Agreement." According to Intaz, Trimac provided that form contract as well. In this agreement, Sheik agreed to provide driving services to Ali's Trucking. The agreement designated Ali's Trucking as the "O/O" (owner/operator) and Sheik as "independent contractor to Ali Trucking." Paragraph 5 required Sheik to "be a competent driver who meets all of the requirements of the U.S. Department of Transportation, including but not limited to familiarity and compliance with state and federal motor carrier safety laws and regulations." Paragraph 6 stated that the parties agreed Sheik was

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[5] The Lease Agreement required the Independent Contractor to obtain public liability and property damage with a $500,000 limit that "shall be primary."

[6] The parties dispute whether the Lease Agreement made workers' compensation insurance optional for drivers other than Intaz, or allowed him to opt to purchase the less expensive occupational accident coverage only for himself. The agreement states that "[t]he independent contractor shall procure and maintain statutory Workers' Compensation Insurance for all drivers and other employees of Independent Contractor." The language allowing the option to obtain occupational accident insurance instead of workers' compensation is provided only "[i]f the Independent Contractor does not maintain statutory Workers' Compensation insurance *for itself*" and resides in a state where that apparently is permitted. (Italics added.) This is consistent with Intaz's understanding, as explained to him by Trimac that owner/operator drivers could opt for coverage other than workers' compensation, i.e., occupational accident insurance, only for themselves and not for drivers they hired.

an independent contractor for the driver services provided under the agreement. It further provided that Sheik "assume[d] full control and responsibility for all hours scheduled and worked, wages, salaries, Occupational Accident or Workers' Compensation and unemployment insurance, state and federal taxes, fringe benefits and all other costs relating to the use of equipment by [Sheik] pursuant to this agreement." Paragraph 7 required Ali's Trucking to "settle with" Sheik "within 14 calendar days, if and only after [Sheik's] submissions of all proper forms and settlement sheets have been received by [Ali's Trucking]." Ali's Trucking agreed to file Form 1099s on behalf of Sheik. The Independent Contractor Agreement is dated June 6, 2006, and signed by Intaz and Sheik. There is no reference to Trimac in this document.

C. The Conduct of Trimac, Ali's Trucking and Sheik

As the arbitrator's report discusses at length, the relationships among Trimac, Ali's Trucking and Sheik operated quite differently in practice from the way their relationships are outlined in these contracts in many respects, both material and immaterial to this dispute. For example, although the Lease Agreement stated that Ali's Trucking would be responsible for all costs associated with the operation of the leased equipment, including permits, the cost of permits was actually covered by Trimac. The Lease Agreement also provided that the Independent Contractor was to load cargo and/or make payment to those who loaded and unloaded the cargo, but in practice Trimac's shippers did the loading, and those who did the unloading were not paid by Ali's Trucking. And notably, despite the title and terms of the Independent Contractor Agreement signed by Intaz (for Ali's Trucking) and Sheik, it was undisputed that the relationship between Ali's Trucking and Sheik was one of employer and employee.

1. *Payment of Sheik*

One way in which the parties' conduct largely tracked the agreements concerned how payments were made. Consistent with the Lease Agreement, Trimac paid Ali's Trucking for the use of the tractor and the driving services it provided based primarily on miles driven, with deductions for gasoline purchased with the Trimac credit card, certain repairs, insurance and other expenses. Trimac set the rate it paid per mile; there was no

negotiation. Ali's Trucking, not Trimac, paid Sheik. As the arbitrator found, "Trimac had nothing to do with what compensation Ali's Trucking paid Sheik Ali." Ali's Trucking paid Sheik a percentage of the revenue it received from Trimac.

2. *Insurance*

One difference between the agreements and how the parties conducted themselves concerns insurance. Ali's Trucking did not have workers' compensation insurance, but instead had only occupational accident insurance. Although the Lease Agreement required its independent contractors to have workers' compensation insurance to cover their drivers and to provide certification that they did, in fact Trimac arranged for its contractors' workers' compensation insurance exclusively through carriers it approved and deducted the costs from the payments (referred to as "settlement") it made to the contractors. Intaz and Trimac's director of insurance and risk management both testified that Trimac secured such insurance because independent contractors could not find their own. In order to make it easier for the independent contractors, Trimac negotiated a group policy that the independents could participate in. Thus, as the arbitrator found "Trimac does all the work in procuring the insurance and then tells the driver what his rate is. This is in spite of the contract language requiring the independent to procure the insurance." Trimac management testified that independents could choose their own insurance, but that without them doing so or signing up for the policy procured by Trimac, they could not work for Trimac.

Intaz testified that he understood Trimac had procured workers' compensation insurance for Ali's Trucking and was deducting the cost of that insurance from his settlements. And Trimac's region manager testified that a document Trimac produced reflected deductions Trimac made from settlements paid by Trimac to Intaz in 2005 for "NAIT Workers' Compensation," which Trimac procured for the employees of independent contractors. He then changed his testimony and said the "NAIT Workers' Compensation" deductions referred to in the document were actually for "Occupational Accident" insurance.

Trimac obtained occupational accident insurance for the independents, consistent with the Lease Agreement. Trimac apparently did not procure workers' compensation insurance for Ali's Trucking, despite having told Intaz it had done so.[7]

Trimac also provided the liability insurance it required independent contractors to have and deducted the cost from their settlements, despite contract language indicating they were to procure it for themselves. As the arbitrator found, "Trimac even goes so far as to buy," and charge back to the independent contractor, "liability insurance that covers the tractor even when it is not pulling a trailer."

3. *Trimac's Control over Sheik*

Most significant in the way the parties' actions departed from the terms of the agreements is the exercise of control over drivers. As already mentioned, the Lease Agreement stated that drivers would be employees of the Independent Contractor (Ali's Trucking) and not the Carrier (Trimac) and purported to place responsibility on the Independent Contractor for "selecting, hiring, firing, supervising, training, setting wages and working conditions" for their drivers and employees. But as the arbitrator found, "the way in which the operation actually worked reflects substantial Trimac involvement."

a. Selection and Hiring.

First, "[a]ny driver who was to be used as a hauler for Trimac had to complete a Trimac application, which Sheik Ali did in this case." Except for being marked as an independent contractor application, the application was the same as Trimac used for prospective employees. Trimac, not Ali's Trucking, performed the reference check on Sheik. And the driver had to be accepted by Trimac. On May 9, 2006, Trimac, not Ali's Trucking, sent Sheik a letter entitled "Welcome to team Trimac" that referred to the necessity of completing company training and confirmed that subject to this and other requirements, Sheik could "join our team." As a May 18, 2006 e-mail reflects, "HR

[7] The record is unclear as to whether the workers' compensation policy Trimac had covered employees of independent contractors such as Ali's Trucking.

Coordinator" Bex Haverson of Trimac "hired Sheik on as a trainee" and assigned him an "employee number."[8] This was about three weeks before Sheik signed the June 6, 2006 Independent Contractor Agreement with Intaz.

b. Training

Second, as a Trimac Branch Manager testified, "independent" drivers were trained and oriented to Trimac by Trimac and expected to work with Trimac " 'on a team basis.' " All drivers, whether considered employees of Trimac or not, had to complete extensive classroom and road training conducted by Trimac. This included three to five days of classroom and road testing conducted by Trimac, completion of Trimac written examinations and about six weeks of road training with other drivers along with training in off-loading of product. Trimac also provided ongoing training to ensure drivers were aware of changes in the law. Trimac provided Sheik Ali with copies of a federal motor carrier safety regulation handbook, hours and service regulations, a drug and alcohol information booklet, a Trimac Driver's Manual, the Trimac Operating Standards and the Trimac Security Plan. The Trimac Driver's Manual required drivers to "present [themselves] in a clean, neat and well-groomed way at all times while on duty."[9] This practice was in sharp contrast to the Lease Agreement provision stating that independent contractors were responsible for training their drivers.

c. Supervision and Direction

Third, despite the Lease Agreement's provision stating that Ali's Trucking would "be responsible to determine the method, means and manner of providing services under this agreement," and for "direct[ing]," "control[ling]," and "supervising" its drivers, Sheik received his job assignments "directly from Trimac rather than from Ali's Trucking." Trimac acted as the dispatcher, communicating directly with drivers,

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[8] Trimac employees testified that assigning an employee number did not mean someone was an employee in the statutory sense but that Trimac used such numbers to keep track of all drivers.

[9] Neither drivers who were considered Trimac employees nor those who were considered independent contractors were required to wear uniforms.

including Sheik. The Trimac Driver's Manual required drivers to report before and after every trip and to contact the Trimac dispatch office "no less than every 24 hours unless other arrangements have been approved." Trimac provided each driver a waybill with the date, time and location of the delivery and provided a "specific route and precise directions to get to each location." Sheik also picked up the tractor from Trimac, not Ali's Trucking. After completing a job, he reported to the Trimac dispatcher rather than Ali's Trucking, and the Trimac dispatcher then assigned him another job. Drivers were encouraged to call Trimac if they had questions and were required to adhere to the Trimac Driver's Manual, which included a requirement to report to work on time and to "notify your supervisor as soon as possible" if unable do so. Trimac's branch manager confirmed that the process was the same for company-employed drivers and "independents."

The testimony was in conflict as to whether drivers had to follow the route specified by Trimac, but the Trimac region manager testified that if a driver varied from the Rand-McNally route provided by Trimac, he would have to report that to Trimac. Further, independents were paid only for the miles set forth on the route provided, and the required delivery time given to them by Trimac meant they had little discretion to vary from the prescribed route. As the arbitrator found, "while drivers in theory had the right to choose their own routes, the reality was that routes were determined by the destination of the delivery, the Rand-McNally route provided by Trimac, the fact that drivers would be paid only for the miles set forth on the route provided, and the fact that if drivers deviated from the prescribed route they were required to report this to Trimac."

d. Equipment and Maintenance

As previously indicated, Ali's Trucking provided the tractor Sheik drove, while Trimac provided the trailer. Besides the trailer, Trimac supplied hoses, safety equipment (including a rain suit, steel-toed boots, gloves, hard hats and safety glasses) and a hammer, and did not charge the independents for these items. Intaz testified that the independents were not permitted by Trimac to supply any equipment other than the

tractor; Trimac supplied all equipment and "[w]e can't have anything from outside."[10] (This is consistent with the Lease Agreement, which only required the independent contractor to supply the tractor and indicated that Trimac would supply the trailer, safety equipment, hoses and fittings and possibly other "products" and "equipment.") Trimac also provided a driver's manual, federal regulations book and emergency hazardous materials book and other materials. And Trimac "inspected tractors owned and operated by the independents and did maintenance[,] charging these costs back to the owners." Notwithstanding the Lease Agreement's statement that independent contractors were required to maintain their trucks "in compliance with all applicable laws and regulations," Trimac required them to get regular mechanical service at Trimac's vendor or the Trimac shop to ensure their vehicles complied with state and federal regulations. If a driver had trouble with his tractor on the road, Trimac would provide a vendor to take care of the problem. The independent could use a different vendor, but they typically used Trimac's national account vendors because they had favorable pricing. Similarly, while not required to, independents could use Trimac's network of fuel stops, and many did because of favorable pricing.

e. Termination of Drivers' Employment

Intaz testified that on multiple occasions Trimac fired individuals driving for Ali's Trucking without consulting him. Trimac notified him after the fact when it had fired his drivers. Although Trimac's traffic supervisor testified that all firings were done via Trimac's independent contractor (such as Ali's Trucking), the arbitrator found Intaz's testimony "convincing that this right [to fire drivers] was exercised by Trimac."

f. Exclusivity

The relationship between the owner/operator and Trimac appears to have been exclusive. Trimac Region Manager Terry Gillitt testified that Intaz had the right to refuse a job, but that if he had refused several jobs there would have been a "discussion" with

[10] Trimac region manager, Terry Gillitt, testified that independent contractors were required to carry their own radio.

Trimac. Intaz did not refuse any jobs. Intaz testified that for the years he drove for Trimac, he never hauled for anyone else and believed it was illegal for him to do so because his truck bore a Trimac logo. Trimac required the independents' tractors to have a Trimac logo on them and supplied a decal with that logo to them. Gillitt testified that if an independent drove for another company, he would have to cover up the Trimac logo. Intaz understood his truck was required to be used exclusively for Trimac. Another driver testified to the same effect, as did Trimac branch manager Thomas Munsey, who testified, "They were not to be used [to pull any semi-trailers other than Trimac semi-tankers] under the terms of the contract."

Language in the Lease Agreement suggests the arrangement between independents and Trimac was to be exclusive, providing that "[t]he Carrier will exercise such exclusive possession, control and use of, and responsibility for the leased equipment as required by law" and that "[s]ub-leasing, whether to another authorized carrier or with respect to private carriage and whether or not with respect to exempt or non-exempt commodities, may only be undertaken by [Trimac]" and "[t]rip-leasing, without authorization . . . from [Trimac], is unauthorized and is deemed to be a material breach by the Independent Contractor and thereby the basis for termination of this Agreement . . . ."

Sheik testified that he thought he could refuse a job.

4. *Beliefs of the Parties*

The evidence demonstrated that Trimac did, and Intaz may have, believed they were creating an independent contractor relationship between Trimac and Ali's Trucking, and further that Intaz probably believed he was creating an independent contractor relationship between Ali's Trucking and Sheik. Further, "[a]t various times in this litigation, Sheik Ali himself believed that he was an independent contractor." At other times, Sheik testified that "he was a Trimac employee since they hired and trained him even though he was paid by Intaz."

III.

Proceedings of and Determination by WCAB

On April 7, 2009, Sheik filed an Application for Adjudication of Claim with the WCAB, naming Trimac and Trimac's workers' compensation carrier, Zurich, as parties.[11] At some point Lexington became a co-defendant. The arbitrator scheduled a trial for May 21, 2013, to address whether Sheik had an employment or independent contractor relationship with Trimac.[12] The parties submitted extensive briefing and exhibits, which the arbitrator described as a "mountain of evidentiary material," including about 1500 pages of transcripts and 1000 pages of other exhibits. Trimac's region manager was the only witness to testify in person at the hearing, although deposition testimony of Sheik, Intaz and others (including other Trimac managers) was submitted. The arbitrator allowed the parties to submit supplemental briefing after the hearing, which combined with the pre-arbitration briefing cumulatively totaled more than 250 pages.

Based on the hearing and the parties' evidentiary submissions and briefs, the arbitrator issued his "Finding of Fact, Conclusion of Law, and Opinion on Decision" on March 7, 2014. He concluded that "[a]t the time of his industrial injury, Sheik Zahid Ali was an employee of Trimac Transportation Services Western, Inc." He concluded that "[t]he legal relationship between Sheik Ali, Ali's Trucking and Trimac was one of joint employment. Both employers had the right to direct and control Sheik Ali's activities while he was at work on the joint enterprise of transporting materials for Trimac and Ali's Trucking" and that "Trimac not only had the right to control, it affirmatively exercised that control."

The arbitrator discussed at length the "seminal case on employee versus independent contractor," namely *Borello & Sons, Inc. v. Department of Industrial*

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[11] Prior to filing the workers' compensation action, Sheik and his wife had filed a negligence action against Trimac, which was later dismissed with prejudice by stipulation of the parties.

[12] The parties stipulated and the arbitrator agreed that this threshold issue would be determined prior to arbitration of the insurance coverage disputes.

Relations (1989) 48 Cal.3d 341 (*Borello*), and the factors it identifies as relevant to the determination of whether an individual is an employee or independent contractor. He read *Borello* as holding that "the right to control is the most important factor distinguishing independent contractors from employees"—specifically, "whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired"—but as requiring that "secondary indicia" relating to " 'the nature of a service relationship' " also be considered.

Evaluating the evidence relating to the issue of control generally as identified in *Borello*, the arbitrator found the following factors reflected that Trimac had considerable control over Sheik's work: (1) Trimac made the decision about which drivers it was willing to use and made the hiring decision, including with respect to Sheik; (2) Trimac trained such drivers and monitored other aspects of their work, required drivers to follow its rules and otherwise "controlled the details of the work in the manner of an employer"; (3) Trimac supplied various tools, safety equipment and hoses essential to the delivery process; (4) while drivers in theory had the right to choose their own routes, the reality was that routes were determined by the destination of the delivery, the route provided by Trimac, the fact that drivers would be paid only for the miles set forth on the route provided, and the fact that if drivers deviated from the prescribed route they were required to report this to Trimac; (5) Trimac, through its dispatchers, gave driving assignments to independent drivers such as Sheik directly, and Sheik called the Trimac dispatcher rather than Intaz when he finished a job; (6) Trimac's employees and independent drivers operated in exactly the same way; (7) Trimac fired the employees of independent contractors without consulting the contractor; (8) there was an exclusive relationship between independents and Trimac; and (9) Trimac procured group insurance and deducted the cost of such insurance from independents' settlement payments. Weighing in favor of independent contractor status for Sheik were the fact that: (1) there was no contract between Sheik and Trimac; 2) Trimac did not pay Sheik directly; (3) Sheik believed he was free to refuse a job; (4) at various times, all of the parties,

including Sheik, believed Sheik was an independent contractor; and (5) except for customer deadlines, Trimac did not control drivers' working hours.

After the arbitrator issued his decision, Lexington and Zurich filed timely petitions for reconsideration arguing that the evidence did "not support or justify the decision." In a 30-page Report and Recommendation on Petitions for Reconsideration, the arbitrator recommended denial of the petitions. The WCAB denied the petitions for reconsideration based on its "review of the record, and for the reasons stated in [the arbitrator's] report." The WCAB specifically concluded that "there is substantial evidence, excluding Trimac's compliance with regulatory requirements, that supports the Arbitrator's decision."

Lexington thereafter filed a petition for writ of review challenging the WCAB decision in this court.

IV.

Discussion

A. Governing Principles

The seminal case regarding the difference between employment and independent contractor relationships in California is *Borello, supra*, 48 Cal.3d 341. In that case our high court set out the basic principles that govern such disputes in the workers' compensation context. "The Workers' Compensation Act (Act) extends only to injuries suffered by an 'employee,' which arise out of and in the course of his 'employment.' ([Lab. Code] §§ 3600, 3700; see Cal. Const., art. XIV, § 4 (former art. XX, § 21).) 'Employee[s]' include most persons 'in the service of an employer under any . . . contract of hire' ([Lab. Code] § 3351), but do not include independent contractors. The Act defines an independent contractor as 'any person who renders 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.' ([Id.] § 3353.)" (*Borello, supra*, 48 Cal.3d at p. 349.)

The court in *Borello* pointed out that the common law distinguished between employees and independent contractors based on an assessment of the extent to which the

hirer had a right to control the details of the service provided. The Workers Compensation Act (the Act) "inserts the common law 'control-of-work' test in the statutory definition." Under the Act and other employee legislation, California decisions "uniformly declare that '[t]he principal test of an employment relationship is whether the person to whom the service is rendered has the right to control the manner and means of accomplishing the result desired.' " (*Borello, supra*, 48 Cal.3d at p. 350.)

However, the *Borello* court also held that "the concept of 'employment' embodied in the Act is not inherently limited by common law principles." (*Borello, supra*, 48 Cal.3d at p. 351.) This is because "[t]he common law and statutory purposes of the distinction between 'employees' and 'independent contractors' are substantially different." The "common law tests were developed to define an employer's liability for injuries caused *by* his employee . . . ." (*Id.* at p. 352.) In determining whether the employer should be vicariously liable for acts of a person it hired, the extent to which it had the right to control the activities performed by that individual was " 'highly relevant.' " (*Id*. at p. 350.) But " 'the basic inquiry in compensation law' " is different. There, the question is " 'which injuries *to* the employee should be insured against by the employer. [Citations.] . . . .' ." (*Id.* at p. 352.)

Thus, in cases involving workers compensation and other remedial legislation, courts have declined to apply the control test "rigidly" or "in isolation." (*Borello, supra*, 48 Cal.3d at p. 350.) Instead, "the 'control-of-work-details' test for determining whether a person rendering service to another is an 'employee' or an excluded 'independent contractor' must be applied with deference to the purposes of the protective legislation. The nature of the work, and the overall arrangement between the parties, must be examined to determine whether they come within the 'history and fundamental purposes' of the statute." (*Id.* at pp. 353–354.) Those purposes are: "(1) to ensure that the cost of industrial injuries will be part of the cost of goods rather than a burden on society[;] (2) to guarantee prompt, limited compensation for an employee's work injuries, regardless of fault, as an inevitable cost of production[;] (3) to spur increased industrial safety[;] and (4) in return, to insulate the employer from tort liability for his employee's injuries.

[Citations.] [¶] The Act intends comprehensive coverage of injuries in employment. It accomplishes this goal by defining 'employment' broadly in terms of 'service to an employer' and by including a general presumption that any person 'in service to another' is a covered 'employee.' " (*Id.* at p. 354.)

While *Borello* acknowledged that even in a workers' compensation case "the right to control work details" is the primary consideration (*Borello, supra,* 48 Cal.3d at p. 350), it recognized that the definition of "employee" in the Act is more expansive than at common law in light of the Act's remedial purpose. (See *Borello,* at p. 354 [The Act "accomplishes this goal [of comprehensive coverage of injuries in employment] by defining 'employment' broadly in terms of 'service to an employer' and by including a general presumption that any person 'in service to another' is a covered 'employee.' "].) In addition to the control test, the court endorsed various " 'secondary' indicia of the nature of a service relationship" that, in addition to the issue of control, may be considered. (*Id*. at pp. 350–351.)

"Thus, we have noted that '[s]trong evidence in support of an employment relationship is the right to discharge at will, without cause. [Citations.]' [Citations.] Additional factors have been derived principally from the Restatement Second of Agency. These 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." (*Borello, supra,* 48 Cal.3d at pp. 350–351; see also *id*. at pp. 354–355 [citing six-factor test developed by other jurisdictions: "the 'right to control the work' "; "the alleged employee's opportunity for profit or loss depending on his managerial skill"; "the alleged employee's investment in

equipment or materials required for his task, or his employment of helpers"; "whether the service rendered requires a special skill"; "the degree of permanence of the working relationship"; and "whether the service rendered is an integral part of the alleged employer's business"].)

In looking at these factors, the *Borello* court admonished that " '[g]enerally, . . . the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations.' " (*Borello, supra*, 48 Cal.3d at p. 351.)

Ultimately, "[t]he determination of employee or independent-contractor status is one of fact if dependent upon the resolution of disputed evidence or inferences, and the [WCAB's] decision must be upheld if substantially supported. [Citation.] If the evidence is undisputed, the question becomes one of law [citation], but deference to the agency's view is appropriate. The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced. [Citations.] The Act must be liberally construed to extend benefits to persons injured in their employment. ([Lab. Code] § 3202.) One seeking to avoid liability has the burden of proving that persons whose services he has retained are independent contractors rather than employees. ([*Id.*] §§ 3357, 5705, subd. (a).)" (*Borello*, *supra*, 48 Cal.3d at p. 349)

B. Lexington's Contentions

Lexington argues that the arbitrator's decision, as adopted by the WCAB, that at the time of injury Sheik was an employee of Trimac is not supported by substantial evidence. More specifically, Lexington argues that the arbitrator relied for evidence of control on facts that "amount to nothing more than [Trimac's] efforts to comply with the law, satisfy its customers and maintain an on-going relationship with independent trucking companies such as Ali's Trucking." Lexington concedes that the arbitrator recognized the rule that " 'where the method of performing a task is dictated by health and safety regulations imposed by the government, the principal is not exercising the manner and means of control as an employer,' " citing *Southwest Research Institute v. Unemployment Institute Appeals Board* (2000) 81 Cal.App.4th 705, 709 (*Southwest*

Research). However, Lexington contends that "notwithstanding this fundamental princip[le], the Arbitrator repeatedly found that Trimac exercised pervasive 'control' over [Sheik], including in specific areas where the evidence showed that the work and training requirements imposed on [Sheik] (either individually or through [Sheik's] employer, Ali's Trucking) merely reflected Trimac's compliance with federal and state regulations."

We note that Lexington made the same argument in its petition for reconsideration, and the arbitrator rejected it, observing: "While Lexington argues that these points merely reflect federal and state mandated requirements, it is my opinion that Trimac goes well beyond that in how it runs its operations." In denying reconsideration and adopting the arbitrator's report, the WCAB agreed, specifically finding "that there is substantial evidence, excluding Trimac's compliance with regulatory requirements, that supports the Arbitrator's decision."

We also note that the arbitrator did not merely recite the rule regarding compliance with regulatory requirements. He declined to rely on any of the following as evidence of control by Trimac: requiring that Sheik take a drug test and have a safe driving record, completing a job application in conformity with Department of Transportation requirements, requiring that Sheik keep a log of his hours, having liability insurance, placing a company logo on a truck, periodically inspecting trucks, administering a basic skills test and monitoring Intaz's or Sheik's compliance with federal and state regulations. He found that such conduct of ensuring compliance with government regulations was evidence of government, not employer, control.

1. *Training*

Lexington contends that the arbitrator improperly relied on the fact that Trimac trained Sheik as evidence of its control (as opposed to merely reflecting government control) because the subjects on which Trimac trained him and other drivers included compliance with various governmental regulations. These arguments understate the evidence regarding Trimac's training regimen and overstate the rule applied in *Southwest Research*.

As the arbitrator found, and the WCAB confirmed, the training Trimac provided went beyond the subjects of federal and state safety requirements. "Trimac had specific requirements as to the manner in which the work was done which was the reason behind its extensive training. It was not enough to simply hire truck driving school graduates. The company wanted work done for it to be consistent with its training." "Trimac trained [Sheik] on exactly how they wanted the job to be done . . . ."

Lexington contends that the arbitrator's report "does not address how training and operation standards of Trimac and their application to [Sheik] reflect anything other than implementation of the substantive regulations imposed on Trimac as an interstate shipper of hazardous appeals." But it was Lexington who had the burden of proof before the arbitrator and the WCAB (Lab. Code § 5705, subd. (a)), and it is Lexington, as the petitioner, who has the burden of persuasion in this court. It was Lexington who was required to prove that federal or state laws required it to train independent drivers like Sheik about compliance with trucking safety standards and that the training it provided focused entirely or predominantly on compliance with such laws. Lexington fails to demonstrate that it made such a showing before the arbitrator and WCAB.

In any event there is substantial evidence, much of which is specifically recounted in the arbitrator's opinions, to support the WCAB's finding that Trimac's training went beyond compliance with government regulations. As Trimac branch manager Thomas Munsey testified, the independent drivers "join our team," by which is meant that "[i]ndependents are trained and oriented to Trimac by Trimac, and the drivers were to work with Trimac 'on a team basis.' " Sheik was required to complete "three to five days of training—both classroom and road testing—conducted by Trimac and complete Trimac written examinations using Trimac tests." In addition to a "federal regulations book and emergency—hazardous materials book," Trimac provided drivers with the Trimac Driving Manual, the Trimac Operating Standards, and the Trimac Security Plan. "[D]rivers were required to adhere to the standards set forth in the Trimac Driving Manual which included extensive instructions regarding Driver's Operating Practices . . . including requirements to report to work on time[,]" "requirements for personal

appearance," and the requirement that a driver "report[] before and after every trip and ' . . . contact [his] dispatch office no less than every 24 hours unless other arrangements have been approved.' " "Section 15.1 [of the Trimac Driving Manual] sets forth detailed Driver Operating Responsibilities evidencing Trimac's control of working conditions, including subsections dealing with reporting to work, leaving the terminal, what to do on the road, and what to do at the end of a trip." "Additionally, Trimac required three weeks of road training which Sheik Ali did with Iftikar Ali plus another three weeks with other drivers. This also included training in off-loading of product [taught by Iftikar at Trimac's direction]." An exhibit entitled "Trimac Training Record" dated June 6, 2006, containing the name Sheik Ali, lists many subjects for which there are citations to federal regulations, but a significant number of others for which there are none. In short, the arbitrator's finding that Trimac trained contract drivers in areas beyond compliance with trucking regulations is supported by substantial evidence.

Moreover, Lexington's arguments interpret *Southwest Research* to mean that no step a trucking company takes vis à vis a driver that enhances the ability of the driver to comply with any law can be considered evidence of control. In its view, because the trucking industry is heavily regulated, every instance of training and every act of supervision is simply part of Trimac's efforts to comply with the law. If this were so, every driver of a commercial truck could be designated an independent contractor no matter how pervasive the company's supervision and control over that driver. Lexington stretches *Southwest Research* too far.

Southwest Research was in the business of testing gasoline for compliance with federal and industry standards and retained Yingst to collect samples of gasoline from service stations and send them to Southwest Research. The very specific methods the company required Yingst to follow for sample collection, packaging and shipping were dictated by government authorities and an industrial standard setting organization, as was the requirement that Southwest provide Yingst training on those methods. The court reversed an administrative decision that held Yingst was an employee, because in finding that Southwest controlled the manner and means of Yingst's work, the tribunal had relied

solely on acts that were dictated by government regulations and industry standards. (*Southwest Research, supra*, 81 Cal.App.4th at pp. 708–709.)

Southwest Research relied on *Empire Star Mines Co. v. California Employment Commission* (1946) 28 Cal.2d 33 (*Empire Star Mines*), overruled on another ground in *People v. Sims* (1982) 32 Cal.3d 468, 479, fn. 8. In *Empire Star Mines*, a mining company had leased portions of a mine containing difficult-to-extract ore to persons particularly skilled who could mine these areas economically. The company paid the lessees on a royalty basis for the ore they extracted, milled and sold. The lease contracts gave each lessee exclusive rights to mine and develop a particular area within the mine for six months. The lessee could terminate on notice, but the company could terminate only for cause. The California Employment Commission held the lessees were employees, but the trial court reversed. It found that "under the lease contract the [lessee] and not the lessor had the right to direct the work in the leased areas, and, as a matter of practice, at all times he was entirely independent from any supervision, direction or control by the mining company of the method, manner or details of the mining operations." (*Empire Star Mines*, at p. 44.) By contrast, the company's employee miners "worked in regular shifts[,] were assigned to their working places by a shift boss and were told what to do, where to drill, just how to drill and frequently were told how much powder to load[,] told what to pick out for waste, what to send to the chute for ore, what chute to use, where to pile the waste, and where to put rock walls." (*Ibid.*) The California Supreme Court affirmed the trial court holding that the lessees were independent contractors. Addressing provisions of the lease agreement that gave the company access to the leased portions of the mine and the right to inspect lessees' operations, the Court held these provisions did not reflect a retention of control. They showed only that the company sought to prevent theft and highgrading of ore and they were required to ensure the lessees complied with safety orders of the Industrial Accident Commission. (*Id*. at p. 45.)

Neither *Southwest Research* nor *Empire Star Mines* held that any acts by a company that facilitates compliance with government regulations can ever be indicia of

control. In both cases, the courts addressed steps taken by a company that were specifically required by government regulations or industry standards. Here, Trimac's decision to train independent drivers like Sheik on all aspects of operating and driving a tractor-trailer, in the same way it trained its employee drivers, facilitated their understanding and presumably their compliance with trucking regulations. But Trimac points to no law that required it to conduct that training itself. It could have required independent contractors such as Ali's Trucking to provide their drivers with training directly or through a third-party vendor. Indeed, the form Lease Agreement Trimac provided purported to require Ali's Trucking to do just that: to "be responsible to direct and control its drivers, . . . including . . . *training*" and to "provide drivers . . . who are qualified under all applicable laws and regulations," including Federal Motor Carrier Safety Regulations. (Italics added.) Lexington fails to explain whether, how and to what extent any law precludes an interstate trucking company from contracting out the training of drivers to the independent contractors who provided those drivers. In other words, it fails to show that adhering to its own contract provisions would have been illegal. Unlike the training Southwest Research required Yingst to undergo, and unlike the inspections Empire Mining undertook, absent some federal or state law requiring Trimac itself to train independent drivers rather than allocate that responsibility to Independent Contractors, its undertaking the training itself is some evidence of control.

In any event, even if we disregarded all aspects of Trimac's training of Sheik relating to federal and state trucking regulations, its training of Sheik on other subjects, including Trimac's own rules and methods, provided some evidence of control. Moreover, as we discuss further below, Trimac's training of independent drivers was one of *many* factors that supported the WCAB's finding that Trimac exercised significant control over Sheik. Lexington's argument that the arbitrator's treatment of training was infected with error thus fails because Lexington has failed to demonstrate that there was no substantial evidence of Trimac's control.

2. *Insurance Procurement*

Lexington similarly argues that Trimac's driver insurance requirements did not reflect employer control because federal regulations require motor carriers such as Trimac to carry sufficient liability insurance for all drivers (employees and contractors) and other regulations permit motor carriers to charge back costs of insurance to independent drivers. Lexington cites the arbitrator's statement that "having liability insurance does not constitute control" and contends that the arbitrator's reliance on the fact that Trimac secured the liability insurance and occupational accident insurance as evidence of control was erroneous. It cites a statute that requires motor carriers to carry sufficient levels of liability insurance and regulations that "authorize motor carriers such as Trimac to charge back the causes of *any* insurance required by the truck leasing agreement to the independent truck drivers." Lexington's argument overlooks that there were multiple types of insurance procured by Trimac and there was no showing that Trimac was required to procure all of them.

The statute and regulation Lexington cites required Trimac to procure a prescribed amount of liability insurance to cover negligence in operation of motor vehicles operated on its behalf, including for leased vehicles. (49 U.S.C. § 13906; 49 C.F.R. § 376.12(j).)[13] As the arbitrator appropriately held, the fact that Trimac had liability insurance is not evidence of control. However, the arbitrator looked at the entirety of Trimac's handling of insurance, and unlike liability insurance, Lexington points to no regulation precluding a trucking company from requiring its independent contractors to procure their own other insurances, such as workers compensation, occupational accident insurance or "bobtail

[13] The cited regulation requires lease agreements to "clearly specify the legal obligation of the authorized carrier to maintain insurance coverage for the protection of the public pursuant to [Federal Motor Carrier Safety Administration] regulations under 49 U.S.C. 13906." It then requires that the lease "specify who is responsible for providing any *other* insurance coverage for the operation of the leased equipment, such as bobtail insurance." (49 C.F.R. §376.12, subd. (j)(1), italics added.) This language suggsests that the carrier itself is required to procure the federally mandated liability coverage but can allocate responsibility for procurement of other types of insurance.

coverage."[14] The regulation Lexington does cite, 49 C.F.R. section 376.12, subd.(j), indicates that motor carriers such as Trimac are permitted to allocate responsibility to independent contractors to procure such coverage. (See footnote 13, *ante*.) And Trimac's form Lease Agreement indeed purports to impose responsibility on the contractors for all insurance except liability insurance.

As the arbitrator found, "in spite of the contract language requiring the independent to procure the insurance[,]" "Trimac does all the work in procuring the insurance and then tells the driver what his rate is." The evidence supports that finding. Trimac procured and charged contractors such as Ali's Trucking not only for workers' compensation insurance, but also for occupational accidental insurance and bobtail insurance. We agree with the arbitrator that Trimac's actions in undertaking to procure and provide all necessary insurance is some evidence of its control "over the details of the working relationships of the parties to the contracts."

3. *Discretion over Routes*

Lexington claims that the arbitrator erred by failing to weigh in favor of independent contractor status the evidence that Sheik "did, in fact, have discretion to choose his own routes and use any applicable shortcuts he deemed fit." It cites cases in which courts have found that a driver determined his own route and concluded there was an independent contractor relationship. Lexington further claims that the fact that Sheik's choice of routes was "constrained by customer delivery requirements" does not indicate control by Trimac but rather indicates control by the end customer. In so arguing, Lexington ignores the evidence contrary to its position.

As the arbitrator found, drivers' ability to choose their own routes was theoretical at best. This is because drivers were provided a prescribed route, the mileage payments were based on those routes, and if a driver deviated from the prescribed route he was

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[14] "Bobtail insurance," which Trimac's Lease Agreement purports to require independent contractors to procure, is "non-trucking insurance for a tractor (cab) without an attached trailer, which is termed a 'bobtail.' " (7 Am.Jur.2d (2015) Automobile Insurance, §263.)

required to report that to Trimac. The delivery time Trimac provided the drivers also affected their ability to choose a route other than that prescribed by Trimac. It is true that the last point, a constraint presumably imposed by customer expectations, does not weigh in favor of control. But the other facts cited by the arbitrator all do. The evidence indicates that taking any route other than that prescribed by Trimac was discouraged by Trimac, and indeed, Intaz testified that drivers were not allowed to deviate from that route. These facts provide additional support for the arbitrator's finding that Trimac exercised control over drivers' working conditions.

4. ***Settlement Payment Practices***

Lexington next takes issue with the arbitrator's "erroneous[] conclu[sion] that the fact that Trimac's [*sic*] would make settlement payments to Intaz on a per load basis after making deductions for expenses borne by Intaz weighed in favor [of] finding that Trimac exercised employer 'control' over [Sheik]." It argues that providing compensation on a "per-load" or "job-by-job basis" reflects a " 'true entrepreneurial opportunity.' " Lexington further argues that the fact that Trimac deducted expenses from the payments should have weighed in favor of finding that there was an independent contractor status because the deductions "reflect[] that the truck owner (and their drivers) are making capital investments in their work by paying costs associated with the acquisition, operation and maintenance of their trucks."

The first problem with Lexington's argument is that it misstates what the arbitrator did. The arbitrator recognized that the fact that a "*Company makes payment by contract price, lump sum, specific fee, or percentage commission*," which "[wa]s the case here," was a "[f]actor[] tending to prove independent contractor" status. As the arbitrator explained: "The question of Sheik Ali's employee status is complicated by the separation between Sheik Ali and Trimac particularly in that all payments made to Sheik Ali were by Ali's Trucking which was solely responsible for setting his compensation. Trimac had nothing to do with what compensation Ali's Trucking paid Sheik Ali. Its sole payment was to Ali's Trucking, and that payment was based primarily on miles driven." Thus, contrary to Lexington's argument, the arbitrator *did* treat the facts that Trimac paid Ali's

Trucking a lump sum and did not pay Sheik as weighing in favor of independent contractor status. He simply concluded that these and other factors that weighed in favor of independent contractor status were not enough to overcome factors weighing the other way. The arbitrator's report reflects appropriate consideration of this factor.

Moreover, Lexington's heavy emphasis on this factor as demonstrating "entrepreneurial opportunity" and "capital investments" is not merited in regard to Sheik. It may be true that Trimac's per-load practice and requirement that independents cover their own expenses reflected an investment and opportunity for Intaz and Ali's Trucking. But as Sheik points out, it is not true for him: "Sheik did not own or provide a truck to Trimac; he simply drove like a Trimac company-driver. Sheik had no opportunity for profit or loss; he simply picked up, transported and delivered a product for Trimac, at Trimac's direction, and was paid for that work and by the job, just as someone hired to work on a piecemeal basis." The investment and opportunity, if any, resulting from Trimac's deduction of expenses from the settlement check it provided were those of Ali's Trucking or Intaz, not of Sheik.[15]

Further, the arbitrator found significant, as do we, that, apart from the truck itself, all or virtually all of the expenses ultimately incurred by Ali's Trucking, such as fuel, truck repairs and insurance, were advanced by Trimac, either by the drivers' use of a Trimac credit card and/or Trimac-authorized fuel or repair businesses, or by Trimac's actual procurement of group insurance. Not only did Trimac advance these costs to independent contractors like Ali's Trucking, avoiding their need to "invest" in their businesses up front, Trimac also kept track of the expenses and deducted them from the settlement payments. In this and other respects, Trimac took care of independent contractors' book and record keeping, which "is yet another indicator of its control over the entire operation."

[15] Intaz testified he paid a portion of revenues to Sheik but the expenses Trimac deducted came out of Intaz's portion. Sheik made no investment. Nor did he have any "entrepreneurial" opportunity; he could not increase his earnings by saving on expenses.

Last, Lexington argues that because "federal trucking regulations expressly authorize the general industry practice of motor carriers taking specified deductions from settlement payments made to owner/operators in conformity with written lease requirements," Trimac's "routine of following these common industry practices . . . was not evidence of employer 'control.' " As discussed above, insofar as Lexington suggests that any action by a carrier that trucking regulations permit cannot be considered evidence of control is not supported by the California case law. Those cases indicate only that a putative employer's compliance with federal or state regulatory mandates cannot be considered evidence of control. They do not hold that any action by a putative employer that is permitted by such laws cannot be considered evidence of control.

In short, we reject Lexington's argument that the arbitrator's treatment of the facts regarding how Trimac paid Ali's Trucking was erroneous.

5. *Sheik's Work as Distinct or Integral to Trimac's Business*

Lexington argues that the arbitrator "erroneously conflated separate *Borello* factors of whether the worker performed services in a 'distinct occupation or an independently established business' with the issue of whether the worker's services were 'integral' to the hirer's primary business." Lexington argues the arbitrator "ignored the evidence that [Sheik] acted as an independent contractor engaged in the distinct occupation of interstate commercial truck driving" and "failed to appreciate that independent contract drivers such as [Sheik] are necessarily and inherently 'integral' to the business of a shipping company such as Trimac." Lexington cites *State Compensation Insurance Fund v. Brown* (1995) 32 Cal.App.4th 188 (*Brown*) and other cases, which it views as establishing that truck driving constitutes a "distinct occupation"—one of the factors identified in *Borello* as weighing in favor of independent contractor status.

In so arguing, it is Lexington who errs and in two respects. First, it ignores our high court's admonition in *Borello* that the secondary factors considered in distinguishing employees from independent contractors " 'cannot be applied mechanically as separate tests; they are *intertwined* and their weight depends often on particular combinations.' "

(*Borello, supra*, 48 Cal.3d 341, 350–351, italics added.) Second, it suggests that interstate truck drivers are necessarily "engaged in a distinct occupation or business," which is not supported by *Brown*.

Here, the arbitrator appropriately addressed whether Sheik was "engaged in a distinct occupation or business" in conjunction with "whether or not the work [he did was] a part of the regular business of [Trimac]." (See *Borello, supra*, 48 Cal.3d at p. 351.) The word "distinct" as used in the phrase "engaged in a distinct occupation or business" raises the question: distinct from what or whom? The arbitrator understood that factor to mean an occupation or business distinct from the principal's. In other words, the arbitrator logically interpreted that *Borello* factor as the inverse of the "regular business of the principal" factor—that is, as indicating that the service provider's occupation or business is distinct from the regular occupation or business of the principal. Understood in that way, these two factors represent opposite ends of a continuum. Whether and to what degree the occupation or business of the service provider (here Sheik) is distinct from the occupation or business of the hirer (here Trimac), or, on the other hand, indistinct and therefore a part of the employer's regular business, are intertwined.

Lexington suggests that "interstate commercial truck driving" is necessarily and always a "distinct occupation" that must weigh in favor of independent contractor status because it requires special skills that set it apart from unskilled laborers. It relies on language in *Brown*. But *Brown* does not support this broad proposition. It is true that the *Brown* court found that the truckers there were engaged in a distinct occupation and that they arguably were not integral to the business of the principal, which was a broker of hauling services: "The independents are engaged in a distinct occupation, one with its own trade association. It is customary for brokers to hire independents rather than have driver employees. The independents work for brokers other than the defendants. The independents make the capital investment in their trucks, which is a substantial investment beyond the provision of their labor. The contracts are indefinite, which gives the relationship the permanence associated with employment. However, the work is

performed and compensated on a job-by-job basis, with no obligation on the part of the independents to accept any assignment and no retribution by MVT for refusing assignments. Depending on how one defines MVT's 'business,' the work performed by the independents can either be considered an integral part of providing transportation services, or it could be considered a tangential aspect of the provision of brokering services; this is consequently not a strong factor either way. There is true entrepreneurial opportunity depending on how well the independents perform their transportation services; this is not mere 'piece work.' Finally, the parties expressly and voluntarily agreed to independent contractor status." (*Brown, supra*, 32 Cal.App.4th at p. 203.)

In finding the truckers were engaged in a "distinct occupation" the *Brown* court did not focus on truck drivers' special skills.[16] Moreover, as the above excerpt makes clear, the court's determination was fact-bound; it was not (as Lexington implies) the pronouncement of a per se rule meant to govern all truck drivers regardless of circumstances. (See *JKH Enterprises, Inc. v. Department of Industrial Relations* (2006) 142 Cal.App.4th 1046, 1066 (*JKH Enterprises*) [holding truck drivers for courier service business were employees, distinguishing *Brown* because totality of circumstances that led to ruling in that case were different from facts in *JKH*].) In *Brown*, the principal, MVT, was a " 'broker' in 'transporting intermodal freight,' in which trucks are directed to customer pick-up and drop-off locations." (*Brown, supra*, 32 Cal.App.4th at p. 195.) It had once owned trucks and used employee drivers, but it had since sold all its trucks and contracted with independent owner-operator truckers (referred to as "independents"). As the court there noted, "[i]n only one instance did a former employee buy a truck from

[16] In its separate discussion of the right of control, in which it distinguished the farm laborers found to be employees in *Borello*, the *Brown* court pointed out that "truck driving—while perhaps not a skilled craft—requires abilities beyond those possessed by a general laborer (or, indeed, possessors of ordinary driver's licenses), and the manner in which the services are provided require a greater exercise of the driver's discretion than the near-ministerial tasks of watering, weeding, and picking." (*Brown, supra*, 32 Cal.App.4th at pp. 202–203.) The skill required comprises a different *Borello* factor, however, as indicated at page 19, *ante*.

MVT (at full market price) and thereafter provide trucking services pursuant to contract." (*Ibid*.) The independents with whom MVT worked were "an organized segment within the trucking industry, who ha[d] their own industry trade group." (*Ibid.*) They did not market their services directly to businesses, but instead worked through brokers like MVT. They "were free to accept or reject any particular job," and MVT did not require them to take any minimum number of jobs. (*Id.* at p. 196.) Further, "they could (and did) work for competing brokers." (*Ibid.*) The independents were "in business for themselves, and assumed all the costs of their own operations, including fuel, maintenance, insurance, and payroll taxes." (*Ibid*.)

Here, as the arbitrator found, the facts are different in significant respects. Trimac was not a broker; it was a hauler in the business of transporting liquid latex by truck. It maintained its own fleet of trucks, and employed company drivers. There was no evidence that the independents who worked with it, much less their employees, were "an organized segment within the trucking industry" or "had their own industry trade group." They did not work for a broker or multiple companies but instead, like Trimac employee drivers, worked exclusively for Trimac. Nor did the evidence indicate drivers like Sheik could reject any job or that Trimac did not expect them to work any minimum number of jobs. On the contrary, the evidence, including the requirement that they contact Trimac within 24 hours of completing each job, demonstrated that Trimac expected the drivers to work continuously for Trimac. Unlike in *Brown*, Trimac exercised significant supervision and control over how the work was performed by its "independent" drivers. And while the independent owner/operators like Intaz (but not drivers like Sheik) ultimately were responsible for their own costs, Trimac fronted those costs and gave them access to its group insurance and its pre-approved vendors for gasoline and repair services. The evidence here was far less supportive than the evidence in *Brown* of a

finding that the independents or those who drove their trucks were engaged in a distinct occupation or business.[17]

The same facts and others support the arbitrator's finding that the work performed by drivers like Sheik was an integral part of Trimac's business. The "independent" drivers were hired directly by Trimac; they were trained in the same way Trimac's employee drivers were trained; they were provided the same Trimac manuals as Trimac provided its employees and were expected to follow the same rules; they were required to follow the same dispatch procedures and performed the same work as Trimac's employee drivers. Except for the truck, Trimac provided them with all necessary equipment, including tools, safety equipment and hoses. They were all a part of the same "Trimac team." And Trimac could fire them just as it could fire its employee drivers. To say, in these circumstances, that drivers like Sheik were engaged in a distinct business or occupation or that they were not an integral part of Trimac's business is simply untenable. The arbitrator's findings on these factors, and his determination that the findings weigh in favor of employee status, are supported by substantial evidence.

Lexington argues that the "integral-to-the-principal's business" factor should be discounted in cases involving transportation and delivery companies, because it is common in those industries to use independent contractors and weighing this factor in favor of employee status will prevent them from doing so. We do not agree. Lexington cites two federal cases. One merely recognizes that no one factor is determinative and that one or more factors weighing in favor of employee status can be outweighed by factors pointing in the other direction. (See *FedEx Home Delivery v. NLRB* (D.C. Cir. 2009) 563 F.3d 492, 502 [that work was " 'regular and essential part of Fed Ex Home's normal operations, the delivery of packages' " is "a legitimate consideration, [but was] not determinative in the face of more compelling countervailing factors"].) The other—*Sahinovic v. Consolidated Delivery & Logistics, Inc.* (N.D. Cal. Sept. 16, 2004, No. C 02-

[17] Of course, we need not and do not address here whether Intaz or Ali's Trucking was an employee or independent contractor, which poses a different question than that posed by Sheik.

4966) 2004 U.S. Dist. LEXIS 31197 at p. *22—which recognizes that transport and delivery company drivers, even when integral to business, have been found to be independent contractors—is in that respect unremarkable. To the extent it holds that the fact that drivers are integral to a company's business weighs in favor of *independent contractor* status, it conflicts with *Borello*, which binds us and holds that the "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; see also *JKH Enterprises*, *supra*, 142 Cal.App.4th at pp. 1062, 1064; *Yellow Cab Cooperative, Inc. v. Workers' Comp. Appeals Bd.* (1991) 226 Cal.App.3d 1288, 1300; *Magic Warehouse & Delivery v. Workers' Comp. Appeals Bd.* (2013) 78 Cal. Comp. Cases 798, 800–802 [driver for trucking company held to be employee based on *Borello* factors, including that his driving work was an integral part of defendant's moving and transportation business].) Under California law, the integral-to-the-principal's business factor weighs in favor of finding an employment relationship, though it is part of a multi-factor test and is not alone determinative.

6. *Public Policy Arguments*

The final section of Lexington's brief is headed as follows: "The Arbitrator's Public Policy Arguments Adopted By The WCAB Do Not Take Into Account The Legal And Practical Realities Of Trucking Industry [*sic*]." The argument contained in this section is difficult to decipher, since the arbitrator did not base his decision on any "public policy arguments." Lexington, however, made "policy" arguments in its initial petition. It argued there (and continues to argue here) that "the Arbitrator's decision threatens to significantly impact the inter-state trucking industry in general in which, consistent with existing California precedent and federal regulations, numerous nationwide trucking companies routinely use independent contractor truck drivers who are commonly considered to be part of a distinct, recognized profession requiring specialized skills, licensure from a state and who are subject to numerous local, state and federal regulatory requirements." It is not a "policy argument" of the arbitrator, but

rather the arbitrator's response to *Lexington's* "policy argument" that Lexington now complains about.

In response to Lexington's argument that the arbitrator's decision, if upheld, could have a "widespread impact . . . on the trucking industry," the arbitrator made two basic points. The first is that there are cases (which the arbitrator cited in his initial opinion) in which "trucking businesses have been successful in setting up arrangements with drivers where the drivers do qualify as independent contractors" and cases in which courts have found drivers to be employees. (See generally Annot., Teamster or Truckman as Independent Contractor or Employee Under Workmen's Compensation Acts (1939) 120 A.L.R 1031 (2015 supp.) [cataloguing cases applying control test and other factors to truck drivers].) As the arbitrator noted, "[p]resumably those decisions finding employee status for truckers have not fundamentally changed the trucking business, or the companies have found ways to either modify their businesses or insure against potential liability." The arbitrator's second point of response was that if Ali's Trucking had obtained workers' compensation insurance for Ali, which Trimac could have obtained for all drivers (instead of the occupational accident insurance coverage that Trimac instead obtained on Ali's Trucking's behalf), this would have avoided the problem here and the need for litigation. It is this second point that Lexington characterizes as the arbitrator's "policy argument."

Lexington complains that "by requiring that Ali's Trucking procure worker's compensation insurance," the arbitrator's decision "would serve as a disincentive to companies such as Ali's Trucking" to "in turn, subcontract out work to other independent contract drivers such as [Sheik]." This is because, according to Lexington, companies like Ali's Trucking who employ other drivers would incur the higher costs of workers' compensation coverage and be at a disadvantage as compared with "individual, independent contract drivers who could either go without coverage or procure lower-cost occupational accident coverage." Companies like Trimac would also be at a disadvantage, according to Lexington, because they would be less attractive to companies like Ali's Trucking who were desirous of expanding their operations. Finally, citing

Albillo v. Intermodal Container Services, Inc. (2003) 114 Cal.App.4th 190, 205–207, Lexington contends that requiring companies like Ali's Trucking to obtain workers' compensation coverage would "violate 'Labor Code section 3715's prohibition on requiring workers to pay for their own workers' compensation insurance.' "

The problem with Lexington's argument is that its premises are false. Its contention that the arbitrator's decision will discourage transportation companies from using independent contractors, discourage independent contractors from hiring additional drivers or force transportation companies to incur the cost of workers' compensation insurance for their independent contractor drivers is false for the simple reason that the arbitrator did not hold that *all* transportation companies who use independent contractor-drivers are necessarily employers either of those contractor-drivers or of the drivers the contractors employ. What the arbitrator did hold was that a transportation company which exercises extensive control over its contractor's driver, at every point from selection, hiring, training, to dispatch, route, arrival time, unloading and return, and requires an exclusive relationship with the contractor and its driver, must obtain workers' compensation insurance for that driver because it has assumed the relationship of employer-employee with that driver. Nothing in the arbitrator's decision prevents such a company from engaging in a genuine independent contractor relationship where it retains a contractor to provide transportation services and exercises more limited control over the contractor and its drivers' activities.

Lexington's second premise—that requiring companies like Ali's Trucking to obtain workers' compensation coverage would "violate Labor Code section 3715"—likewise fails. It is true that the arbitrator suggested that Trimac could retain its existing business model, entailing substantial control over drivers like Sheik, if it required the independent contractors who hire them to provide them with workers' compensation coverage. The *Albillo* case, which prevented a company from charging a driver for his *own* workers' compensation coverage, did not address whether a company like Trimac could charge an independent company like Ali's Trucking for workers' compensation insurance for Ali's Trucking's employees. In any event, the arbitrator's decision does not

force Trimac to require its contractors to procure workers' compensation insurance, even for their drivers. Only if Trimac engages in the kind of relationship with drivers that bears the essential characteristics of an employment relationship must it ensure that its drivers have workers' compensation coverage. The cost of such insurance may well be more than the cost of occupational accident coverage, but it is a cost borne by all businesses who employ people in California, and one the Legislature long ago determined was fair to both employees and employers.

DISPOSITION

Ultimately, Lexington's arguments must fail because it has fallen short of demonstrating either that the arbitrator's decision, as adopted by the WCAB, is unsupported by substantial evidence or that, as a matter of law, all commercial truck drivers whom a transportation company designates as "independent contractors" are necessarily so. "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.) Thus, while the contract Sheik signed designated him as an independent contractor of Ali's Trucking, and the contract Ali's Trucking signed designated it as an independent contractor of Trimac, these labels are evidence of such relationships, but not dispositive. The evidence of independent contractor status might be stronger if Trimac, its contractors and their drivers had actually operated in a manner consistent with the terms of these contracts, but in many significant respects they did not. While the fact that they deviated from these agreements is not necessarily significant, what is significant is that the deviations entail conduct that has a direct bearing on the nature of their relationships.

The arbitrator did a thorough job of canvassing the evidence and sizing up the situation, faithfully adhering to the analysis prescribed by *Borello*. That evidence demonstrated substantial, if not pervasive, control by Trimac over not only its own operations but the operations carried out on its behalf by all those who drove for it, whether designated employees or independent contractors. Trimac selected Sheik, hired him, trained him, supervised him, monitored his comings and goings, provided his safety equipment, dispatched his jobs, investigated the accident that led to his injury and treated

him in almost every respect the same as one of its employee drivers. It, not Ali's Trucking or Intaz, maintained all records relating to Sheik's work. It even procured the insurance that purportedly covered him, though not the workers' compensation insurance that should have been obtained for that purpose. As the evidence showed, it could have fired him had he performed in an unsatisfactory manner. All of this evidence supported the arbitrator's determination that Sheik was Trimac's employee for purposes of workers' compensation.

To be sure, and as the arbitrator acknowledged, there was some evidence that weighed in favor of a contrary determination, a determination that Sheik was an independent contractor. This included the agreements he and Intaz signed, the fact that at most times Sheik believed he was an independent contractor, that he believed he could decline a job had he chosen to do so, and that Trimac did not pay Sheik directly or control how he was paid by Intaz. The arbitrator concluded, however, that these factors were significantly outweighed by the factors pointing toward an employer-employee relationship, and we fully agree with that conclusion.

We therefore hold that Lexington has failed to demonstrate that Sheik was an independent contractor excluded from coverage under the Act. Accordingly, the Petition for Writ of Review is denied, and we remand this case to the WCAB for further proceedings consisting with this decision.

STEWART, J.

We concur.

RICHMAN, Acting P.J.

MILLER, J.