LABOR COMMISSIONER, STATE OF CALIFORNIA **Department of Industrial Relations** **Division of Labor Standards Enforcement** **411 East Canon Perdido Street, Room 3** **Santa Barbara, CA 93101** **Tel: (805) 568-1222 Fax: (805) 568-1569**	For Court Use Only:
Plaintiff: Steven Maynard	Court Number
Defendant: H.F. Cox Inc. dba Cox Petroleum Transport	
State Case Number **13 - 46266 554**	**ORDER, DECISION OR AWARD OF THE LABOR COMMISSIONER**

1. The above-entitled matter came on for hearing before the Labor Commissioner of the State of California as follows:

DATE: March 14, 2013 ☐ **CONTINUED TO:**

CITY: 411 East Canon Perdido Street, Room 3, Santa Barbara, CA

2. IT IS ORDERED THAT: **Plaintiff recover from Defendant.**

$	0.00	for wages **(with lawful deductions)**
$	0.00	for liquidated damages pursuant to Labor Code Section 1194.2
$	118,043.82	Reimbursable business expenses
$	34,734.04	for interest pursuant to Labor Code Section(s) 98.1(c), 1194.2 and/or 2802(b),
$	0.00	for additional wages accrued pursuant to Labor Code Section 203 as a penalty *and that same shall not be subject to payroll or other deductions.*
$	0.00	for penalties pursuant to Labor Code Section 203.1 which *shall not be subject to payroll or other deductions.*
$	0.00	other (specify):
$	**152,777.86**	**TOTAL AMOUNT OF AWARD**

3. The herein Order, Decision or Award is based upon the Findings of Fact, Legal Analysis and Conclusions attached hereto and incorporated herein by reference.

4. The parties herein are notified and advised that this Order, Decision or Award of the Labor Commissioner shall become final and enforceable as a judgment in a court of law unless either or both parties exercise their right to appeal to the appropriate court* within ten (10) days of service of this document. Service of this document can be accomplished either by first class mail or by personal delivery and is effective upon mailing or at the time of personal delivery. If service on the parties is made by mail, the ten (10) day appeal period shall be extended by five (5) days. For parties served outside of California, the period of extension is longer (See Code of Civil Procedure Section 1013). In case of appeal, the necessary filing fee must be paid by the appellant and appellant must, immediately upon filing an appeal with the appropriate court, serve a copy of the appeal request upon the Labor Commissioner. If an appeal is filed by a corporation, a non-lawyer agent of the corporation may file the Notice of Appeal with the appropriate court, but the corporation must be represented in any subsequent trial by an attorney, licensed to practice in the State of California. Labor Code Section 98.2(c) provides that if the party seeking review by filing an appeal to the court is unsuccessful in such appeal, the court shall determine the costs and reasonable attorney's fees incurred by the other party to the appeal and assess such amount as a cost upon the party filing the appeal. An employee is successful if the court awards an amount greater than zero.

PLEASE TAKE NOTICE: Labor Code Section 98.2(b) requires that as a condition to filing an appeal of an Order, Decision or Award of the Labor Commissioner, the employer shall first post a bond or undertaking with the court in the amount of the ODA; and the employer shall provide written notice to the other parties and the Labor Commissioner of the posting of the undertaking. Labor Code Section 98.2(b) also requires the undertaking contain other specific conditions for distribution under the bond. While this claim is before the Labor Commissioner, you are required to notify the Labor Commissioner *in writing* of any changes in your business or personal address within 10 days after any change occurs.

* Santa Barbara County Superior Court
1100 Anacapa Street, 2nd Floor
Santa Barbara, CA 93101

LABOR COMMISSIONER, STATE OF CALIFORNIA

BY: _____
Joni D. Kellermann HEARING OFFICER

DATED: September 30, 2013

BEFORE THE LABOR COMMISSIONER

OF THE STATE OF CALIFORNIA

STEVEN MAYNARD, Plaintiff Vs. H.F.COX INC. Dba: COX PETROLEUM TRANSPORT, Defendant	Case No. 13-46266 ORDER, DECISION, OR AWARD OF THE LABOR COMMISSIONER

BACKGROUND

The Plaintiff filed an initial claim with the Labor Commissioner's office on July 1, 2011. In that Complaint, the Plaintiff alleged that he is due the following:

1. $118,043.82 in unpaid business expenses from 7/1/09 to 10/22/10.
2. Interest pursuant to Labor Code § 2802.

A hearing was conducted in Santa Barbara, California, on March 14, 2013, before the undersigned-hearing officer designated by the Labor Commissioner to hear this matter. The Plaintiff appeared and was represented by Brian Hefelfinger (Hefelfinger), Attorney at Law. Daniel Mairs (Mairs), President, and Christopher C. McNatt, (McNatt), Attorney at Law represented the Defendant. Tom Davis (Davis), safety supervisor, appeared as a witness on behalf of the Defendant. Due consideration having been given to the testimony, documentary evidence, and arguments presented, the Labor Commissioner hereby adopts the following Order, Decision or Award.

FINDINGS OF FACT

The Plaintiff was employed by the Defendant to perform personal services as a truck driver, for the period from 1995 to October 22, 2010, in the County of Ventura, California, under the terms of a written agreement at the ending rate of 75% of the load.

The Plaintiff testified that, he began working for the Defendant as an employee in 1995 at its Ventura terminal. He was paid on an hourly basis and received a payroll check

with deduction statement. In 2002, he quit his employment, but returned to work for the Defendant in 2006. He continued to work for the Defendant until his employment was terminated on October 22, 2010.

The Plaintiff testified that, in July of 2009 the Defendant closed its Ventura, California terminal, after which, he was presented with an independent contractor agreement (Agreement). Under the Agreement, he was to receive 75% of the gross proceeds the Defendant received from the hauling and delivery of petroleum products. He leased a semi-tractor owned by the Defendant, which displayed the Defendant's logo. The Defendant provided the trailer tanks that he pulled. He was required to work six (6) days on and two (2) days off. The Defendant scheduled the pickup and delivery of his loads and gave him the preferred routes to use. If he changed the route, he had to notify the Defendant's dispatcher. The Defendant instructed him how to deliver the load and installed tracking equipment in the semi-tractor. All of the licenses required for the semi-tractor were in the Defendant's name as was the pre-pass authorization for the truck scales. He was not allowed to have a passenger and could not assign or delegate the delivery of the loads unless pre-approved by the Defendant. He was not allowed to pull any load for another company; if he did so, his lease would be broken.

The Plaintiff further testified that, every thirty (30) days, an inspection was required by law. The inspection was performed through the Defendant. If there were any required repairs the work had to be performed by the Defendant's mechanics at the Defendant's set rates, or he had to get approval from the Defendant to use an outside vendor. He purchased fuel directly from the Defendant or from one (1) of the Defendant's pre-approved fuel stations. All fuel and repair costs were deducted from his pay. The Defendant also deducted insurance costs, including liability insurance for the semi-tractor and his portion of the Defendant's workers' compensation insurance. He paid for parking rent when he was not using the semi-tractor. The Defendant also deducted a percentage of his pay in "escrow" for unexpected costs related to the semi-tractor.

The Plaintiff explained that, his duties remained the same when he was changed from an hourly employee to an independent contractor. He still had to ask the driver supervisor for approval before he could have any time off. All of the customers were the Defendant's customers. He did not bill customers or collect payments from customers.

The Plaintiff alleged that he is due reimbursement of $118,043.82 in business expenses as shown in his exhibit "A".

Under cross-examination by McNatt, the Plaintiff testified that prior to 2009 he was paid at the rate of $22.00 per hour. He was offered a position to work for the Defendant in Van Nuys, California but rejected the offer due to the commute. He signed an equipment lease for the Defendant's semi-tractor on July 27, 2009. He reviewed the Agreement, which was explained by Mairs. Under the Agreement, he worked the same hours. As an employee, he did not reject any load, but after July 29, 2009, he rejected a load once or twice, but did the delivery anyway. since he was told, "I need you to do the load". His truck routes were designated, but he did not know if the routes were mandated by the California Highway Patrol. The pre-pass was a benefit, but he was not given an option to use it or not. The Defendant provided him with training for the handling of petroleum at refineries. The on board computer in the semi-tractor let the Defendant know when the load was delivered. He did not ask to come back as an employee after signing the Agreement. The Defendant required him to get a fictitious business name statement.

Davis testified that, he was the Defendant's terminal manager from November of 2005 to 2010. His duties were to supervise drivers and scheduling. He oversaw the dispatchers who assigned the employee drivers. The independent contractors called in before the shift to see if work was available. The independent drivers could refuse loads without disciplinary action. Independent drivers were required to follow through with the load as dispatched. The routes were not determined by the Defendant, but some customers had specific routes. The Defendant held the motor carrier permits. The

Defendant terminated the Plaintiff's Agreement for multiple issues regarding customer rules.

Under cross-examination by Hefelfinger, Davis testified that once a load is accepted, the loads are run identically by employees or independent drivers. The Plaintiff was issued company uniforms with the Defendant's logo since the customers required it. All drivers use the Defendant's communication system and until very recently, the independent drivers operated under the Defendant's permits.

Mairs testified that the Plaintiff did not want to transfer to Van Nuys when the Ventura terminal closed. The Plaintiff asked him for help and he explained to the Plaintiff that his only option was to lease a truck from the Defendant and to become an independent contractor. He told the Plaintiff that he needed to obtain a fictitious business name statement. As an independent contractor, the Plaintiff received 75% of the revenue. The Defendant has maintenance requirements and the independent contractor could use the Defendant's mechanics or use a pre-approved state certified repair station. Independent contractors do not have to get insurance through the Defendant. The Defendant did not require the Plaintiff to use the pre-pass. Because the Plaintiff was benefiting from the revenue the truck made, he had to pay for the permit and registration fees. The policy on truck logos has changed. Currently the independent contractor's name is listed under the authority of Cox Transport.

Under cross-examination by Hefelfinger, Mairs testified that the leased semi-tractor was insured under the Defendant's insurance. The Plaintiff's hours of service were maxed[1] so the Plaintiff did not, and could not, work for others.

In closing, McNatt argued that the Plaintiff made a conscious decision to be an independent contractor and knew the difference between an employee and an independent contractor. Financially, the Plaintiff made more money as an independent

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[1] Department of Transportation (DOT) regulations.

contractor. The Plaintiff controlled to manner and means to operate the truck. Should it be determined that the Plaintiff was an employee, the relationship should be unwound.

Hefelfinger argued that the Defendant failed to meet its burden in proving the Plaintiff was an independent contractor.

Hearing briefs and documentary evidence were submitted by both parties in support of their respective positions.

LEGAL ANALYSIS

In the instant matter, the Defendant argued that the Plaintiff was an independent contractor, and that as an independent contractor, the Division of Labor Standards Enforcement was the improper venue for resolution of the Plaintiff claims.

If found to be an independent contractor, the Labor Commissioner would have no authority to make a decision on the merits of the Plaintiff's complaint as the Labor Commissioner can only intercede on complaints arising from an employment relationship. In determining whether an individual providing service to another is an employee or an Independent contractor, there is no single determinative factor. However the party seeking to avoid liability has the burden of proving that those persons whose services they have retained are independent contractors rather then employees. In other words there is a presumption of employment (California Labor Code § 3357.)

The existence of a written agreement purporting to establish an independent contractor relationship is not determinative. "The label placed by the parties on their relationship is not dispositive, and subterfuge will not be countenanced." (48 Cal.3d at p. 349) The Labor Commissioner and the courts will look behind any such agreement in order to examine the facts that characterize the parties' actual relationship. The facts of each service relationship require examination, and the "multi-factor" or economic realities" test adopted by the California Supreme Court in *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal.3d 341 must be applied to assist in arriving at a

decision. "The modern tendency is to find employment when the work being done is an integral part of the business of the employer, and when the worker, relative to the employer, does not furnish an independent business or service." (48 Cal.3d at p. 357).

Prior to Borello, the leading case on this subject *was Tieberg v. Unemployment Insurance Appeals Bd.* (1970) 2 Cal.3d 943, which held that that "the principle 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." While the right to control the work remains a significant factor, the Borello court identified the following additional factors, which must be considered:

1. Whether the person performing services is engaged in an occupation or business, distinct from that of the principal;
2. Whether or not the work is a part of the regular business of the principal;
3. Whether the principle or the worker supplies the instrumentalities, tools, and the place for the person doing the work;
4. The alleged employee's investment in the equipment or materials required by his task;
5. The skill required in the particular occupation;
6. 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;
7. The alleged employee's opportunity for profit or loss depending on his managerial skills;
8. The length of time for which the services are to be performed;
9. The degree of permanence of the working relationship;
10. The method of payment whether by time or by the job;
11. Whether or not the parties believe they are creating an employer-employee relationship.

Given the above court decisions and the facts presented in this dispute, it is determined that the Plaintiff was an employee of the Defendant for the following reasons:

a. The Plaintiff was not engaged in a separate business distinct from that of the Defendant;
b. The work performed by the Plaintiff was an integral part of the Defendant's business;
c. Without demeaning either party, the type of work done by the Plaintiff was not so skilled that the Defendant had to exert direct and constant control over the details of his performance;
d. There was no showing by the Defendant that the Plaintiff established his own route, rather his route was determined by the Defendant or the customer;
e. The Defendant offered no proof that the Plaintiff had any opportunity for profit or loss other than working additional hours;
f. The work was ongoing and permanent in nature.

Furthermore, a careful review of the requirements placed on the Plaintiff under the independent contractor agreement established that the Defendant retained pervasive control over the Plaintiff during the claim period.

Therefore, the Labor Commissioner finds that the Plaintiff was an employee and asserts the right to decide the merits of the Plaintiff's claim.

Labor Code § 2802 requires an employee to indemnify his or her employee for all necessary expenditures of losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful.

The Labor Commissioner finds that the testimony and evidence provided by the Plaintiff was credible and reasonable.

Therefore, the Plaintiff is entitled to recover $118,043.82 in reimbursable business expenses.

In that the Plaintiff's award is for due and owing expenses, the Plaintiff is entitled to receive interest on the award.

CONCLUSION

For all of the reasons set forth above, IT IS HEREBY ORDERED that the Plaintiff, is entitled to recover from the Defendant:

1. $118,043.82 in reimbursable business expenses.
2. $34,734.04 in interest.

Dated: September 30, 2013

Joni D. Kellermann, Hearing Officer

INFORMATION ABOUT HOW YOUR CASE WILL HANDLED AFTER THE HEARING

Either party may file an appeal for a trial de novo (new trial) within 15 calendar days from the date of mailing by this office of the Order, Decision or Award. The date of mailing appears on the enclosed certification of mailing.

You will be notified by mail if the defendant (your former employer) files an appeal. You will also be sent the appropriate forms for you to request representation by our attorneys.

If the defendant does not appeal the decision, the full amount shown on the decision is due an payable to the Labor Commissioner's office within 15 calendar days from the date that the decision is mailed by this office.

If your former employer neither pays nor appeals the decision, a judgment will be filed on your behalf with the appropriate court. It currently takes about 30 days for the judgment to be filed. **You will be notified when this occurs.**

Once a judgment is filed, you will be sent some forms inquiring whether you know if any liquid assets (such as bank accounts, accounts receivables) are available, or if the defendant owns any real property, and whether you wish for this office to attempt collection of your judgment for you. Your other alternative is to take your judgment to the Court, obtain a writ of execution and bring the writ to the Sheriff or marshall to execute on any assets that you have located.

PLEASE DO NOT CONTACT THIS OFFICE TO DETERMINE WHETHER PAYMENT HAS BEEN RECEIVED OR FOR A STATUS REPORT ON YOUR CASE. IF PAYMENT IS RECEIVED, YOU WILL BE ISSUED A CHECK AS PROMPTLY AS POSSIBLE. IF PAYMENT HAS NOT BEEN RECEIVED, APPROPIATE ACTION WILL BE TAKEN AND YOU WILL BE NOTIFIED.

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INFORMACION SOBRE EL PROCESO DE SU CASO DESPUES DE LA AUDIENCIA

Cada parte titular de la acción puede pedir un nuevo juicio en menos de 15 dias naturales de la fecha que su Orden, Decisión y Laudo fue enviada de esta oficina. La fecha de envío de correo se encuentra en la forma de certificado adjunta a la decisión.

Usted será notificado por correo si la parte demandada (su patrón anterior) archiva una apelación. Usted tambien recibirá formas a llenar para pedir representación de abogado.

Si su patrón no apela la decisión, la cantidad bruta debe de ser pagada a la oficina de Comisionado donde su caso fue archivado en menos de 15 dias de la fecha que la decisión fue enviada por correo.

Si su patrón no paga y no apela la decisión, un dictamen será archivado en su nombre con la corte del condado correspondiente. En estos momentos nos esta tomando aproximadamente 30 dias para archivar el dictamen. **Usted será notificado cuando ésto se lleve a cabo.**

Tan pronto como el dictamen esté registrado, le enviaremos formas a llenar, preguntando si usted sabe donde su patrón tiene cuenta de banco, personas o compañías que tienen cuentas a pagar a su patrón, bienes raíces, etc. Tan pronto localice estos bienes, haga el favor de notificar a nuestra oficina para tratar de colectar la cantidad del fallo. Otra alternativa es recibir el dictamen de la corte y de obtener un mandamiento de ejecución y llevarlo al sheriff o marshall para que colecte los bienes que usted ha localizado.

FAVOR DE NO LLAMAR A ESTA OFICINA PARA AVERIGUAR SE EL PAGO HA LLEGADO O PARA AVERIGUAR LO QUE ESTA PASANDO CON SU CASO. SI RECIBIMOS EL PAGO, LE MANDAREMOS SU CHEQUE TAN PRONTO COMO SEA POSIBLE. SI SU PAGO NO SE RECIBE, LLEVAREMOS A CABO LA ACCION PROPIA A LA SITUACION Y USTED SERA NOTIFICADO.

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT

CERTIFICATION OF SERVICE BY MAIL
(C.C.P. 1013A) OR CERTIFIED MAIL

I, Maryrose Breault, do hereby certify that I am a resident of or employed in the County of Santa Barbara, over 18 years of age, not a party to the within action, and that I am employed at and my business address is:

LABOR COMMISSIONER, STATE OF CALIFORNIA
411 East Canon Perdido Street, Room 3
Santa Barbara, CA 93101
Tel: (805) 568-1222 Fax: (805) 568-1569

I am readily familiar with the business practice of my place of business for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

On October 3, 2013 at my place of business, a copy of the following document(s):

Order, Decision or Award

was(were) placed for deposit in the United States Postal Service in a sealed envelope, by first class mail, with postage fully prepaid, addressed to:

NOTICE TO: Michael Strauss
Palay Law Firm
121 N. Fir Street, Suite F
Ventura, CA 93001

and that envelope was placed for collection and mailing on that date following ordinary business practices.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on: October 3, 2013 at Santa Barbara, California

STATE CASE NUMBER: 13-46266 554

Maryrose Breault
Maryrose Breault