Filed 8/31/18 Herrera v. Cal. Unemployment Ins. Appeals Board CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JOSE E. BUSCARON HERRERA, Petitioner and Appellant, v. CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD, Respondent.	B276008 (Los Angeles County Super. Ct. No. BS157015)

APPEAL from an order of the Superior Court of Los Angeles County, Mary Strobel, Judge. Affirmed.

Jose Buscaron Herrera, in pro. per., for Petitioner and Appellant.

Xavier Becerra, Attorney General, Julie Weng-Gutierrez, Assistant Attorney General, Leslie P. McElroy and Cristina M. Matsushima Deputy Attorneys General, for Respondent.

INTRODUCTION

Jose Buscaron Herrera was discharged from his job as a delivery driver with Datalok Co. after the company claimed he was intoxicated while at work. Herrera filed a claim for unemployment insurance benefits. The Employment Development Department (EDD) denied the claim, finding that Herrera was terminated for misconduct and therefore ineligible for benefits. Herrera appealed that determination to the California Unemployment Insurance Appeals Board (CUIAB). Following an administrative hearing, the administrative law judge (ALJ) affirmed the EDD's determination. Herrera appealed to the CUIAB panel; the CUIAB affirmed that decision and rejected Herrera's claims that the ALJ was biased against him and the hearing was unfair. Herrera then filed a petition for writ of mandate in the superior court. The court conducted an independent review of the administrative proceedings and concluded that the ALJ's determination was supported by the evidence and that the proceedings were conducted fairly.

Herrera, proceeding in propria persona as he has throughout the case, now appeals from the denial of his writ petition. Once again, he contends that the evidence does not support the conclusion that he was discharged for intoxication; he also asserts that the administrative and superior court proceedings were unfair. We have reviewed the entire record and conclude that substantial evidence supports the trial court's decision denying the petition. Therefore, we affirm.

FACTUAL AND PROCEDURAL HISTORY

A. *Termination and application for unemployment benefits*

Herrera was employed by Datalok as a delivery driver between August 2012 and May 2014. On May 14, 2014, he was terminated when Datalok claimed he was intoxicated at work. That day, Datalok gave Herrera a dismissal notice stating that he was "tested for blood alcohol level and it was twice the legal limit while driving." Herrera signed the notice indicating he agreed with that statement and understood it.

Herrera filed a claim for unemployment insurance benefits with the EDD on May 25, 2014, listing the following reasons for separation: "company transitioning - is being sold; many workers let go. Unsatisfactory work performance." Datalok told the EDD that Herrera was terminated for being intoxicated and testing positive for alcohol at twice the legal limit. The EDD completed a telephonic claim status interview with Herrera on June 12, 2014, documented in a claim form. During this interview, Herrera initially said he was terminated because of a customer complaint about poor work performance. The EDD representative advised Herrera of Datalok's statement and Herrera "denied [the] accusation." The EDD representative then advised Herrera that Datalok had submitted the written termination notice and the alcohol breath test results, both of which Herrera had signed. Herrera "became angry and stated it was his signature on both doc[uments.]" Herrera was asked why he said he was terminated for work performance when he had "in fact signed a dismissal notification stating [the] reason for termination was due to intoxication." Herrera "stated ok and then hung up."

The EDD issued a determination on June 20, 2014, finding that Herrera was not eligible to receive unemployment benefits under Unemployment Insurance Code section 1256.[1] The decision noted that Herrera had been "discharged from your last job with Datalok Co. because you tested positive to a drug test required by the employer." Thus, "after considering the available information," the EDD concluded that Herrera was disqualified from receiving benefits under section 1256 because he had been discharged for misconduct.[2] In its notice of determination sent to Datalok, the EDD reported that Herrera's claim had been denied. The notice also stated, "the Department finds that the incident leading to the claimant's discharge was not caused by a compulsive use of drugs or alcohol. Therefore the claimant is not disqualified under section 1256.4."[3]

B. ***Administrative hearing and determination***

Herrera filed an administrative appeal of the EDD's determination with the CUIAB. He stated that he disagreed with the EDD's decision for three reasons: (1) he did not understand what he was signing because it was in English and he only speaks Spanish; (2) he signed "under intimidation, pressure and

---

[1] All further statutory references herein are to the Unemployment Insurance Code unless otherwise indicated.

[2] Section 1256 provides, in pertinent part: "An individual is disqualified for unemployment compensation benefits if . . . he or she has been discharged for misconduct connected with his or her most recent work."

[3] Under section 1256.4, subdivision (a)(1), an individual is disqualified for benefits if he or she was discharged for, among other things, "reporting to work while intoxicated or using intoxicants on the job," if such incident was "caused by an irresistible compulsion to use or consume intoxicants."

under coercion"; and (3) he was not given the opportunity to seek legal advice. Herrera did not specify which document(s) he was referring to or when he was denied legal advice. In its notice setting the appeal hearing, the CUIAB notified Herrera that he would be provided with a Spanish language interpreter and that he should "[b]ring all documents and witnesses necessary to support your case. **Evidence is rarely accepted after the hearing** [emphasis in original]."

Herrera submitted an application for a subpoena and request for production of documents, addressed to Lynn Hoshizaki, a Datalok employee. According to a notation in the file, that request was denied without prejudice by an ALJ on August 12, 2014.

After several continuances, the hearing proceeded before an ALJ over the course of two days in October 2014. Herrera was assisted by a certified Spanish language interpreter throughout the hearing. At the beginning of the hearing on October 15, 2014, the ALJ explained to the parties the difference between disqualification for benefits under sections 1256 and 1256.4. Specifically, he noted that under section 1256.4 there are two methods to obtain reinstatement of benefits—resuming employment and earning a specified amount, or entering into a treatment program—while under section 1256 only the former option is available. (Compare section 1256.4, subd. (b) with section 1260). Next, the ALJ detailed the issues to be decided and described the process for the hearing. After confirming that Herrera had an opportunity to look over the proposed exhibits prior to the hearing, he admitted exhibits 1 through 42 into evidence.

Datalok presented four of its employees as witnesses at the hearing. Each witness testified in response to questions posed by the ALJ. At the conclusion of that testimony, the ALJ asked both parties whether they had questions of that witness. Herrera declined each time and did not ask any questions of Datalok's witnesses. He also raised no objections to any witness testimony during the hearing.

Lynn Hoshizaki, a Datalok administrative manager, testified first. She confirmed Herrera had been employed as a driver, transporting boxes and files to and from customers. On May 14, 2014, she received a phone call from a customer around 11:00 a.m., who said her co-worker had smelled alcohol on the delivery driver's breath. At the ALJ's request, Hoshizaki identified the name of the company and also the individual caller by her initials.

Hoshizaki told Silverio Alonso, Herrera's supervisor, to take Herrera to US Healthworks, a company Datalok used for drug and alcohol testing. There, Herrera was given two breath tests: one at 12:15 showed an alcohol level of .212, and one at 12:32 showed a level of .196. Once she received the test results and Herrera returned to the office, Hoshizaki told Herrera to wait. Hoshizaki called office manager Georgina Anaya in the corporate office and sent her the test results; Anaya then provided those results to Tak Nakamura, Datalok's president. After reviewing the test results, Nakamura told Anaya and Hoshizaki (who was on the phone) to terminate Herrera. Hoshizaki testified that she wanted to keep Herrera at work for a little while that afternoon to reduce his alcohol level, so she and Alonso told Herrera to take his lunch break.

On the second day of the hearing, October 29, 2014, Datalok presented witnesses Nakamura, Alonso, and Anaya. Alonso testified that on the day of the incident, Hoshizaki called him into her office and told him a customer had reported that Herrera "smelled like strong alcohol on his breath." They decided to take Herrera to have an alcohol test. Herrera returned from making deliveries around 11:30 a.m. Alonso testified that he noticed Herrera had a red face and "was trying to keep his distance from me." Alonso also noticed "a faint smell of alcohol" on Herrera's breath.

Alonso drove Herrera in a company van to the testing site at U.S. Healthworks. While they were in the van together, Alonso noticed that Herrera, who "is usually very talkative," was "very quiet." He told Herrera Datalok had received a customer complaint and he was going to be tested for alcohol. In response, Herrera mentioned that he had been drinking the night before, and asked if that would affect the test. Alonso also mentioned that Herrera sometimes used a prescription mouthwash and that it could "possibly" have been the mouthwash that he smelled on Herrera.

Alonso noted that Herrera's face stayed red until they returned from the test site, which was unusual. Upon further questioning on this topic, Alonso stated that Herrera might otherwise have a red face if he was doing a lot of work outside unloading boxes, but not on a normal delivery day like that day. When they got back to the office, Alonso brought the test results to Hoshizaki. Afterward, she told him they needed to write a letter informing Herrera that "he was being terminated for being intoxicated at work." Alonso gave this letter to Herrera. He also orally translated the letter into Spanish for Herrera. According

to Alonso, Herrera was "apologetic" and said he "understood why he was being let go," although he also denied consuming alcohol at work.

Herrera started to leave and Alonso told him he could not let him drive. Herrera denied that he was intoxicated. Alonso offered to drive him home, but Herrera refused and started to get upset. Alonso and Hoshizaki then wrote a second letter stating that they had offered to drive Herrera home, he refused, and "he was just going to go home at his own risk." The letter stated that Herrera acknowledged he had been terminated, was offered a ride home, and refused. Herrera signed the letter and left. In later testimony, Herrera stated he did not understand the document when he signed it because it was in English.

Nakamura testified in response to Herrera's claim that Datalok was being sold and other workers had been let go. Nakamura stated that at the time Herrera was fired, Datalok was in negotiations for the sale of the business, but no offers had been made. The potential sale did not play any role in the decision to terminate Herrera. Datalok was not reducing its workforce; in fact, the company still needed drivers and it took a lot of time to train them. Nakamura also testified that no other workers were let go around that time period; about three or four employees left individually for other jobs. Nakamura also stated that he found the breath test results for Herrera "pretty shocking" when he received them.

Anaya testified that Hoshizaki called her on the day of the incident and related the customer complaint received about Herrera. Anaya approved the plan to have Herrera tested for intoxication. Later that day, she received the test results from Hoshizaki. Anaya gave the results to Nakamura and he decided

to terminate Herrera. She also noted that Herrera consistently missed work. Alonso confirmed that Herrera had attendance problems, including regularly failing to either call or show up to work, and had received several warnings. Datalok also produced multiple warning forms documenting missed days of work.

Herrera testified on his own behalf. He denied using his mouthwash that day. When asked to explain the test results, Herrera said that "with that amount of alcohol I would not be able to perform my job." He did not deny submitting to breath tests on that date, but suggested that the results were wrong, and that the listed levels were "what they put." He also pointed to the negative urine test as evidence contradicting the breath test results. However, Alonso testified that the urine test was testing for drugs, not alcohol. Herrera denied telling Alonso that he had been drinking the night before. He initially stated, "I don't drink." Subsequently, he testified, "I am not going to say that I don't drink. I drink like everybody, but not the way they state it here."

Herrera also admitted he knew he was being terminated because the company thought he was intoxicated at work. When asked why he put other reasons on his EDD claim form, he said it was "what I felt." The ALJ asked Herrera why he wrote that other workers were let go when he knew that was not the truth. Herrera responded that his English was not good, but then testified that his uncle filled out the EDD form for him, and that his uncle speaks and writes fluently in Spanish and English. When the ALJ asked whether Herrera had explained the reason for his termination to his uncle in Spanish, Herrera responded that "maybe [my uncle] does not understand." At the conclusion

of his testimony, the ALJ twice asked Herrera whether he wanted to add anything else.

On or about October 21, 2014, between the first and second day of hearings, Herrera submitted a second application for subpoena of witnesses and request to produce documents. This subpoena was again denied without prejudice and without further explanation. However, it appears that Datalok produced documents in response to a request for production from Herrera. Herrera acknowledged receipt of those documents, as exhibits A through J, on the record at the start of the second day of the hearing. He did not raise any objection.

One of the documents produced by Datalok was its written policy forbidding any employee from being under the influence of alcohol while on Datalok premises or performing Datalok business. In addition, "employees whose positions with Datalok require driving as a part of their work may be removed from such positions if found to have been driving under the influence of alcohol whether on or off duty." The policy also states that if there are reasonable grounds for suspecting a violation of the policy, Datalok "has the right to require testing at Datalok's expense." Herrera signed an acknowledgment of this policy in November 2012.

The ALJ issued a written decision on October 31, 2014. He found that Herrera established good cause for his delay in filing his appeal.[4] He also found that Herrera "knew that he was reporting false facts and withholding important facts when he submitted" his unemployment insurance claim to the EDD. The

---

[4] Herrera filed his appeal late. When the ALJ asked him about this at the hearing, Herrera said he had to find someone to translate it after he received it in the mail.

ALJ noted Herrera's claim that his uncle had possibly misunderstood when he helped Herrera prepare the form, but found that Herrera's statement to the EDD was inaccurate in two respects: first, it suggested the discharge was part of a larger layoff; and second, it failed to disclose the employer's stated reason for the discharge--suspicion that Herrera was intoxicated at work. The ALJ concluded that Herrera's "purported explanation is improbable," and that Herrera "willfully gave the department a false explanation for his separation and that he also withheld important facts." Herrera's "failure to act honestly in reporting the real circumstances of his discharge to the department renders his testimony much less credible than it would otherwise be."

Next, the ALJ recounted the conflicting testimony from Alonso and Herrera regarding Herrera's purported admission that he had been drinking the night before the incident. The ALJ found Alonso's testimony more credible. He also considered Herrera's argument that the high levels of blood alcohol indicated by the test called the results into question, as Herrera could not have carried out his duties at that degree of intoxication. The ALJ found this argument unpersuasive. First, "even if it is assumed that the test results are improbably high, that does not mean that the positive test results are totally non-probative in detecting significant amounts of alcohol" in Herrera's system, as corroborated by witness testimony. Second, the test results were "not on their face incompatible with [Herrera's] activities that day," as he could have been drinking gradually throughout his shift, or could have a high tolerance for alcohol.

The ALJ concluded he was "persuaded by the evidence that on May 14, 2014, [Herrera] was working and did drive the

company vehicle while under the influence of alcohol." The ALJ found that the company had an express policy prohibiting employees from being under the influence of alcohol while performing company business; further, even if it did not have such an express policy, "such a prohibition was implied from the employment itself." Herrera "willfully violated that prohibition in a manner that clearly endangered the employer's interests. Therefore, the claimant was discharged for misconduct" and was disqualified from benefits under section 1256.

C. *Appeal to CUIAB Panel*

Herrera appealed the decision to the appellate panel of the CUIAB, alleging "biased performance" by the ALJ. He also requested that the panel consider "new evidence" including an "investigation into policy and procedure for breath test [*sic*] performed by the Company's drug testing clinic."

Herrera presented the declaration of Teresa Curry, dated November 13, 2014, as evidence to the CUIAB. He did not explain who she was or why this information could not have been presented during the administrative hearing. In her declaration, Curry stated that she spoke by phone on November 12, 2014 with a diagnostic supervisor at US Healthworks. Curry stated that she discussed "the procedure and policy of alcohol breath test[s]" taken by US Healthworks. According to Curry, the supervisor stated that an alcohol test result of .212 meant the "Collector was to show to in-house Doctor [*sic*] for review." Curry also stated that she spoke to the person who performed the test on Herrera, who confirmed that an alcohol test was requested by Datalok. He told Curry there was no bill for the breath test because it "was processed by another department."

The CUIAB panel issued its decision in January 2015. The board said, "we have carefully and independently reviewed the record in this case, and have considered the contentions" raised by Herrera on appeal. The board concluded there were "no material errors" in the ALJ's decision. The findings of the ALJ were not contrary to the evidence, nor did the board find support in the record for Herrera's claim of bias against him by the ALJ. The board therefore concluded that Herrera had "a fair hearing" and affirmed the decision of the ALJ.

D. ***Writ petition***

Herrera filed a petition for writ of mandate in Los Angeles Superior Court on July 30, 2015. He alleged that on May 14, 2014 he was "notified by his employer that his services were terminated and told to sign separation documents." He further alleged that in affirming the EDD's decision, the ALJ "abused his discretion and acted in excess of his jurisdiction in concluding that [Herrera] was discharged for misconduct in connection with his most recent work." Specifically, the decision was "contrary to the weight of the evidence that [Herrera] had a pristine work record prior to a wrongful termination." In affirming the ALJ's determination, the CUIAB panel "abused its discretion and acted in excess of its jurisdiction in the same manner as did the administrative law judge."

In his accompanying memorandum of points and authorities, Herrera argued that the ALJ was "biased" against him by: (1) "disbelieving [Herrera's] version and accepting [the] sole conclusion of [Datalok]; (2) "disallowing" Herrera's "right" to call witnesses and produce evidence; and (3) "badger[ing]" Herrera during the hearing "with accusations of giving 'improbable' explanations." He further contended that the

CUIAB failed to read the transcript of the hearing, while claiming it had. Herrera also argued that the ALJ improperly dismissed his attempts to subpoena the complaining witness and that the breath test was unreliable as the collector had failed to follow company protocol. Herrera attached copies of the EDD determination and the ALJ's decision as exhibits to his petition.

The trial court set a briefing schedule and directed Herrera to lodge the administrative record. In his opening brief, Herrera again accused the ALJ and the CUIAB of "blatantly acting biased" by agreeing with his employer and failing to require production of an "independent witness." He also contended, incorrectly, that the EDD had determined he was ineligible based on an "uncontrollable use of drugs or alcohol" but that the ALJ had rejected that finding and instead found he was disqualified under section 1256. He stated that the ALJ was "motivated by his personal feelings of disdain" for Herrera. In addition, Herrera complained that the Spanish interpreter who assisted him during the administrative hearing was inadequate.

Herrera attached his own declaration and two exhibits to his opening memorandum of points and authorities. In his declaration, Herrera stated that he had received commendations for his performance as a delivery driver; he also claimed that he had heard Datalok was intending to sell the company and noticed employees leaving around the time he was terminated. In addition, he discussed his use of prescription mouthwash (although he did not claim to have used it that day), reiterated that he was told to sign documents he did not understand, and acknowledged that he had been "subjected to breath and urine tests." Herrera also attached two exhibits: a prescription for oral rinse, and an email he claimed was a rejection of his second

subpoena and request for production of documents. The email, dated October 21, 2014, reflects an exchange between the ALJ who conducted Herrera's administrative hearing and another individual at the CUIAB. In the email, the CUIAB member noted that Herrera "appeared in the lobby" seeking to file a subpoena and request for production of documents, set two. The ALJ responded, noting that the prior subpoena was denied without prejudice and there was no follow-up in the file. A handwritten note at the bottom of the page, also dated October 21, 2014, indicated that Herrera left without speaking to the ALJ; further, the "request to produce/subpoena duces tecum application is denied without prejudice." Respondent CUIAB filed an opposition and Herrera filed a reply.

The court held a hearing on the writ petition on May 10, 2016. At the start of the hearing, the court issued a tentative decision denying the writ of mandate. Herrera argued that because there was no bill for the breath tests, they were invalid, and that he did not get the chance to speak during the administrative proceedings or to prove that Datalok's claim that he was intoxicated "was a lie." The court responded that it had "paid careful attention to the fact that the hearing examiner ask[ed] you several times whether you had any questions for the witnesses or there was anything you wanted to say, but you didn't provide any defense . . . other than your arguments that you didn't believe the levels could have been as high as the test showed. . . . But I think you were given the chance to address the hearing examiner and to tell him anything else you wanted him to consider in making his decision." The court then asked whether Herrera had anything to add. Herrera responded that

"it's a lie" and repeated his argument that he could not have worked that day with alcohol levels that high.

The court took the matter under submission. The court treated Herrera's inclusion of a declaration and two exhibits with his opening brief as a motion to augment the administrative record. The court denied this motion, finding Herrera had not shown that this evidence could not have been produced in the administrative proceedings or was improperly excluded therefrom.

In a twenty-page written decision, the court denied the petition. It primarily relied on the transcript of the administrative hearing and the decisions issued by the ALJ and the CUIAB.[5] The court summarized the evidence presented in the administrative hearing. Examining that evidence de novo, the court concluded that the weight of the evidence supported the conclusion of the ALJ and CUIAB that Herrera was disqualified from benefits under section 1256. The evidence showed that Herrera violated Datalok's policy by working under the influence of alcohol. The court also found that the ALJ's determination that Herrera was not a credible witness was supported by the evidence, citing his contradictory testimony at the hearing and his failure to credibly explain why he included false information on his claim form.

---

[5] These documents were submitted prior to the hearing. Herrera did not lodge the administrative record with the court until after the hearing on his writ petition. However, the court indicated it reviewed the administrative record and that "nothing about the untimely lodged administrative record changes the court's decision." Moreover, the court cited to the administrative record in its decision.

The court also rejected Herrera's arguments that he was not given a fair hearing. The court found Herrera had not shown that the ALJ abused his discretion by denying Herrera's original subpoena. Herrera also did not identify any relevant documents he requested that were not produced at the administrative hearing. In addition, the court noted that Herrera had the opportunity to cross-examine Hoshizaki, who received the original customer complaint, and that the initiating complaint "was not the primary basis for Petitioner's termination," as there was significant corroborating evidence from the observations of Herrera by Datalok employees and the breath test results. The court also found that Herrera's briefing took "several comments by the ALJ out of context" to suggest bias in favor of Datalok. The court concluded that Herrera was given a fair hearing, as he was given the opportunity to examine every witness and present testimony and the ALJ thoroughly considered his arguments. Finally, the court rejected Herrera's objection regarding the Spanish interpreter as unsupported by the evidence; Herrera also failed to raise this objection during the administrative hearing.

The court entered judgment in favor of CUIAB on June 7, 2016. Herrera timely appealed.

DISCUSSION

A. *Legal standard*

In reviewing a decision of the CUIAB, "the superior court exercises its independent judgment on the evidentiary record of the administrative proceedings and inquires whether the findings of the administrative agency are supported by the weight of the evidence." (*Lozano v. Unemployment Ins. Appeals Bd.* (1982) 130 Cal.App.3d 749, 754 (*Lozano*), citing Code Civ. Proc., § 1094.5, subds. (b), (c); *Lacy v. Unemployment Ins. Appeals Bd.* (1971) 17

Cal.App.3d 1128, 1132 (*Lacy*).) "In exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence." (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817.)

Our review on appeal of the trial court's judgment is "confined to an inquiry as to whether the findings and judgment of the trial court are supported by substantial, credible and competent evidence." (*Lozano, supra*, 130 Cal.App.3d at p. 754; see also *Fukuda v. City of Angels, supra*, 20 Cal.4th at p. 824 ["the standard of review on appeal of the trial court's determination is the substantial evidence test"].) Evidentiary and discovery rulings are reviewed for abuse of discretion. (*Natkin v. Unemployment Ins. Appeals Bd*. (2013) 219 Cal.App.4th 997, 1002.)

B. *Analysis*

Herrera argues that the court's determination was unsupported by the evidence and that both the administrative and superior court proceedings were procedurally unfair. We examine each contention in turn.

1. *Determination that Herrera was discharged for misconduct*

The trial court conducted an independent review of the administrative record and concluded that the weight of the evidence supported the findings by the ALJ and CUIAB that Herrera was disqualified from benefits under section 1256 because he was discharged from Datalok for misconduct. We find substantial evidence supports the trial court's conclusion.

As our Supreme Court has explained, "[t]he fundamental purpose of California's Unemployment Insurance Code is to reduce the hardship of unemployment by 'providing benefits for persons unemployed through no fault of their own.' [Citations.] In light of this purpose, "'fault is the basic element to be considered'" when 'interpreting and applying' the provisions of the code." (*Paratransit, Inc. v. Unemployment Ins. Appeals Bd.* (2014) 59 Cal.4th 551, 558 (*Paratransit*).)

Under section 1256, an individual is ineligible for unemployment compensation benefits upon a finding that "he or she has been discharged for misconduct connected with his or her most recent work." "Misconduct" under this section is defined as "'conduct evincing such wilful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, ... [but not] mere inefficiency, unsatisfactory conduct ... inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion." (*Paratransit, supra*, 59 Cal.4th at pp. 558-559, quoting *Amador v. Unemployment Ins. Appeals Bd.* (1984) 35 Cal.3d 671, 678.)

Here, Herrera acknowledges that being intoxicated at work would constitute misconduct within the meaning of section 1256. Moreover, Datalok had an express policy prohibiting intoxication or consumption of alcohol while on company premises or conducting company business. There appears to be no dispute that performing work as a delivery driver while intoxicated would demonstrate a deliberate violation of the employer's reasonable

standards of behavior, thus triggering disqualification under section 1256.

Instead, Herrera argues that the evidence did not support a finding that he was indeed intoxicated on the day he was terminated. We disagree. The trial court pointed to multiple pieces of evidence demonstrating intoxication. Several Datalok employees consistently testified regarding the events leading up to Herrera's termination. After a customer called to complain that Herrera smelled of alcohol, Herrera's supervisor and company administrators decided to send him to be tested. His supervisor, Alonso, testified that he faintly smelled alcohol on Herrera, Herrera's face was unusually red, he kept his distance, and he seemed unusually quiet on the trip to the testing facility. Alonso also testified that Herrera admitted drinking alcohol the night before and wondered if that would affect the test. Further, an independent testing facility administered two breathalyzer tests; the results of both tests indicated Herrera's blood alcohol content was more than twice the legal limit to drive a vehicle. (See Veh. Code § 23152, subd. (b).)

Although Herrera challenges the reliability of the testimony from these witnesses because they are Datalok employees, the ALJ found them credible and we see nothing in the record to undermine that conclusion. Moreover, their testimony was supported by the breath test results. Conversely, the ALJ found Herrera was not credible and the trial court agreed. Substantial evidence supports this conclusion as well. Herrera gave contradictory testimony about whether he ever drank and whether he knew at the time why he was being terminated. He claimed in his application and interview with the EDD that he was discharged for poor performance and failed to

mention the allegation of intoxication. When confronted with the termination notice and breath test results bearing his signature, and when questioned by the ALJ, he claimed he did not understand the forms or that his uncle did not understand them when assisting him with the EDD application. Both the ALJ and the superior court found this explanation lacked credibility and that the evidence supported the conclusion that Herrera willfully submitted false information regarding his termination to the EDD. Herrera contends that the discussion of his statements on his EDD application focused on an issue irrelevant to whether he was terminated for misconduct. To the contrary, as the ALJ and superior court noted, evidence suggesting that he knew the reason given by Datalok for his termination but gave a different explanation to the EDD is relevant to his overall credibility. As a result, the ALJ and trial court were well within their discretion to discount Herrera's testimony that he did not drink the night before or the day of the incident and that he did not understand the statements by Datalok explaining why he was being fired.

Herrera also challenges the reliability of the breath test results, arguing that no bill for the test was produced and that the test was improperly performed. As an initial matter, these arguments were not raised before the ALJ, nor did Herrera seek to introduce the evidence on which he now relies, including the declaration of Theresa Curry regarding purported testing policies. Herrera has not shown that this evidence could not have been produced or was improperly excluded from the administrative hearing. Thus, we need not consider it. (See Code Civ. Proc. § 1094.5, subd. (e); *Pomona Valley Hosp. Med. Ctr. v. Superior Court* (1997) 55 Cal.App.4th 93, 100.) Further, even if we did consider Herrera's arguments on this point, they would

not lead us to conclude that the tests were fake or unreliable as he claims. The presence in the record of a bill by US Healthworks for the urine test and the absence of a corresponding bill for the breath tests does not, alone, suggest that the breath tests were invalid. Herrera admits that he submitted to the breath tests at US Healthworks on the day of the incident. The two tests were administered at least 15 minutes apart, as Herrera suggests is required. The official results from US Healthworks were signed by the collector and by Herrera and transmitted to Datalok. As such, there is no evidence to establish that the test results were rejected by US Healthworks as flawed or otherwise invalid. Herrera's bald assertion that he could not have performed his duties with such a high blood alcohol content—an argument that the ALJ expressly considered—is insufficient to challenge the test results.

Moreover, we are not persuaded by the other evidence Herrera contends undermines the court's conclusions regarding his intoxication. First, he points to his prescription mouthwash and Alonso's acknowledgement that it could have accounted for the alcohol smell. However, this ignores Herrera's own testimony that he did not use the mouthwash on the day of the incident. Second, Herrera argues that his red face could have resulted from being outside working on a hot day. He suggests that the ALJ ignored this possibility during the hearing. In fact, the ALJ questioned Alonso at length regarding his perception that Herrera was red-faced, querying whether it could have been the result of being outside or exertion from deliveries. Alonso explained that it was unusual given the nature of the work Herrera had performed that day and noted that Herrera's face

remained red even after riding in the van, getting the alcohol and drug tests, and returning to work.

Finally, we note that Herrera appears to confuse the distinct findings related to section 1256 and 1256.4. As detailed herein, the EDD found that Herrera was terminated for misconduct because he was intoxicated at work, and that misconduct disqualified him from benefits under section 1256. On the other hand, the EDD concluded there was no evidence to support a finding that Herrera's intoxication was caused by an irresistible urge to consume alcohol; thus, he was *not* disqualified under section 1256.4. Both conclusions were affirmed by the ALJ and the CUIAB. As such, Herrera's suggestion that the ALJ and CUIAB rejected any finding of intoxication, relying instead on a "vague disqualification under section 1256," is belied by the record.

In sum, substantial evidence supports the trial court's determination that Herrera was intoxicated at work, was terminated on that basis, and was therefore disqualified from receiving unemployment compensation benefits under section 1256.

2. *Fairness of procedures*

Herrera also argues that the proceedings before the CUIAB and the trial court were unfair and the hearing officers were biased against him. In essence, Herrera accuses every opposing party and determining body of bias against him and a conspiracy to deny his unemployment insurance benefits, including Datalok and all of its employees, the alcohol testing facility and the individual test collector, the EDD, the ALJ, the Spanish translator(s), the reviewing CUIAB board members, the Attorney General's office acting as counsel for CUIAB, and the superior

court. We have found no evidence in the record to support Herrera's due process claims. Moreover, substantial evidence supports the trial court's finding that Herrera was provided a fair hearing.

The primary instance of an unfair proceeding, Herrera argues, was the ALJ's denial of both of his requests for subpoenas. As a result, he was not allowed to present and question the "key" witness, the original complaining customer (or, as he suggests, prove that the customer did not complain). Herrera's claim of inequity fails for several reasons. First, as noted by the trial court, the subpoenas were denied in both instances without prejudice, but Herrera did not raise the issue during the hearing with the ALJ or seek to resubmit the subpoena. As such, Herrera was not barred from introducing testimony from this, or any other, witness. Second, both subpoenas were addressed to Datalok, rather than the company that employed the complaining caller. Herrera has not shown how the denial of the subpoenas was an abuse of discretion, and we find none. Third, Herrera had the opportunity to question the Datalok witnesses about the phone call and related details regarding their investigation, but he declined to do so. Finally, even assuming Herrera could have undercut the testimony of this caller if given the chance, it would not change the other substantial evidence of intoxication. Nor does Herrera establish that any other evidence was improperly excluded. He acknowledged that he received the documents Datalok produced in response to his request for production, and he has not identified any responsive documents that were omitted.

Herrera also claims that the ALJ's conduct during the hearing demonstrated bias in favor of Datalok and against

Herrera; he suggests the ALJ "belittled" Herrera through his questioning and practically engaged in "coaching" of Datalok's witnesses. The trial court found no evidence to support these accusations and noted that Herrera took several statements by the ALJ out of context to suggest improper conduct where there was none. We agree. Throughout the hearing, the ALJ explained the process, confirmed that Herrera understood, and asked whether he had objections to evidence or questions for the witnesses. Indeed, where it appeared Herrera did not understand a question, the ALJ would rephrase or repeat the question to confirm Herrera's response. As the trial court noted, the ALJ gave Herrera the opportunity to cross-examine each witness, to present testimony to support his case, and to add to his testimony after a brief cross-examination by Datalok. (See *Burrell v. City of Los Angeles* (1989) 209 Cal.App.3d 568, 581-582 [bias and prejudice cannot be "implied and must be established by clear averments"].) We also reject Herrera's contention that the Spanish language interpreter used by the ALJ was substandard or somehow biased. There is no evidence in the record to support this contention. Moreover, Herrera failed to raise any objection to the interpreter during the administrative proceeding.

On appeal, Herrera also raises procedural arguments regarding the trial court's handling of his writ petition. He argues that the trial court improperly conducted a "flash trial" and did not give him adequate time to prepare or to present his evidence. As the trial court explained, its review of an administrative proceeding on a writ petition is limited to the record of the administrative proceedings, unless the petitioner can demonstrate why new evidence could not have been

presented or was improperly excluded from the administrative hearing. (*Pomona Valley, supra*, 55 Cal.App.4th at p. 101.) Herrera has made no such showing. Moreover, the trial court held a hearing in which it explained the procedure and allowed Herrera time to argue his case. The court's thorough opinion also supports its claim that it reviewed the entire record and carefully considered Herrera's arguments. We therefore find that Herrera was given a fair hearing on his writ petition as well as in the administrative proceedings.[6]

DISPOSITION

Affirmed. Parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

MANELLA, P. J.

*MICON, J.

---

[6] We reject Herrera's claim that the trial court engaged in an improper ex parte communication with counsel for CUIAB. There is no evidence of such communication in the record.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.