

STATE OF MAINE
WORKERS' COMPENSATION BOARD
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(for the Employee)

(for the Employer)

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Within 5 days after issuing this decision, the hearing officer may request that the full Worker's Compensation Board review the decision. *See* 39-A M.R.S.A §320.

Within 20 days after receiving this decision a party may file a motion asking the Board to find further facts and make further conclusions of law and file the appropriate decision if it differs from the original decision; within 15 days after filing the motion, the party shall file its proposed findings of fact and conclusions of law pursuant to §318 of the Act. WCB R.Ch. 12 §5.

Any party in interest may request an appeal to the Maine Law Court by filing a copy of this decision with the clerk of the Law Court within 20 (twenty) days of receipt of this decision, and by filing a petition seeking appellate review with the Law Court within 20 days thereafter. See 39-A M.R.S.A. §322.

PAUL SPESCHA
(Employee)
v.
NORTH AMERICAN VAN LINES, INC.
(Employer)
and
LIBERTY MUTUAL INSURANCE
(Insurer)

Pending before the Board is the Employee's PETITION FOR AWARD filed January 4, 2002.

Pending before the Board is the Employee's PETITION FOR PAYMENT OF MEDICAL AND RELATED SERVICES filed on January 4, 2002.

All petitions concern a September 12, 2001 date of injury. An evidentiary hearing was held on March 19, 2003, at which the Employee and Timothy Hughes testified. On August 12, 2003, a hearing was held to complete the employee direct and cross exam. The following exhibits have been entered into evidence and considered by the Board: Employee Exhibits 1-15 and Employer Exhibits 1-15.

The 50-year-old employee,¹ Paul Spescha, is a resident of Old Orchard Beach, Maine. He has worked as a long-haul trucker for a number of years. In May of 1999, Mr. Spescha went to Fort Wayne, Indiana to apply for a job driving tractor trailer trucks for North American Van Lines (hereinafter "NAVL"). He did not own a truck at this time. On May 14, 1999, Mr. Spescha signed a "Contractor Operating Agreement" which outlined the terms of his work as an "owner/operator" for NAVL. He also signed a "Conditional Sales Contract" under which he chose a tractor truck to purchase from NAVL's fleet. The employee put no money down and NAVL provided an installment plan for the purchase of the truck.

Mr. Spescha also attended an extensive orientation program at this time. An insurance agent was present at the orientation providing information on various types of insurance. Drivers were given the option of obtaining insurance on the open market but, according to the employee, most chose to purchase it through NAVL due to cost and convenience.

¹ The only issue to be decided in this matter is whether Mr. Spescha was an employee of North American Van Lines. As is customary in workers' compensation cases, the terms "employee" and "employer" will be used to designate the parties but not as a finding on the employment issue.

Mr. Spescha became an owner/operator for NAVL in the blanket wrap division delivering loads mostly of office furniture in May of 1999. In January of 2001, he became part of NAVL's "Premier Fleet." The Premier Fleet was usually dedicated to a certain client company which, in Mr. Spescha's case, was Steelcase. There was a different set of rules and expectations for drivers on the Premier Fleet who were generally expected to be more available to make time sensitive deliveries. NAVL's enhanced expectations from drivers on the Premier Fleet are contained in Employee's Exhibit 12.

The employee delivered furniture from Steelcase's warehouse in Grand Rapids, Michigan to various locations on the east coast. He was expected to make three turns, i.e. round trips, in a period of seven to eight days.

Mr. Spescha continued to drive on the Premier Fleet until September 12, 2001, when he alleges that he sustained an injury that arose out of and in the course of employment. The contract between Mr. Spescha and NAVL was terminated on December 21, 2001. However, for purposes of this decree and by agreement of the parties, the only issue to be decided is whether the relationship between Mr. Spescha and NAVL was an employer/employee relationship or that of a contractor/independent contractor.

The Workers' Compensation Act defines independent contractor as follows:

13. Independent Contractor. "Independent contractor" means a person who performs services for another under contract, but who is not under the essential control or superintendence of the other person while performing those services. In determining whether such a relationship exists, the board shall consider the following factors:

- A. Whether or not a contract exists for the person to perform a certain piece or kind of work at a fixed price;
- B. Whether or not the person employs assistants with the right to supervise their activities;
- C. Whether or not the person has an obligation to furnish any necessary tools, supplies and materials;
- D. Whether or not the person has the right to control the progress of the work, except as to final results;
- E. Whether or not the work is part of the regular business of the employer;
- F. Whether or not the person's business or occupation is typically of an independent nature;
- G. The amount of time for which the person is employed; and
- H. The method of payment, whether by time or by job.

In applying these factors, the board may not give any particular factor a greater weight than any other factor, nor may the existence or absence of any one factor be decisive. The board shall consider the totality of the relationship in determining whether an employer exercises essential control or superintendence of the person.

39-A M.R.S.A. §102(13).

Taking these points one by one, the Board finds as follows. With respect to subpart (A), “. . . a contract exists for the person to perform . . . piece . . . work at a fixed price.” The Board finds that being paid by the mile, as Mr. Spescha was, is akin to piece work. Because the price per mile was fixed, this factor goes in favor of NAVL.

With respect to subpart (B), the Board finds that Mr. Spescha had, on occasion, hired assistants. He testified to this at the second hearing in August 2003. This factor goes in favor of NAVL.

With respect to subpart (C), the Board finds that Mr. Spescha provided no tools, supplies or materials of his own. He arrived in Fort Wayne, Indiana in May 1999 with nothing. NAVL required Mr. Spescha to buy one of their tractors on their terms. NAVL retained title to the truck and controlled its maintenance, payments and inspections. On

the side of the truck was NAVL's name and license numbers. This factor goes in favor of Mr. Spescha.

With respect to subpart (D), the Board finds that NAVL exercised considerable control over the progress of the work, particularly the work of the Premier Fleet. While on the Premier Fleet, Mr. Spescha was required to work at least 46 weeks per year, wear a NAVL uniform for all pick-ups and deliveries and *was not allowed to refuse a load*. See Employee's Exhibit 12. Moreover, although Mr. Spescha theoretically could take any route he wished, the speed with which he was required to deliver the load made it necessary to take the fastest route. He was also in near-constant communication with the NAVL dispatchers on Qual Comm, a radio communications device, reporting his route, location, etc. Mr. Spescha received important information on the Qual Comm as well, such as areas to avoid due to weather and traffic problems and reminders about vehicle inspections and physical examinations. This factor favors goes in favor of Mr. Spescha.

With respect to subpart (E), the work is undisputedly the regular business of the employer, a trucking company. This factor goes in favor of Mr. Spescha.

With respect to subpart (F), no evidence was presented as to what is "typical" in the trucking industry. This factor is not counted toward either NAVL or Mr. Spescha.

With respect to subpart (G), Mr. Spescha was employed for an indefinite period of time, terminable upon two weeks notice. He was thus not employed only for the duration of a particular job. This factor goes in favor of Mr. Spescha.

With respect to subpart (H), Mr. Spescha was paid neither by time nor by job. He was paid a certain amount per mile, similar to piece work. In *West v. C.A.M. Logging*, 670 A.2d 934 (Me. 1996), the Law Court stated that "Maine law has traditionally

regarded piece-work as an indicator of the employee-employer relationship.” *Id.* at 938. Citing *Stone v. Thorbjornson*, 656 A.2d 1121, 1214 (Me. 1995), *Timberlake v. Frigon & Frigon*, 438 A.2d 1294, 1295 (Me. 1982).

This factor thus also goes in favor of Mr. Spescha.

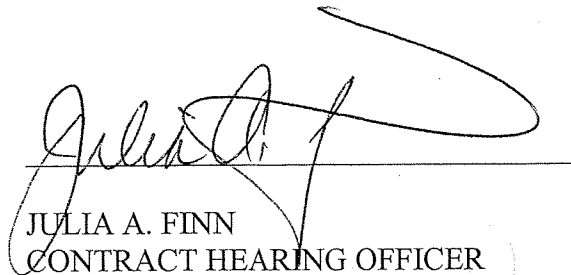
The weight of the above factors indicates an employer/employee relationship. Moreover, in considering the totality of the relationship, the Board finds that NAVL does indeed exercise essential control and superintendence of the employee. The Board thus finds that Mr. Spescha is an employee and is entitled to a determination on the merits of his workers’ compensation claim.

The employer argues strenuously that Mr. Spescha freely and voluntarily entered into the contract with NAVL and that he agreed to independent contractor status. While this is true, it is not a factor that the Board may consider in determining whether employment status exists because it does not appear in the statute, §102(13), or in the relevant Maine case law.

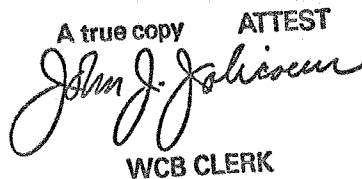
THEREFORE, the Board finds that Mr. Spescha was an employee of NAVL. The employee’s Petition for Award of Compensation and Petition for Payment of Medical and Related Services are referred for hearing.

SO ORDERED.
Portland, Maine

DATED: November 12, 2003



JULIA A. FINN
CONTRACT HEARING OFFICER

A true copy ATTEST

WCB CLERK

**PURSUANT TO BOARD RULES CHAPTER 12, §19 ALL EVIDENCE
AND TRANSCRIPTS IN THIS MATTER WILL BE DESTROYED IN 60 DAYS
UNLESS (1) WE RECEIVE WRITTEN NOTIFICATION THAT ONE OR
BOTH
PARTIES WISH TO HAVE THEIR EXHIBITS RETURNED TO THEM
OR (2) A PETITION FOR APPELLATE REVIEW IS FILED. THE 60 DAYS
WILL
NOT BEGIN TO RUN UNTIL ALL POST-DECREE MOTIONS HAVE
BEEN
DECIDED OR OTHERWISE DISPOSED OF.**

