

FINAL AWARD DENYING COMPENSATION  
(Decision issued after Remand from Court of Appeals, Southern District)

Injury No.: 99-182907

Claimant: David Martinez  
Employer: Nationwide Paper (now known as Xpedx) (alleged)  
Insurer: International Paper Company  
Date of Accident: May 26, 1999  
Place and County of Accident: Springfield, Greene County, Missouri

On May 18, 2005, the Court of Appeals, Southern District, issued its opinion in the above claim reversing and remanding the claim to the Commission for further proceedings. The Court determined that the findings of fact were not sufficient for the Court to review and that to the extent that benefits were denied based upon a lack of a direct contractual relationship between claimant and Nationwide Paper, now known as Xpedx, was a misapplication of law. In accord with the Court's decision and mandate, we issue the following award and decision.

David Martinez, claimant, worked as a self-described self-employed lumper. A lumper is an individual who contracts with a truck driver to unload trucks. Nationwide operated a regional paper distribution center and distributes paper towels, paper tissue and printing paper to local customers.

Steve McPhetridge is the assistant warehouse manager, and was working in that capacity on the date that claimant was injured. Mr. McPhetridge testified that Nationwide contacted its vendors when it needed a shipment of product. Some of the vendors included Reckitt-Benckiser and Kimberly-Clark. The vendors were responsible for delivering the product to Nationwide's distribution facility and for unloading the product when it arrived at the facility. The vendors usually contracted with a common carrier to deliver the product. US Express was one of the common carriers that vendors used to deliver product. The driver of the truck was responsible for unloading the product off the truck onto pallets at Nationwide's facility. The drivers would sometimes contract with lumpers to unload the product. The lumper and the driver would work out the terms of the job, including pay. The driver would usually get permission from the trucking company before "hiring" the lumper. The lumper would be paid by the trucking company usually with a Comcheck. Although the testimony of Susan Antrim, human resource manager of Xpedx, was vague regarding whether Xpedx contracted with a vendor or a trucking company, Ms. Antrim admitted that she did not have direct knowledge of the process when Nationwide was still in business. She admitted that some of her answers might be speculative because questions about having product delivered were outside the realm of human resources. We therefore find that the testimony of Mr. McPhetridge is credible that Nationwide contracted with a vendor, which in turn contracted with a trucking company. Nationwide did not contract with a trucking company to have product delivered and had no involvement with any contract between the vendor and trucking company.

Claimant worked as a lumper for several years at various facilities, including Nationwide and Associated Wholesale Grocers. He generally worked with Joe Hart. Someone would contact Mr. Hart or he would ask a particular facility when a truck was due, then he would call claimant who would go to that particular facility to try to contract with a truck driver to unload a truck. On May 26, 1999, someone contacted Mr. Hart about a truck delivering product on that date to Nationwide. Mr. Hart contacted claimant and stated that he was unable to go, but inquired as to whether claimant could go. Claimant immediately went to Nationwide's premises and spoke with the driver from US Express. The driver contacted US Express, which agreed to claimant's asking price to unload the truck. Claimant used a pallet jack that Nationwide made available to use to unload product with Nationwide's permission. Claimant was unloading the truck and placing the product on Nationwide's dock when he sustained his injury. He was backing up and felt himself bump into something. He stepped to the left and his right foot became stuck on another jack. He was unable to stop himself and his right foot became caught between two jacks and bent upward. A Nationwide employee helped claimant get dislodged. He took off his shoe and sock and noted that his foot was becoming discolored. He was also unable to bear weight on the foot. He asked someone whether he should go to a doctor and the response was in the affirmative. He was brought ice to put on the foot. He asked the Nationwide employee to call his wife. Claimant's wife arrived, and then

took claimant to the hospital. X-rays revealed several fractures in the right foot. He underwent surgery on June 15, 1999. He was unable to work for three months.

At issue is whether Nationwide is the statutory employer of claimant.

Section 287.040.1 RSMo provides:

Any person who has work done under contract on or about his premises which is an operation of the usual business which he there carries on shall be deemed an employer and shall be liable under this chapter to such contractor, his subcontractors, and their employees, when injured or killed on or about the premises of the employer while doing work which is the usual course of his business.

The seminal case regarding statutory employment is *Bass v. National Super Markets, Inc.*, 911 S.W.2d 617 (Mo. banc 1995). The Supreme Court stated that three elements must be met to find statutory employment: "(1) the work is performed pursuant to a contract; (2) the injury occurs on or about the premises of the alleged statutory employer; and (3) the work is in the usual course of business of the alleged statutory employer." *Id.* at 619-620. There is no dispute that the accident and injury occurred on Nationwide's premises. However, elements one and two are in dispute. We find neither element has been met.

Nationwide did not have a contract with the common carrier. Nationwide contracted with a vendor. The vendor contracted with a common carrier, in this instance US Express. The driver for US Express then contracted with claimant to unload the truck with US Express' permission. While a contract pursuant to section 287.040.1 RSMo may be express or implied, oral or written and does not require a complete delegation of a business or operation to a contractor or subcontractor, there must be some sort of an assignment of duties routinely performed by employer to a contractor or subcontractor. *McGuire v. Tenneco, Inc.*, 756 S.W.2d 532, 535 (Mo. banc 1988). There is no requirement that the contract be between the statutory employee and statutory employer directly, and it is sufficient if the statutory employer contracts with claimant's employer. That Nationwide may have received a benefit from the contract between vendor and common carrier and claimant does not make Nationwide a party to any contract on how its product is delivered or unloaded. Nationwide employees did not unload product from the truck delivering products by the common carrier. Unloading the truck onto a pallet was the responsibility of the driver and the driver could either unload the truck himself or obtain authorization from the trucking company to hire a lumper. Claimant's job of unloading the truck was not work performed under contract with Nationwide.

Additionally, we do not find that claimant was performing work in the usual course of Nationwide's business. The Supreme Court in *Bass*, 911 S.W.2d 617, defined the usual course of business "as those activities (1) that are routinely done (2) on a regular and frequent schedule (3) contemplated in the agreement between the independent contractor and the statutory employer to be repeated over a relatively short period span of time (4) the performance of which would require the statutory employer to hire permanent employees absent the agreement." *Id.* at 621.

Our research has found one case that is factually similar to the one before us. In *Wilson v. Altruk Freight Systems, Inc.*, 820 S.W.2d 717 (Mo. App. 1991), the worker worked as a lumper. He was hired by the driver of Altruk Freight Systems, Inc., (Altruk) to unload the truck on the premises of Associated Wholesale Grocers, Inc., (AWG). He was injured while unloading the truck. Altruk was the common carrier. Altruk contracted with Bert Nichols who owned the truck and furnished Melvin Sloniker as a driver. The contract between the carrier and the truck owner provided that the driver had the responsibility to unload the truck under certain circumstances. Drivers frequently hired lumpers to unload trucks. The employee regularly unloaded trucks at the AWG warehouse. He generally called drivers and negotiated prices for unloading trucks. The employee knew how AWG wanted products stacked on pallets and had met AWG's requirements over the years that he unloaded at its facility. Sloniker had hired the employee in the past to unload product and had contacted him to unload the product on August 25, 1989, the date that he was injured.

The employee filed a personal injury action against Altruk, which was dismissed upon motion for summary judgment based upon the exclusivity of the Workers' Compensation Act. The Court of Appeals affirmed the dismissal for lack of subject matter jurisdiction, based on a finding that the employee was a statutory employee of Altruk. The Court stated:

In the truck lease between the defendant [Altruk] and Nichols, was a provision that required the truck owner and his employees to "load and unload the freight if such services are provided for in Carriers' tariffs." The [employee's] affidavit is replete with statements that at the AWG warehouse he always contracted with and was paid by truck drivers for his unloading services. That was the consistent practice followed when the [employee] contracted with Sloniker to unload the defendant's [Altruk's] trailer. Unloading of the trailers at

AWG was not part of AWG's usual business. Otherwise, the [employee] would have been contracting with AWG or its employees to unload the trailers at AWG.

*Id.* at 721.

We also find instructive the case of *Parker v. National Super Markets, Inc.*, 914 S.W.2d 30 (Mo. App. 1995). In that case, Mr. Parker was employed by a Pepsi-Cola distributor to deliver product to employer's customers. As part of his employment with employer, he was required to unload its product and place it on customers' shelves. This was part of the contract between National Super Markets, Inc., and the distributor. No employees of National Super Markets ever delivered or unloaded the distributor's product. Mr. Parker was injured on a loading dock while unloading product on National Super Markets' premises. The Court held that Mr. Parker was not a statutory employee of National Super Markets because the work performed by Mr. Parker was not in the usual course of National Super Markets' business.

Similarly, here, the usual course of Nationwide's business was not to unload product when it was delivered by the common carrier from the truck onto the pallets. Nationwide never used its own employees to unload product when delivered and would not have had to hire its own employees to unload product from the truck onto the pallets when delivered. Claimant negotiated with the driver of the truck to get hired and Nationwide had no say in whether claimant unloaded the truck or what pay he received. Additionally, while delivery of paper products to the Nationwide warehouse was an essential part of Nationwide's business, deliveries were made as needed. There was no agreement contemplating that claimant would perform repeated unloading of trucks over a short span of time. Claimant presented no evidence that he, Mr. Hart, or any particular common carrier was repeatedly or frequently called to unload trucks by Nationwide. See *Nichols v. Overnight Express, Inc.*, 156 S.W.3d 406 (Mo. App. 2005).

Because we find claimant is not a statutory employee of Nationwide, we deny his claim for benefits.

Given at Jefferson City, State of Missouri, this 4<sup>th</sup> day of August 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

Attest: \_\_\_\_\_  
John J. Hickey, Member

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Secretary