

DECISION AND ORDER
BEFORE THE FULL COMMISSION APPELLATE PANEL
of the
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO.: 1023143

George Ferguson, CLAIMANT/APPELLANT,

vs.

AMERCO/U-HAUL International, EMPLOYER/RESPONDENT,

&

**New Hampshire Insurance Company, CARRIER FOR AMERCO/U-HAUL
INTERNATIONAL/RESPONDENT,**

AND

Sean P. Unterkoeffer d/b/a United Stand Moving, EMPLOYER/RESPONDENT,

&

**S.C. Workers' Compensation Uninsured Employers Fund, DEFENDANTS/
RESPONDENT.**

DATE OF HEARING: Heard May 20, 2013, in Columbia, South Carolina.

APPEARANCES: Claimant George Ferguson was represented by Stephen B. Samuels, Esquire of Samuels Law Firm, LLC. Defendants AMERCO/U-HAUL International and New Hampshire Insurance Company were represented by Kristian M. Cross, Esquire.

PURPOSE OF HEARING: Appeal from the Single Commissioner.

COMMISSIONERS: Avery B. Wilkerson, Jr., Chairperson
Melody L. James
Gene McCaskill

FILED:

8-7-13

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SC Court of Appeals

STATEMENT OF THE CASE

This is a denied claim. Claimant George Ferguson filed a Form 50 on April 5, 2012, naming United Stand Moving and eMove, Inc. Ferguson's employers and New Hampshire Insurance Company and the South Carolina Uninsured Employers' Fund ("SCUEF") as insurance carriers. The Form 50 alleges Ferguson sustained injuries to his right shoulder, right hand, right arm and right knee on August 21, 2010, while employed by Sean Unterkoeffer d/b/a United Stand Moving. United Stand Moving does not have workers' compensation insurance.

AMERCO/U-Haul International d/b/a eMove, Inc. (hereinafter referred to as "eMove") and the SCUEF timely filed Form 51s denying liability. Sean Unterkoeffer did not respond to the Form 50.

A hearing was held on July 12, 2012 before Commissioner Andrea C. Roche. Commissioner Roche ultimately determined based on a review of the evidence and relevant law that the claim was not compensable. From that Decision & Order, Claimant appealed to the Full Commission Appellate Panel.

POSITION OF THE PARTIES

Claimant argues he sustained an injury by accident to his right arm, right hand, and right shoulder, arising out of the course and scope of his employment with Sean Unterkoeffer d/b/a United Stand Moving on August 21, 2010. Claimant contends Sean Unterkoeffer d/b/a United Stand Moving is subject to the Act, regularly employing four or more employees. In the alternative, Claimant contends Mr. Unterkoeffer was a subcontractor of eMove, and therefore, a statutory employer of the Claimant. Claimant alleges he is entitled to temporary total disability benefits from August 21, 2010, through February 1, 2011, and temporary partial disability benefits from February 1, 2011, to the present and continuing until he reaches maximum medical

improvement. Claimant further contends he is not at maximum medical improvement, that he is in need of additional medical treatment to include additional medical treatment to his shoulder and hand.

Mr. Unterkoeftler did not appear for the single Commissioner hearing on behalf of Sean Unterkoeftler d/b/a United Stand Moving.

eMove contends Sean Unterkoeftler d/b/a United Stand Moving was not a subcontractor for eMove. eMove further contends it is not in the business of moving as eMove merely provides a service or marketplace in which U-Haul truck renters and movers can meet to assist with moving help. As such, eMove contends it is not George Ferguson's statutory employer.

The SCUEF's position is Claimant was not an employee of Sean Unterkoeftler d/b/a United Stand Moving. The SCUEF contends Claimant was a casual employee. In the alternative, the SCUEF contends Claimant was a subcontractor and Mr. Unterkoeftler received jobs from eMove and subcontracted the jobs to the Claimant. The SCUEF also contends Sean Unterkoeftler did not regularly employ four or more persons in employment and was not, therefore, subject to the Act.

STIPULATIONS

At the hearing before Commissioner Roche on July 12, 2012. Counsel for all parties stipulated to the following facts, which are incorporated into the Full Commission Decision & Order:

1. The purpose of the hearing is to determine the issues set forth in the hearing notice and issues plead in the Forms 50 and 51.
2. Notice of the hearing was timely and properly served upon all parties of interest.

3. This claim arose out of an alleged accident that occurred in North Carolina. However, all parties consent to venue in Richland County, and therefore, venue is properly set in Richland County.

4. The issue of average weekly wage and compensation rate are held in abeyance by consent of the parties.

5. Without objection, the Commission's file is made a part of the record, excluding any unstipulated medical reports and/or self-serving statements.

APA SUBMISSIONS OF THE PARTIES

Pursuant to provisions of the South Carolina Workers' Compensation Act and the South Carolina Code, the following medical reports were submitted as direct evidence at the hearing before the single Commissioner, and the reports and evidence are therefore subject to review by the Full Commission.

CLAIMANT'S APA SUBMISSIONS AND EXHIBITS

APA	NAME OF PROVIDER	DATE	PAGES
1)	New Hanover Regional Medical Center	8/21/2010	1-15
2)	Robert S. Leak, M.D. Carolina Bone & Joint Surgery Center	8/27/2010	16-36
3)	Matthew Welsch, M.D. Pee Dee Orthopaedic Associates	3/26/2012	27-38
4)	Robert Leak, M.D. Strand Orthopaedic Consultants	7/5/2012	39

Claimant introduced the following exhibits into evidence without objection from either party.

EXHIBIT	NAME OF EXHIBIT	DATE	PAGES
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EXHIBIT	NAME OF EXHIBIT	DATE	PAGES
5)	W-2 OS Restaurant Services	2011	40
6)	SCDEW Wage Records	2005-2011	41-43

DEFENDANT eMOVE'S APA SUBMISSIONS AND EXHIBITS

Defendant eMove did not submit medical records as direct evidence. eMove introduced the deposition of Sean Unterkoefer without objection from either party.

EXHIBIT	NAME OF EXHIBIT	DATE	PAGES
A)	Deposition of Sean Unterkoefer	03/16/2012	1-118

DEFENDANT SCUEF'S APA SUBMISSIONS AND EXHIBITS

Defendant SCUEF did not submit medical reports as direct evidence or introduce exhibits into evidence.

EVIDENCE OF THE CASE

The following evidence was presented to the single Commissioner, and therefore was included in the review and analysis by the Full Commission Appellate Panel in reaching its decision regarding Claimant's appeal.

TESTIMONIAL EVIDENCE

George Ferguson – Ferguson is a divorced, 48 year old male with four children. (Hr'g Tr. p. 10, ll. 6-9). He has an associate's degree in nursing and was licensed as a registered nurse. (Hr'g Tr. p. 10, ll.10-12). In August 2010, Ferguson worked full-time as a waiter for Outback Steakhouse. (Hr'g Tr. p. 10, l. 22 – p. 11, l. 3) He worked part-time for Sean Unterkoefer loading and unloading U-Haul trucks. (Hr'g Tr. p. 11, ll. 6-10). Ferguson learned of Sean

Unterkoefer d/b/a United Stand Moving through a friend, David Coates. (Hr'g Tr. p. 11, ll. 11-15).

Unterkoefer paid Ferguson, had the right to fire him if he committed misconduct, and told him where to go and what to do. (Hr'g Tr. p. 11, l. 20 – p. 12, l. 3). The equipment used for each moving job was provided with the U-Haul truck. (Hr'g Tr. p. 12, ll. 4-6). Ferguson was paid by the job and split his earnings with the number of men in the moving crew on that particular day. (Hr'g Tr. p. 7-24). Ferguson has worked with at least three other individuals on moving jobs other than Unterkoefer. (Hr'g Tr. p. 13, ll. 10-25). Ferguson does not know whether the other individuals were employees, independent contractors, or held some other status with Sean Unterkoefer d/b/a United Stand Moving. (Hr'g Tr. p. 14, ll. 2-4; p. 28, ll. 22-25; p. 29, ll. 13-16).

Ferguson performed approximately ten to fifteen moving jobs between April/May 2010 and August 2010. (Hr'g Tr. p. 14, ll. 14-25). Ferguson was allowed to turn down moving jobs. (Hr'g Tr. p. 15, ll. 21-23).

On cross-examination, Ferguson agreed he would defer to Sean Unterkoefer's testimony on the definition of Sean Unterkoefer d/b/a United Stand Moving's relationship with eMove. (Hr'g Tr. p. 32, ll. 12-23). He agreed he would defer to Unterkoefer's testimony on whether Sean Unterkoefer d/b/a United Stand Moving had any employees. (Hr'g Tr. p. 32, l. 24 – p. 33, l. 2). He also agreed he would defer to Unterkoefer's testimony on the operation of his business, i.e., how he was paid, how much he was paid, and contact with customers. (Hr'g Tr. p. 30, ll. 15-24; p. 33, ll. 3-11).

Ferguson was injured on August 21, 2010, while performing a job in Carolina Beach, North Carolina. (Hr'g Tr. p. 18, l. 10 – p. 19, l. 6). He injured his right hand and recently

discovered injuries to his right shoulder and scapula. (Hr'g Tr. p. 19, ll. 8-19). He did not allege injury to his right shoulder or mention such injury to a physician until after his deposition in March 2012. (Hr'g Tr. p. 31, l. 14 – p. 32, l. 1). He has limited range of motion on his right side from his wrist to shoulder. (Hr'g Tr. p. 19, ll. 15-24). His right little finger is deformed and bent. (Hr'g Tr. p. 20, ll. 7-11).

Ferguson was unable to work for approximately sixteen weeks following his surgery. (Hr'g Tr. p. 23, l. 19 – p. 24, l. 2). He returned to working at Outback Steakhouse in January or February 2011. (Hr'g Tr. p. 23, l. 19 – p. 24, l. 13). He was involved in an unrelated accident resulting in injury to his right wrist and forearm in October 2011. (Hr'g Tr. p. 24, ll. 14-24). He was written out of work; however, he subsequently returned and is currently working at Outback Steakhouse. (Hr'g Tr. p. 25, ll. 2-10).

Sean Unterkoeffer – Sean Unterkoeffer testified via deposition transcript. Unterkoeffer was deposed on March 16, 2012. Unterkoeffer is 26 years old and resides in Lisbon Falls, Maine. Unterkoeffer is the owner of United Stand Moving. (eMove's Exhibit A at p. 3, Depo. Tr. p. 8, ll. 20-24). Unterkoeffer did not register his business with the South Carolina Secretary of State or file taxes for his business. (eMove's Exhibit A at p. 3, Depo. Tr. p. 9, ll. 4-11).

eMove operates a website known as movinghelp.com in which individuals renting U-Haul trucks (or other "do it yourself" trucks) can search for and hire local moving companies to assist with loading and unloading their belongings. (eMove's Exhibit A at p. 4-6, Depo. Tr. p. 11, l. 18 – p. 12, l. 8; p. 19, ll. 2-11; p. 18, ll. 18-23). Unterkoeffer started United Stand Moving by visiting movinghelp.com and signing up for an account. (eMove's Exhibit A at p. 8, Depo. Tr. p. 28, l. 5 – p. 29, l. 18). Before his account sign-up was complete, he had to check a box to agree to the terms and conditions contained in the "eMove Moving Help - Moving Helper

Agreement". (eMove's Exhibit A at p. 9, Depo. Tr. p. 31, l. 14 – p. 32, l. 1; Defendants' Exhibit A at p. 97-106).

Sean Unterkoeffer d/b/a United Stand Moving's services included loading and unloading, packing and unpacking, cleaning help, and driving help. (eMove's Exhibit A at pp. 5-6, Depo Tr. p. 17, l. 5 – p. 18, l. 17). Sean Unterkoeffer d/b/a United Stand Moving provided a labor service to its customers, and therefore, Unterkoeffer did not have his own moving truck or equipment. (eMove's Exhibit A at p. 5, Depo. Tr. p. 14, ll. 11-16). He used the rental moving trucks, blankets, dollies, etc. supplied by his customers. (Id.) He set his own availability for days and times he could perform moving services. (eMove's Exhibit A at p. 6, Depo. Tr. p. 20, ll. 5-7). He set his own rates and coverage area. (eMove's Exhibit A at p. 6, Depo. Tr. p. 20, ll. 8-10, 21-25) He used eMove for advertising. (eMove's Exhibit A at p. 4, Depo. Tr. p. 10, l. 3 – p. 11, l. 14). eMove received a 15% marketplace fee for each job completed by Sean Unterkoeffer d/b/a United Stand Moving in exchange for Unterkoeffer's business being listed on its website. (eMove's Exhibit A at p. 4, Depo. Tr. p. 11, ll. 11-14)

Unterkoeffer was not employed by eMove, or its parent company AMERCO/U-Haul International. (eMove's Exhibit A at p. 6, Depo. Tr. p. 19, ll. 2-13). Unterkoeffer was paid by the customer through direct deposit. (eMove's Exhibit A at p. 4, Depo. Tr. p.12, l. 17 – p. 13, l. 4). Customers created accounts on movinghelp.com in which they were able to select Unterkoeffer's moving company, the nature of the services needed, and the moving date and time. (eMove's Exhibit A at p. 4, Depo. Tr. p.11, l.18 – p.12, l. 13). Upon booking an appointment, the customer submitted their credit card or other payment information and received a payment code. (eMove's Exhibit A at p. 4, Depo. Tr. p.12, l. 17 – p. 13, l. 4).

Once a customer scheduled a service, Unterkoeﬂer received a text notification with the customer's booking information. (eMove's Exhibit A at p. 23, Depo. Tr. p.86, ll. 8-21). Unterkoeﬂer called the customer to verify the time of the job, nature of the job, services requested, date, and time. (eMove's Exhibit A at p. 5, Depo. Tr. p. 14, l. 17 – p. 15, l. 7). The customer provided the moving truck. (eMove's Exhibit A at p. 5, Depo. Tr. p. 16, ll. 2-5; Exhibit A p. 13, Depo. Tr. p. 48, l. 15 – p. 16, l. 6). Unterkoeﬂer and his friends drove their personal vehicles to each location. (eMove's Exhibit A at p. 5, Depo. Tr. p. 15, 24 – p. 16, l. 1).

When the moving job was completed to the satisfaction of the customer, the customer provided Unterkoeﬂer with the payment code. (eMove's Exhibit A at p. 4, Depo. Tr. p.12, l. 17 – p. 13, l. 13). Unterkoeﬂer could then log on to his movinghelp.com account and enter the payment code for the funds to be direct deposited into his account. (eMove's Exhibit A at pp. 4-5, Depo. Tr. p. 14, l. 17 – p. 15, l. 7).

Sean Unterkoeﬂer d/b/a United Stand Moving did not have employees. (eMove's Exhibit A at p. 5, Depo. Tr. p. 15, ll. 8-17). Unterkoeﬂer operated Sean Unterkoeﬂer d/b/a United Stand Moving himself and found "friends here and there" to help him perform jobs. (Id). When Unterkoeﬂer could not complete a job on his own due to the size of the job or multiple jobs scheduled at the same time, he asked for help or gave the job to someone else like Ferguson. (eMove's Exhibit A at pp. 10-11, Depo. Tr. p. 36, l. 19 – p. 39, l. 17). Unterkoeﬂer did not take any money from a job unless he participated in the job. (Id). If Unterkoeﬂer participated in the job, he split the proceeds equally with whoever he worked with. (Id). Ferguson was paid per job. (Id). Unterkoeﬂer paid Ferguson the full amount of any job Ferguson performed unless Unterkoeﬂer worked the job with him, in which case they would split the proceeds equally. (Id).

Unterkoefler was notified of Ferguson's injury by Kenneth Hill. (eMove's Exhibit A at p. 11, Depo. Tr. p. 39, ll. 20-25). Sean Unterkoefler d/b/a United Stand Moving did not purchase workers' compensation insurance because he did not believe he was required to get it since he had less than three employees. (eMove's Exhibit A at p. 12, Depo. Tr. p. 42, ll. 5-15).

MEDICAL EVIDENCE

Ferguson was admitted to New Hanover Regional Medical Center on August 21, 2010, with a right hand injury. (APA 1 at p. 2). The emergency department records indicate Ferguson fell down stairs while moving a washer/dryer unit resulting in a crush injury to the right hand. (APA 1 at p. 12). Several lacerations to the right hand were noted. (APA 1 at p. 2). X-rays revealed fractures of the distal portion of the fifth metacarpal and the proximal portion of the proximal phalanx of the fifth digit. (APA 1 at p. 7). No other injuries were noted.

Dr. Robert S. Leak of Carolina Bone and Joint Surgery Center performed closed reduction and percutaneous pinning of the right small finger proximal phalanx fracture and metacarpal neck fracture on August 27, 2010. (APA 2 at pp. 16-17).

Dr. Matthew D. Welsch of Pee Dee Orthopaedics performed an independent medical examination on March 26, 2012. Dr. Welsch noted the surgical pins placed in Ferguson's hand were removed four to six weeks following his surgery. (APA 3 at p. 37). X-rays revealed well-healed fractures and normal MP and IP joints. (APA 3 at p. 38). Dr. Welsch diagnosed Ferguson with posttraumatic right small finger MP contracture and extensor tendon scarring with a slight rotational deformity. (Id).

The only medical record referencing injury to the right shoulder is nearly two years post accident. (APA 4 at p. 39). Ferguson returned to Dr. Leak for evaluation on July 5, 2012, with complaints of right upper extremity pain. (Id). Dr. Leak noted decreased range of motion in the

right shoulder with inability to abduct overhead. (Id.) Dr. Leak diagnosed Ferguson with right shoulder adhesive capsulitis with possible rotator cuff pathology, right wrist synovitis, and right small finger clinical rotational abnormality. (Id.)

FINDINGS OF FACT

Based upon the evidence submitted and the arguments presented, the Full Commission Appellate Panel hereby affirms in full the Findings of Fact of the single Commissioner, as set forth below:

1. The South Carolina Workers' Compensation Commission has exclusive jurisdiction over this matter and pursuant to S.C. Code Ann. § 42-1-540.
2. Average weekly wage and compensation rate are held in abeyance as stipulated by the parties.
3. Ferguson suffered a crush injury to the right hand, resulting in fractures of the distal portion of the fifth metacarpal and the proximal portion of the proximal phalanx of the fifth digit, on August 21, 2010, while moving furniture.
4. Ferguson is not the statutory employee of eMove.
5. Claimant failed to carry his burden of proving he was an employee of Sean Unterkoeffer d/b/a United Stand Moving.
6. Claimant failed to carry his burden of proving Sean Unterkoeffer d/b/a United Stand Moving regularly employed four or more employees.
7. Claimant failed to carry his burden of proving Sean Unterkoeffer d/b/a United Stand Moving was subject to the Act.

8. Claimant failed to carry his burden of proving eMove was a statutory employer of the claimant.

9. The actual moving was not a part of eMove's trade, business, or occupation.

10. eMove's business was to match U-Haul renters with moving help. There was no evidence that eMove contracted with anyone to move or engaged in any moving itself.

11. SCUEF is dismissed with prejudice as Unterkoeffer is not an uninsured employer subject to the Act.

12. eMove is dismissed with prejudice as Ferguson failed to prove he is a statutory employee.

13. Because the resolution of the above issues are dispositive of the claimant's claim, it is not necessary to address the remaining issues raised by the parties. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999).

CONCLUSIONS OF LAW

Based upon the evidence submitted and the arguments presented, the Full Commission Appellate Panel hereby affirms the conclusions of law in full based on a preponderance of the evidence as set forth by the single Commissioner as follows:

1. The South Carolina Workers' Compensation Commission has exclusive jurisdiction over this matter pursuant to S.C. Code Ann. § 42-1-540.

2. In workers' compensation cases, the burden is on the claimant to prove all elements of his claim to entitle him to compensation. Herndon v. Morgan Mills, Inc., 246 S.C. 201, 143 S.E.2d 376 (1965).

3. Ferguson suffered a crush injury to the right hand, resulting in fractures of the distal portion of the fifth metacarpal and the proximal portion of the proximal phalanx of the fifth digit, on August 21, 2010, while moving furniture. However, Ferguson failed to carry his burden of proving he is entitled to benefits under the Act. S.C. Code Ann. §§ 42-1-130, -140, -150, -160, -360, -400, *et seq.*; McLeod v. Piggly Wiggly Carolina Company, 280 S.C. 466, 313 S.E.2d 38 (Ct. App. 1984) (an award under our Workers' Compensation Act will not be made unless an employment relationship existed at the time of the alleged injury for which the claim is made).

4. Ferguson is not the statutory employee of eMove. S.C. Code Ann. § 42-1-400, *et seq.*

5. Claimant failed to carry his burden of proving he was an employee of Sean Unterkoeffer d/b/a United Stand Moving. S.C. Code Ann. §§ 42-1-130, -140, -150.

6. Claimant failed to carry his burden of proving Sean Unterkoeffer d/b/a United Stand Moving regularly employed four or more employees. S.C. Code Ann. §§ 42-1-130, -140, -150, -360; Marlow v. E.L. Jones & Son, Inc., 248 S.C. 568, 151 S.E.2d 747 (1966).

7. Claimant failed to carry his burden of proving Sean Unterkoefer d/b/a United Stand Moving was subject to the Act. S.C. Code Ann. §§ 42-1-130, -140, -150, -360.

8. Claimant failed to carry his burden of proving eMove was a statutory employer of the claimant. S.C. Code Ann. § 42-1-400, *et seq.*; Marlow v. E.L. Jones & Son, Inc., 248 S.C. 568, 151 S.E.2d 747 (1966).

9. eMove's business was to match U-Haul renters with moving help. There was no evidence that eMove contracted with anyone to move or engaged in any moving itself. The actual moving was not a part of eMove's trade, business, or occupation. See Murray v. Aaron Mizell Trucking Company, 286 S.C. 351, 334 S.E.2d 128 (Ct. App. 1985).

10. SCUEF is dismissed with prejudice as Unterkoefer is not an uninsured employer subject to the Act.

11. eMove is dismissed with prejudice as Ferguson failed to prove he is a statutory employee.

12. Because the resolution of the above issues are dispositive of the claimant's claim, it is not necessary to address the remaining issues raised by the parties. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999).

FULL COMMISSION APPELLATE PANEL ORDER

IT IS NOW THEREFORE ORDERED the Full Commission Appellate Panel considered Claimant's appeal and finds a FULL AFFIRMATION of the single Commissioner's Decision & Order.

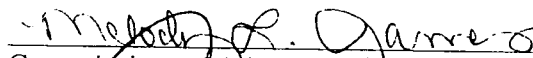
IT IS THEREFORE ORDERED that Claimant George Ferguson is not entitled to benefits under the South Carolina Workers' Compensation Act.

IT IS FURTHER ORDERED that AMERCO/U-Haul International, New Hampshire Insurance Company, and the South Carolina Uninsured Employers' Fund are dismissed from this claim with prejudice.

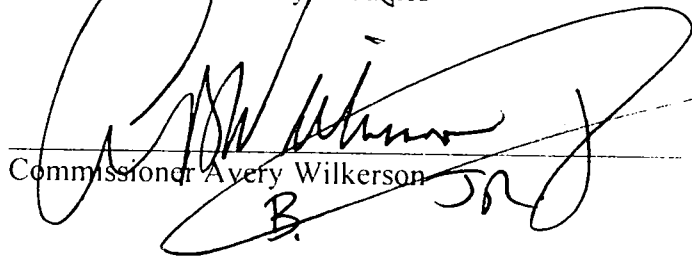
AND IT IS SO ORDERED!



Commissioner Gene McCaskill



Commissioner Melody L. James



Commissioner Avery Wilkerson

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order on the above entitled parties upon all persons to be served by depositing a copy of said order in the United States mail addressed to attorney or attorneys for said parties.

is 7th day of August, 2013
Valerie D. Beller

Administrative Assistant to the Commissioner

Stephen B. Samuel's

Kristian M. Cross

Sean P. Unterkoeffer dba United Stand Moving (Reg & cert)