THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

WCC File No. 1023143

George Ferguson, Employee/Claimant, ... Appellant,

v.

Sean P. Unterkoefler d/b/a United Stand Moving, Employer,

and

AMERCO/U-HAUL International, Employer,

and

New Hampshire Insurance Company, Carrier for AMERCO/U-HAUL International,

and

S.C. Workers' Compensation Uninsured Employers' Fund .... Respondents.

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ARGUMENT

I. George Ferguson is the statutory employee of eMove [in Reply to Brief of Respondent at pages 9-10].

The parties agree eMove is Ferguson's statutory employer if revenue from moving activities "(1) are an important part of the trade or business of the employer [or] (2) are a necessary, essential, and integral part of the business of the employer . . ." Brief of Respondent, page 9, quoting Glass v. Dow Chemical Co., 325 S.C. 198, 482 S.E.2d 49 (1997). Although agreeing this is the correct test, eMove contends Ferguson failed to prove either test, arguing: "There is no testimony from eMove on its business' revenue sources in the record." Brief of Respondent, page 10.

As described in detail in Appellant's Brief, eMove's own documents prove its revenue came entirely from the 15% markup applied to the moving services performed by its subcontractors. Moreover, at the trial itself, eMove conceded "that they received 15% of the negotiated price" paid by the consumer. [Tr. Page 7, lines 7-13]. eMove produced no evidence to contradict, explain or rebut the documentary evidence or their admission at trial. The Court should reject eMove's reliance on its own failure to call a witness or otherwise rebut the documentary evidence. Cf. Canady v. Martschink Beer Distributors, 255 S.C. 119, 177 S.E.2d 475 (1970) (It is well settled in this State that if a party fails to produce the testimony of an available witness on a material issue in the cause, it may be inferred that such testimony, if presented, would be adverse to the party who fails to call the witness.).

For Ferguson to prove his statutory employment case, he only needed adduce evidence that the moving services were an important or essential revenue source for eMove. See Voss v. Ramco, Inc., 325 S.C. 560, 566, 482 S.E.2d 582, 585 (Ct.App.1997)(finding a manufacturer of small

equipment was the statutory employer of field salespeople because selling the equipment was an essential part of the manufacturer's business without which it could not remain in business). eMove's new assertion on appeal that it might have other unspecified sources of revenue is entirely unproven and irrelevant. eMove never denies it received a 15% markup on moving services performed by its subcontractors. Instead, it tries to recharacterize its revenue stream by arguing "eMove only charged Unterkoefler 15% of any completed job in exchange for listing his company on its website." [Brief of Respondents, page 10].

This argument must fail. eMove is not the telephone book; it is not a newspaper – it is not even a free review based website like TripAdvisor.com. eMove does not sell advertising; it does not charge for advertising. The subcontractors do not pay eMove; the consumers of moving services pay eMove. eMove did not *charge* Unterkoefler anything; eMove *paid* Unterkoefler.

The central purpose underlying the statutory employer doctrine "is to prevent owners and contractors from subcontracting out their work to avoid liability for injuries incurred in the course of employment." Fortner v. Thomas M. Evans Const. and Development, LLC, 741 S.E.2d 538, 402 S.C. 421 (Ct. App. 2013), *quoting* Glass v. Dow Chem. Co., 325 S.C. 198, 201 n. 1, 482 S.E.2d 49, 50 n. 1 (1997). Cases like this are exactly why we have the statutory employment doctrine.

The Court should reverse and find Ferguson was the statutory employee of eMove/U-Haul.

II. George Ferguson is the Direct Employee of Sean Unterkoefler d/b/a United Stand Moving [in Reply to Respondents' argument at pages 11-14].

The parties agree that whether Ferguson's relationship with Unterkoefler is as an employee or an independent contractor is controlled by the four factors which determine the right of control: 1) direct evidence of the right or exercise of control; 2) furnishing of equipment; 3) right to fire; and 4) method of payment. Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 676 S.E.2d 700 (2009).

Right of Exercise of Control

Respondents contend "Unterkoefler did not exercise control over the work [Ferguson] performed [because the] date and time of the job was strictly dictated by the customer." [Brief of Respondents, page 12]. However, the fact Unterkoefler told Ferguson when and where to go *supports* an employer/employee relationship. See Spivey v. D.G. Constr. Co., 321 S.C. 19, 467 S.E.2d 117 (Ct.App.1996)(employment relationship shown when employer instructed worker where to report and "explained to worker exactly what needed to be done"). Furthermore, there were some jobs where Ferguson was the only employee working directly under Unterkoefler on-site supervision. [Tr. Page 26, lines8-9].

There is nothing in the relationships among the parties inferring that Ferguson was an independent contract. Unterkoefler had a written contract with eMove. eMove contracted with Unterkoefler to do the moving work – providing him with the date, time, location, and scope of the work. Ferguson had no contact whatsoever with eMove. His relationship was entirely to work as either a direct helper for Unterkoefler or as part of a two-man crew employed by Unterkoefler at Unterkoefler's direction. Merely because Ferguson's employment was his second part-time job does

not mean it was not employment – if anything, the part-time nature supports the inference of employer/employee. Ferguson had no business cards, no business license, no contract – in short, none of the indicia of operating as a contractor.

Method of Payment

As to the method of payment, Respondents overlook Ferguson's testimony that he was paid $17.50 per hour. [Tr. Page 12, lines 16-24]. Hourly wages are a strong indicator that the worker is an employee. See South Carolina Industrial Commission v. Progressive Life Ins. Co., 242 S. C. 547, 550, 131 S.E.2d 694, 695 (1963)(insurance agents who were paid guaranteed minimum wage were employees); Spivey v. D.G. Constr. Co., 321 S.C. 19, 467 S.E.2d 117 (Ct.App.1996)(fact worker was paid $8.00 per hour was evidence that he was an employee).

Ferguson did not know how much eMove paid Unterkoefler for any given job. However, he was always paid directly by Unterkoefler. Sometimes he got paid the day after a job; sometimes he got paid weekly. He testified: "It just depended on when I saw him. If we were at different sites moving, you know, on different days, I might not see him that day, so it varied." [Tr. Page 12, lines 7-24].

Ferguson was paid cash, so there are no written records recording how much he was paid. eMove paid Unterkoefler by PayPal after each job was completed. He would not pay Ferguson until he got the cash and saw Ferguson in person– which could be the end of the week or the next job. In total, the method of payment supports a finding that Ferguson was Unterkoefler's employee. There is no evidence to support eMove's contention that Ferguson "split profits with Unterkoefler when they performed jobs together." [Brief of Respondents, page 13].

Furnishing of Equipment

All equipment on the job (truck, dollies, moving pads) was supplied by the upstream employer, eMove. The equipment was owned by U-Haul and rented from U-Haul by the customer - the same customer who contracted with U-Haul's subsidiary, eMove, for the moving services. Ferguson supplied no equipment. This factor strongly supports an employee/employer relationship.

Right to Fire

Respondents argue:

> Unterkoefler operated a sole proprietorship in which he performed most of the work and merely asked friends and friends of friends to assist him from time to time. Appellant would have the Court believe an employment relationship exists merely because Appellant assisted Unterkoefler on a few occasions. [Brief of Respondents, page 13].

Well, *yes*, Appellant would have the Court believe an employment relationship exists. Unterkoefler did operate a sole proprietorship. However, he plainly did not and could not perform "most of the work" – not by August 2010 when did 32 moving jobs. [eMove APA pages 107-118]. At least five employees were mentioned by name in the testimony: George Ferguson, David Coates, Arly Barr, Kenneth Hill and Josh. [Tr. page 13, lines 19-25; Dep. Tr. page 69, lines 19-25]. The records from customer surveys show Josh working at least two jobs, along with other named employees: "David", "Mark", "Mike", "CJ", "Tyrone," and "Josh." [eMove APA pages 107-118]. Ferguson himself was working as many as five jobs a week during August before his accident on August 17, 2010. [Tr. Page 14, lines 15-22].

Every job required a minimum of two men – which meant Unterkoefler had to use at least one employee on a job. By July and August, Unterkoefler was sending out two man crews.

Unterkoefler's operation was small – of that there is no doubt. It was nonetheless a moving

business with employees. Whether the employees were friends or friends of friends makes no difference. Unterkoefler did not merely *ask* people to help him do moving jobs for eMove – he paid them. That's what employers do. Casual employees working in the owner's trade business or occupation are still considered employees for workers' compensation purposes. S.C. Code Ann. § 42-1-130 (2007). The fact Unterkoefler was a subcontractor doing moving work for a much larger employer – eMove/U-Haul – merely shows why the Legislature created the statutory employer doctrine.

The lack of a set schedule and less than consistent work does not vitiate the employee/employer relationship. Both Unterkoefler and Ferguson agreed Unterkoefler had the right to fire Ferguson. [Tr. Page 11, lines 20-22; Dep Tr. Page 70, line 17-page 71, line 7]. Therefore, the Court should find the right to fire is present, thus confirming an employee/employer relationship.

III. The Commission has jurisdiction over U-Haul International [in Reply to Respondents' argument at pages 15-17].

In their brief, for the first time in these proceedings, eMove argues "Without evidence to establish United Stand Moving regularly employed four or more employees, Appellant cannot reach the question of whether eMove is Appellant's statutory employer." [Brief of Respondents, page 17]. This is an incorrect statement of the law. It has never been disputed that U-Haul International itself is subject to South Carolina's Workers' Compensation Act.[1] eMove, through its parent U-Haul International, is insured for South Carolina workers' compensation. See S.C.Code Ann. § 42-5-20 (2007)("every employer who accepts the provisions of this title relative to the payment of compensation shall insure and keep insured his liability . . .").

[1]The screenshots from eMove's computer system all bear the notation "Copyright 20012 U-Haul International, Inc." [eMove APA pages 28-118].

The legal question being raised by eMove is whether the employees of subcontractors other than Unterkoefler count towards the jurisdictional limit. This suggestion should be rejected. The purpose of statutory employment is to protect employees of small employers who themselves are subcontractors of larger employers. An upstream employer cannot insulate itself from liability by spreading the work around to multiple tiny subcontractors – each of whom employs less than four employees. Nor should statutory employment for any particular employee depend on whether the direct employee was subject to the Act.

To the extent there is any factual question regarding U-Haul being subject to the Act, U-Haul operates multiple moving centers throughout South Carolina.

eMove itself regularly used many subcontractors throughout South Carolina – all of whom worked each job with two man crews.[2] Thus, each subcontractor had one owner and at least one employee. Unterkoefler testified: "the customer would get on [eMove's website] and there'd be a list of moving companies in that area." [Dep. Tr. Page 11, line 18-page 12, line 8]. He specifically identified one other Myrtle Beach based moving company (Quality Movers) listed on eMove's website. [Dep. Tr. Page 10, lines 3-21]. On questioning from eMove's attorney, Unterkoefler further confirmed that once a customer puts in a moving date, "there's a list of movers that comes up . . . " [Dep. Tr. Page 33, lines 6-14].

eMove's website was set up with a rating system. " . . . when you go on the eMove website or Moving Help website, it lists . . . competition, it gives a customer the ability to choose the

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[2]Although eMove disputes the legal question of whether its movers were subcontractors, eMove admits it used multiple moving companies within South Carolina. In eMove's Statement of the Facts, "Customers created accounts on movinghelp.com in which they were able to view a *list of local movers*, select Unterkoefler's moving company, the nature of the services needed, and the moving date and time." [Brief of Respondents, page 5 (emphasis added)].

company . . . they want to go with, and then naturally they can see some reflection there upon your performance . . . to make their choice." [Dep. Tr. Page 34, line 25-page 35, line 11].

All of this was arranged through eMove. eMove located the customer. Unterkoefler testified: "Once my services were rendered and *the customer had chose from a list of companies*, so per se, they chose United Stand Moving, eMove would handle the order, they would send an e-mail to the customer with my contact information as well as, you know, eMove would send me the details of the job." [Dep. Tr. Page 52, line 23-page 53, line 4]. "[The customer] could choose, per se, me or any other company on there." [Dep. Tr. Page 53, lines 19-24].

As discussed in Appellant's Brief, pages 20-22, the evidence shows Unterkoefler employed four or more persons during the critical period. In fact, he had two jobs requiring four persons (three of whom were employees) on the day Ferguson was injured. [Dep. Tr. Page 36, line1-page 37, line 12; D APA pages 69-70]. In the period surrounding Ferguson's date of accident (July 22, 2010-September 21, 2010), Unterkoefler worked scheduled or worked multiple jobs on 17 different days. On August 5th and September 13th, his company had three separate moving jobs; On August 30th and September 15th, it had four. [D APA pages 68-71].

This evidence supports a finding that Unterkoefler's business was subject to the Act. Even beyond that, it confirms eMove and the multiple moving companies it subcontracted must necessarily have collectively employed many more than four persons on a regular basis.

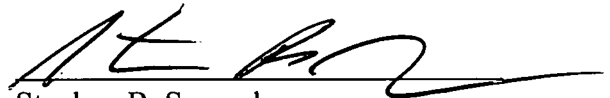
To summarize the issues, Ferguson can receive workers' compensation benefits under two separate theories. Under either theory, he must prove he was an employee of Unterkoefler. If the Court finds he was an independent contractor, then his claim fails without further inquiry. Assuming he is Unterkoefler's direct employee, he can prevail by (1) proving Unterkoefler regularly employed

four or more employees; or (2) by proving that Unterkoefler is a subcontractor for eMove/U-Haul's moving services, such that Ferguson is a statutory employee.

CONCLUSION

For the foregoing reasons, the Decision and Order of the Appellate Panel should be reversed. The Court should remand the case to the Commission for a hearing on the extent of injuries, medical treatment required, temporary total disability due, and average weekly wage.

Respectfully Submitted



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Columbia, South Carolina
April 21, 2014

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PROOF OF SERVICE

I certify that I am paralegal to Stephen B. Samuels and I have served the **INITIAL REPLY BRIEF OF APPELLANT and DESIGNATION OF MATTER** upon the Respondents by mailing a copy of the same in the United States mail, with sufficient postage affixed thereto and return address clearly marked on the date indicated below, addressed as follows:

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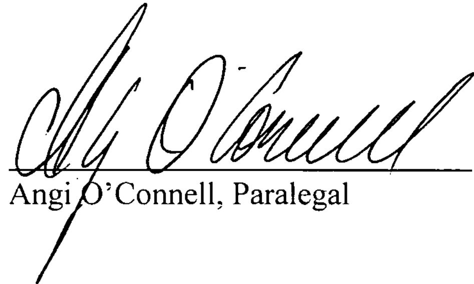

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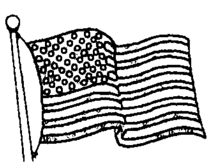

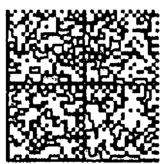

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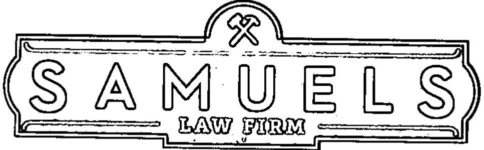

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