THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

WCC File No. 1023143

George Ferguson, Claimant,

Appellant,

v.

New Hampshire Insurance Company, Carrier for Amerco/U-Haul International, and Sean P. Unterkoefler d/b/a United Stand Moving, Employer, and S.C. Workers' Compensation Uninsured Employers Fund,

Respondents.

FINAL BRIEF OF APPELLANT

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   A. an important part of the trade or business of the employer; or
   B. is a necessary, essential, and integral part of the business of the employer.?

2. Whether the Commission erred in finding Ferguson failed to carry his burden of proving that he was an employee of Sean Unterkoefler d/b/a United Stand Moving?

3. Whether the Commission erred in finding Ferguson failed to carry his burden of proving that Sean Unterkoefler d/b/a United Stand Moving employed four or more employees during the relevant period, thus making Unterkoefler an uninsured employer subject to the Act?

4. Whether the case should be remanded due to the Commission's failure to rule on all of Ferguson's causally related injuries, specifically to his right hand, right arm, right knee, and right shoulder; such issue being raised but not ruled on?

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7. Whether the Appellate Panel erred as a matter of law in failing to make specific and detailed findings of fact sufficient for appellate review?

STATEMENT OF THE CASE

This workers' compensation appeal arises out of work-related injuries sustained by the Appellant, George Ferguson, on August 21, 2010. At the time of the accident, Ferguson was working on a furniture moving job moving for Respondent Sean P. Unterkoefler d/b/a United Stand Moving. Unterkoefler had contracted with Respondent Amerco/U-Haul International to provide moving services for its customers. Amerco/U-Haul provided the moving services through its subsidiary, eMove.

Amerco/U-Haul is insured through the New Hampshire Insurance Company. As Unterkoefler/United Stand is uninsured, the South Carolina Uninsured Employers Fund (hereinafter "Fund") was added as a party.

On December 14, 2011, Ferguson filed a Form 50 (Request for Hearing) seeking workers' compensation benefits for the August 21, 2010 injury by accident. Ferguson served the Form 50 on his direct employer United Stand Moving; on the upstream statutory employer (eMove) and its insurance carrier (New Hampshire Insurance Company); and on the South Carolina Uninsured Employers Fund (hereinafter "Fund").

On January 12, 2012, eMove and New Hampshire Insurance Company timely filed a Form 51 (Employer's Answer to Request for Hearing). eMove denied all allegations made by Ferguson.

On April 5, 2012, Ferguson filed an Amended Form 50 (Request for Hearing). [R. p. 31-32].

On April 16, 2012, eMove filed a Form 51 in response to the Amended Form 50. [R. p. 33].

On April 27, 2012, the Fund filed a Form 51 in response to the Amended Form 50.

On June 28, 2012, the Fund filed a Motion to Amend Caption, based on United Stand Moving being a sole proprietorship owned Sean Unterkoefler. On July 2, 2012, Commissioner

Andrea Roche issued a Consent Order changing the caption to "Sean P. Unterkoefler d/b/a United Stand Moving, Employer."

Unterkoefler made no formal appearance in the case and filed no pleadings. His trial deposition was taken on March 16, 2012.

The case was tried on July 12, 2012 before Commissioner Roche.

On November 19, 2012, Commissioner Roche issued a Decision and Order on November 19, 2012. The Commissioner denied benefits and dismissed the case. She found Ferguson failed to prove he was an employee of Sean Unterkoefler and failed to prove eMove was his statutory employer. [R. p. 1-14].

Ferguson timely filed his Form 30 (Notice of Appeal) on December 30, 2012. [R. p. 34-35] The Appellate Panel heard arguments on May 20, 2013. By Decision and Order dated August 7, 2013, the Appellate Panel affirmed the Single Commissioner's Order. [R. p.15-29].

This appeal followed.

STATEMENT OF THE FACTS

Respondent eMove is a wholly owned subsidiary of Amerco/U-Haul International. eMove's offices are located in U-Haul's main headquarters in Arizona. [R. p. 231]. U-Haul advertises for eMove services on its website, on its rental trucks and at its truck rental centers. [R. p. 149: Page 54, line 7-page 55, line 4].

eMove provides loading and unloading services to people who rent U-Haul trucks. The actual work is done by subcontractors who sign an on-line contract with eMove. eMove's sole source of revenue is a 15% markup of the moving services performed by its subcontractors. [R. p. 232].

eMove customers schedule a moving date with one of the subcontractors on eMove's website. The customer enters a credit card to secure payment and receive a verification code from eMove. eMove then sends a text message to the subcontractor telling them when to go; where to go; what services to provide; how long the job will take; and how many men are required. Jobs generally require a two man crew.

Upon completion of the job, the customer gives the verification code to the subcontractor – who enters the code into eMove's website. eMove then pays the subcontractor 85% of the price charged to the customer, keeping "a 15% cut from the total amount paid by the Customer for the Services." [R. p. 232].

People interested in becoming subcontractors for eMove sign an on-line contract. [R. p. 231-240]. Although not phrased in those terms, the contract establishes a classic owner-subcontractor relationship. The contract requires the subcontractors (identified as "moving helpers" or "service providers") to comply with all terms of the contract. [R. p. 231]. Most importantly, the contract

prohibits the subcontractors from making side agreements or accepting payment directly from eMove's customers – all Customer payments must be made to eMove. [R. p. 232-233]. All transactions are initiated directly with eMove. eMove does not allow the subcontractor and customer to contact each other until the moving services have been scheduled and secured with a credit card.

In March 2009, Sean Unterkoefler executed a contract with eMove to provide "moving help" to eMove's customers. [R. p. 231-240]. Unterkoefler identified his business as United Stand Moving. He operated the business until March 2011 – doing a total of 225 jobs for eMove. [R. p. 137: Tr. Page 8, line 21-page 9, line 21; R. p. 141: page 23, lines 9-22].

As required by eMove, Unterkoefler went through a training session. He was told how to be a successful mover, given advice on actual moving activities and "how to keep [eMove's] customers happy." eMove also explained the ground rules of what the subcontractors could and could not do, including "mak[ing] it clear to [Unterkoefler] that [he] couldn't have any side agreements or direct contact with a customer except through eMove." [R. p.152: Tr. Page 66, lines 5-23].

United Stand offered moving services for up to 5 jobs per day, seven days a week. [R. p. 195]. The first moving job was done on March 2, 2009. [R. p. 198]. From there, the work ebbed and flowed reaching a high point of 32 completed jobs in August 2010 – the month in which Ferguson was injured. [R. p. 203-206].

Appellant George Ferguson worked full-time as a waiter at Outback Steakhouse. In the spring of 2010, he took on a part-time job "working for Sean [Unterkoefler] with United Stand Movers to help load and unload U-Haul trucks." [R. p. 46, lines 4-10].

Ferguson first met Unterkoefler somewhere around April of 2010. Ferguson was approached by a friend, David Coates, who was already working for Unterkoefler. Coates told him "They had

multiple jobs at times where they needed extra help." [R. p. 46, lines 11-15].

At first, work was slow and Ferguson did not work many jobs – only one or two for the first couple of months. By July and August, Ferguson was doing as many as five jobs a week. [R. p. 49, lines 15-22].

To keep up with the increasing workload, Unterkoefler added people. Ferguson himself worked with 3 other employees at various times (plus Unterkoefler): David Coates, Arly Barr and Kenneth Hill. [R. p. 48, lines 19-25; R. p. 152: Tr. page 69, lines 19-25]. Unterkoefler testified to one other employee named Josh. [R. p. 152: Tr. page 69, lines 19-25]. The records from customer surveys show Josh working at least two jobs. They also mention various other employees by name including "David", "Mark", "Mike", "CJ", "Tyrone," and "Josh." [R. p. 241-252]. The surveys are particularly telling as they are from customers. Notably CJ and Tyrone did a job on August 19, 2010 – two days before Ferguson was injured.

This number of employees makes logical sense when you look at how many jobs Unterkoefler did during the critical period. The chart below shows how Unterkoefler's workload substantially increased by August 2010 when Ferguson was injured:

	March	April	May	June	July	August
Days	31	30	31	30	31	31
Scheduled	8	5	9	12	24	38
Completed	2	4	4	10	22	32
% completed	25%	80%	44%	83%	92%	84%

In August, Unterkoefler was doing more than one job every day. He was scheduled to work 38 jobs – yet could only complete 32. His business had gone from a trickle to a flood. Unterkoefler could not handle it with just himself and a helper. Everyone who worked for United Stand had

other full time jobs. There was no way for Unterkoefler to do this much work without multiple crews – each crew included at least two men.

On August 21, 2010, Ferguson was working a job for United Stand in Carolina Beach, North Carolina. He and another employee, Kenneth Hill, were carrying a washer and dryer down a stairwell. Hill let go. The washer and dryer pinned Ferguson's "whole right side up against the wall." [R. p. 18, lines 7-25]. Ferguson injured several fingers, his right hand, arm and shoulder. [R. p. 53, line 25-page 55, line 17].

Ferguson received medical treatment from an orthopaedic surgeon. [R. p. 76-114]. He was unable to return to work as a mover. He also missed work from his full-time job at Outback. He has not completed his treatment, as he cannot afford further treatment and has been unable to obtain workers' compensation benefits.

STANDARD OF REVIEW

The existence of an employment relationship is a factual question that determines the jurisdiction of the Workers' Compensation Commission and is reviewable under the preponderance of the evidence standard. Brayboy v. WorkForce, 383 S.C. 463, 681 S.E.2d 567 (2009). When the issue involves jurisdiction, the appellate court may take its own view of the preponderance of the evidence. It is South Carolina's policy to resolve jurisdictional doubts in favor of inclusion rather than exclusion. White v. J.T. Strahan Co., 244 S.C. 120, 135 S.E.2d 720, 723 (1964).

"[T]he guiding principle undergirding our workers' compensation system [is] that the Act is to be liberally construed in favor of the claimant. The second is the equally compelling evidentiary principle that an award may not rest upon surmise, conjecture, or speculation." Hutson v. S.C. State Ports Authority, 399 S.C. 381, 732 S.E.2d 500 (2012).

ARGUMENT

1. George Ferguson is the statutory employee of eMove.

The Appellate Panel held "Claimant failed to carry his burden of proving eMove was a statutory employer of the claimant."[1] Nowhere in the Order is there a single reference to the statute or case law stating the test for statutory employment.

eMove does all its work – and generates 100% of its revenue – through subcontractors like Unterkoefler. eMove's business model is exactly the type of scheme the Legislature addressed by bringing employees of subcontractors within the ambit of workers' compensation coverage. "Any doubts as to a worker's status are to be resolved in favor of coverage under the Act." Voss v. Ramco, Inc., 325 S.C. 560, 566, 482 S.E.2d 582, 585 (Ct.App.1997)

Section 42-1-400 provides:

> When any person, in this section and §§ 42-1-420 and 42-1-430 referred to as "owner," undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section and §§ 42-1-420 to 42-1-450 referred to as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him. S.C. Code Ann. § 42-1-400 (2007).

Under this section, the Commission must determine if the work performed is part of the "trade, business, or occupation" of eMove. To make that determination, one of three tests must be met. Owners are statutory employers for injuries related to activities that:

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[1]Under Conclusions of Law, the Commission relied on Murray v. Aaron Mizell Trucking Co., 334 S.E.2d 128, 286 S.C. 351 (Ct. App. 1985). However, in Murray, the Court of Appeals affirmed the Commission's finding that the upstream contractor was the statutory employer of the claimant. As such, Murray demonstrates that the Commission's holding was contrary to the law and thus erroneous.

(1) are an important part of the trade or business of the employer;

(2) are a necessary, essential, and integral part of the business of the employer; or

(3) have been previously performed by employees of the employer. Glass v. Dow Chemical Co., 325 S.C. 198, 482 S.E.2d 49 (1997).

The third test does not apply. However, the first and second are plainly applicable to eMove. eMove's sole source of revenue is the 15% it collects on every moving job done by its subcontractors.[2] If people like Unterkoefler and Ferguson did not do the moving jobs, eMove would have no revenue at all. 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). An employer's sole source of revenue is, by definition, "a necessary, essential, and integral part of the business of the employer." Glass.

Despite the self-evident nature of the issue, eMove "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." [R. p. 3]. The Commission made two findings in line with this contention. The first was "The actual moving was not a part of eMove's trade, business, or occupation." [Finding of Fact 9, R. p. 26]. The second finding held "eMove's business was to match U-Haul renters with moving help. There was no evidence that eMove contracted with anyone

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[2]eMove calls their 15% cut of the moving job a "marketplace fee." Regardless of how eMove identifies their revenue stream or how their contract with Unterkoefler is written, the facts control the analysis; not a self-serving contract written to avoid liability under the Act. See Harrell v. Pineland Plantation, Ltd., 337 S.C. 313, 322, 523 S.E.2d 766, 770 (1999) ("Whatever the parties contract to call their relationship is not controlling in a statutory employment analysis.").

to move or engaged in any moving itself." [Finding of Fact 10, R. p.26].

The Commission's findings have no true significance in this case. No one contends eMove's Phoenix-based employees actually engaged in physical moving activities. As to the finding "There was no evidence that eMove contracted with anyone to move . . .," that finding is patently incorrect. The customer contracted directly with eMove through its website – completing the contract by ensuring paying payment via credit card.[3] eMove then sent a text message to their subcontractor telling them "where the job was, who it was with and when the job was." [R. p. 159: Tr. P. 94, lines 12-25].

Unterkoefler testified, ". . . I didn't have control financially of anything. I didn't deal directly with a customer. [eMove] dealt with the customer and passed the information on to me. [eMove] had control of releasing the funds based on the work I did . . ." [R. p. 159: Tr. P. 95, lines 1-18]. Unterkoefler confirmed "regarding the payment arrangements . . . the customer paid eMove and then eMove paid [him]. [R. p. 159: Tr. P. 94, lines 8-11]. "[T]he customer made all those arrangements with eMove on their website." [R. p. 159: Tr. P. 94, lines 17-21].

Unterkoefler confirmed he did not have a contract with the customers; his "only contract was with eMove." [R. p.148: Tr. Page 52, lines 10-14]. Unterkoefler told Ferguson "That he was a subcontractor for U-Haul and he just took care of the moving aspect of the business for them." [R. p. 71, lines 2-6]. Unterkoefler explained to Ferguson "That [U-Haul] had to subcontract out the work because there's no way for U-Haul to have enough manpower throughout the country to do the work that they did." [R. p. 51, lines 13-18].

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[3]eMove's "Moving Helper Agreement" defines "Customer(s)" as an "individual who desires to obtain Services." [R. p. 231].

Unterkoefler confirms this in his own testimony. He agreed his relationship was comparable to a heating and air conditioning subcontractor "because I didn't have control financially of anything. I didn't deal directly with the customer. They dealt with the customer and passed the information on to me. They had control of releasing the funds based on the work I did, you know, that's about it.[4]

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[4]In the initial line of questioning from eMove's attorney, Unterkoefler pointedly claimed "My relationship with eMove was basically eMove advertised for my business and took a 15-percent marketplace fee for the advertisement." [R. p. 138: Tr. Page 11, lines 11-14]. On cross-examination, Unterkoefler testified:

> Q. Before you had your deposition taken, have you had any conversation with anybody regarding this case?
>
> A. No, I have not.
>
> * * *
>
> Q. I'm assuming you spoke to somebody at [eMove's attorney's] office about sort of the logistics of getting set up with a court reporter and where to go; is that correct?
>
> A. That is correct, sir.
>
> Q. As far as the substance of the case like the questions you've been asked already so far in your deposition, have you discussed those with anybody?
>
> A. No, I have not.

[R. p. 147: Tr. Page 49, lines 7-24].

These denials were proven false when eMove's attorney (to her credit) confirmed that Unterkoefler had spoken to her nine or ten days prior. Their prior discussion included the central issue in this case – "what [Unterkoefler's] relationship was with eMove." [R. p. 155: Tr. Page 80, lines 16-page 81, line 15]. On recross, Unterkoefler confirmed that the relationship he described – and only that scenario – had been suggested to him. [R. p. 158: Tr. page 92, line 12-page 94, line 7].

There is no impropriety on the part of eMove's counsel; interviewing potential witnesses and pro se parties is part of the normal due diligence of investigating a case. The issue is about the credibility of Unterkoefler's self-serving testimony. Because we are dealing with jurisdictional facts, this Court takes its own view of the evidence – including the credibility of the witnesses.

eMove wants the Court to believe it is a marketing service or auction website, akin to eBay or Priceline. This argument must be rejected. First off, eMove is a captive company of U-Haul. U-Haul rents trucks and moving supplies to customers. eMove (through its subcontractors) provides moving services to people who rent trucks through U-Haul. Secondly, eMove is paid 15% of the job itself. This, unsurprisingly, is a typical markup for subcontracted work in the construction trades. It does not make money from selling advertising space on its website, nor is there a subscription fee.

eMove's sole source of revenue comes from moving services provided through its subcontractors. The focus should be on the work that generated the revenue; not on the fictional relationships set out in the Moving Help Agreement. "The 'trade, business, or occupation' analysis focuses on the work the owner has employed the subcontractor to complete." Harrell v. Pineland Plantation, Ltd., 337 S.C. 313, 321, 523 S.E.2d 766, 770 (1999). See also Boone v. Huntington and Guerry Elec. Co., 311 S.C. 550, 552, 430 S.E.2d 507, 508 (1993)("[W]hen an owner contracts with a subcontractor to perform or execute *any work* which is a part of his trade, business, or occupation, the subcontractor becomes a 'statutory employee' of the owner for the purposes of workers' compensation liability.")(emphasis added).

The South Carolina Supreme Court specifically addressed this "it's not really our business argument" in Harrell:

> An owner could subcontract out all of his work . . . and greatly avoid any compensation responsibility. Under such an approach, a business that uses all subcontractors would not be liable for any workers' compensation coverage except for those specific acts that alone would rise to the level of the Glass analysis. The General Assembly's desire to prevent a business from avoiding the responsibility for workers' compensation by subcontracting out the work would be greatly frustrated by such a position. Such a rule would also exclude many workers and employers from the Act's coverage, which is against this Court's policy. Harrell v. Pineland Plantation, Ltd., 337 S.C. 313, 523 S.E.2d 766 (1999).

In this case, eMove knew moving jobs require at least a two-person crew. [R. p. 198-208]. Even if one member of the crew was an independent contractor, eMove knew the other was certainly an employee. eMove also knew that many, if not most, of its subcontractors were too small to require workers' compensation insurance. eMove cannot claim ignorance of the risks faced by the downstream employees engaged in a very physical, dangerous job. Indeed, its contract seems knowingly designed to circumvent statutory employer liability.

Ferguson was simply trying to earn a living on a part-time job. He was just an employee. He did not know the details of the relationship between Unterkoefler and eMove. See Fortner v. Thomas M. Evans Const. and Development, LLC, 741 S.E.2d 538, 402 S.C. 421 (Ct. App. 2013)(statutory employer doctrine applied even though employee "was not aware of" who was actually paying for his work). He is precisely the type of innocent worker the statutory employment doctrine is designed to protect.

The evidence overwhelmingly shows the work Unterkoefler and his employees did – and the revenue generated – was necessary, essential, and integral to eMove's business. Therefore, the Court should reverse the Appellate Panel and hold eMove is George Ferguson's statutory employer.

II. George Ferguson is the Direct Employee of Sean Unterkoefler d/b/a United Stand Moving.

The Appellate Panel found Ferguson failed to meet his burden of proving he was an employee of Sean Unterkoefler d/b/a United Stand Moving. This was error, as an application of the 4-factors shows Ferguson was Unterkoefler's employee. Unterkoefler himself testified that the reason he did not carry workers' compensation insurance was because, "I had less than three *employees*, and I was under – the interpretation of the law is if I had three or less *employees*, I didn't

have to carry Workman's Compensation." [R. p. 146: Tr. Page 42, lines 6-13 (emphasis added)].

Workers' compensation awards are authorized only if an employer-employee relationship exists at the time of the injury. "The general test applied is that of control by the employer. It is not the actual control then exercised, but whether there exists the right and authority to control and direct the particular work or undertaking, as to the manner or means of its accomplishment." Young v. Warr, 252 S.C. 179, 189, 165 S.E.2d 797, 802 (1969). There are four elements 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. These factors "should be evaluated in an evenhanded manner in determining whether the questioned relationship is one of employment or independent contractor." Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 676 S.E.2d 700 (2009). Ferguson is able to establish all four elements showing the right of control.

1. Direct Evidence of the Right or Exercise of Control.

The testimony of both Unterkoefler and Ferguson establishes the right of control by Unterkoefler. To begin with, only Unterkoefler knew when and where the jobs were. He told Ferguson where to go and what to do. [R. p. 46, line 23-page 47, line 1]. 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"). The jobs were scheduled on eMove's website on the dates and times Unterkoefler listed United Stand as available.

Although the employment relationship was informal with no written documentation (which itself infers an employer/employee relationship), Unterkoefler was clearly the boss. Ferguson never dealt directly with eMove – he received his instructions directly from Unterkoefler. "The right to

control does not require the dictation of the thinking and manner of performing the work. It is enough if the employer has the right to direct the person by whom the services are to be performed, the time, place, degree, and amount of said service." Nelson v. Yellow Cab Co., 343 S.C. 102, 110, 538 S.E. 2d 276, 280 (Ct. App. 2000), *overruled on other grounds by* Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 676 S.E.2d 700 (2009).

Other workers appeared to have the same relationship of working *for* Unterkoefler rather than *with* him. David Coates specifically told Ferguson he "works *for* Mr. Unterkoefler."[5] [R. p. 62, lines 16-17].

Unterkoefler's claim that Ferguson "was responsible for . . . getting his own help however way" is belied by the testimony about Kenneth Hill. Ferguson could not even remember Hill's last name – only "the day I was injured, I was working with a Kenneth, and I don't recall his last name." [R. p. 48, lines 19-22].

Conversely, when Unterkoefler was asked how he found out Ferguson was injured, he testified: "It was actually the guy he was working with. I believe it was Kenneth Hill. . . . Who he was working with at the time, *he called me* and said that, you know, George was hurt." [R. p. 145: Tr. Page 39, line 18-page 40, line 3]. As to whether he had any contact information for Hill, Unterkoefler testified:

> I do not. Last I knew, he had moved to Arkansas, I believe. I've kind of lost contact with Kenneth, so I don't have any information on how to contact him or anything. I do know the last state he resided in was Arkansas." [R. p. 145: Tr. page 40, lines 4-9].

The testimony shows Unterkoefler was the one who had an ongoing relationship with Hill; not

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[5]The Fund's counsel moved to strike this testimony, but did not obtain a ruling. [R. p. 62, lines 16-17].

Ferguson. Ferguson could hardly have recruited Hill to work as a helper when he did not even know his last name. Unterkoefler knew Hill's last name and knew enough about him to know he had moved to Arkansas sometime after the accident. Moreover, Hill had Unterkoefler's telephone number.

Ferguson even asked Unterkoefler about workers' compensation and liability insurance on the day he was hired. The illusory promise about workers' compensation coverage "was the basis of my decision to work for him, knowing that, you know, there was a chance of injury and I wanted to make sure that if something did happen that I was covered." [R. p. 52, line 12-page 53, line 6].

This evidence of direction and control over Ferguson and other workers, supports the existence of an employer/employee relationship.

2. Furnishing of Equipment.

Ferguson and Unterkoefler used equipment supplied by the upstream employer, U-Haul (eMove is a subsidiary of U-Haul). Equipment was provided pursuant to the contract between U-Haul and the consumer. This included dollies, hand trucks and moving pads. Indeed, Ferguson's injury occurred while using a furniture dolly supplied by U-Haul. Ferguson provided only his labor. "When it is the employer who furnishes the equipment, the inference of right of control is a matter of common sense and business." Shatto v. McLeod Regional Medical Center, Op. No. 27341 (S.C.Sup.Ct. filed December 18, 2013)(Shearouse Adv.Sh. No. 53 at 16, 24) *quoting* 3 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 61.07[2] (2013). See, also 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 furnished supplies, which included all forms" were employees).

The fact Ferguson furnished no equipment infers he is an employee. Although strictly speaking, Unterkoefler did also not furnish equipment, the fact the equipment was provided by the upstream employer – with whom only Unterkoefler had a contract – indicates Ferguson was Unterkoefler's employee.

3. Right to Fire.

"The absolute right to terminate the relationship without liability is not consistent with the concept of independent contract, under which the contractor should have the legal right to complete the project . . ." Shatto v. McLeod Regional Medical Center, Op. No. 27341 (S.C.Sup.Ct. filed December 18, 2013)(Shearouse Adv.Sh. No. 53 at 16, 25) *quoting* 3 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 61.08[1] (2013).

Both Unterkoefler and Ferguson agreed Unterkoefler had the right to fire Ferguson. Ferguson testified he could have been fired had he committed any misconduct. [R. p. 46, lines 20-22].

Unterkoefler was asked if he "basically had the right to fire him . . ." He responded, "I suppose I wouldn't have him – I wouldn't pass the job . . . I guess I wouldn't pass on jobs to him anymore, no." To clarify, he was then asked, "You could basically say I'm not going to use you again, you're not working for United Stand ever again, correct?" He answered, "Yeah." [R. p. 153: Tr. Page 70, line 17-page 71, line 7].

"The fact remains that [Unterkoefler] had the right to determine whether [Ferguson's] work was satisfactory and the right to terminate that relationship if [he] was not satisfied. Id. at 26. This central fact confirms the right to fire existed in the relationship, thus confirming that Ferguson was Unterkoefler's employee.

4. Method of Payment.

The method of payment supports a finding that Ferguson is an employee. Independent contractors are typically paid a set price for a job from which they deduct the cost of materials and other expenses. See Marlow v. E.L. Jones & Son, Inc., 248 S.C. 568, 151 S.E.2d 747 (1966). Ferguson was paid by the hour. He testified Unterkoefler paid $35.00 an hour for a two-man crew, so he was paid $17.50 per hour. [R. p. 47, 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).

There is testimony from Unterkoefler that he paid Ferguson by the job. Although paying someone by the job could imply an independent contractor relationship, here the inference still points to an employer/employee relationship. Unterkoefler did not "actually give [Ferguson] the job as a subcontractor and let [him] deal with the expenses and paying helpers and so on." Ferguson testified, "No, he just told me where to go and what to do." [R. p. 69, lines 15-19]. Furthermore, Unterkoefler intended to deduct his business expenses from his taxes, including "the wages paid to Mr. Coats and Ferguson."[6] [R. p. 148: Tr. Page 51, line 9-page 52, line 3].

Ferguson emphasized that Unterkoefler was always the one who paid him. "Sean would get the money and then pay us every time." [R. p. 65, lines 18-24]. If he did a job with someone other

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[6]Unterkoefler qualified his answer noting he did not "1099 them their wages or anything like that," explaining "I guess through ignorance and being young and not doing my homework, you know, I just kind of got overwhelmed and haven't filed and plan to do so." [R. p. 148: Tr. page 52, lines 5-9].

than Unterkoefler, Ferguson never paid his coworker,

Ferguson received his pay directly from Unterkoefler – sometimes right after a job, sometimes he got paid weekly. [R. p. 47, lines 8-15]. He was never paid by the customer nor was he paid by eMove. He relied entirely on Unterkoefler for payment – he had no way of knowing how much eMove paid Unterkoefler for any given job. [R. p. 65, lines 15-24]. Ferguson had no business license; no business cards; no website; no records – none of the indicia of running his own business. Moreover, he never took the affirmative steps to establish any sort of subcontractor relationship such as Unterkoefler took with eMove. Unlike United Stand Moving, he did not hold himself out as a business entity. Ferguson may have been a part-time employee, but he was nonetheless an employee.

III. Sean Unterkoefler d/b/a United Stand Moving is subject to the Workers' Compensation Act because he employed 4 or more employees during the relevant time period.

The evidence shows Unterkoefler employed 4 or more employees once his business picked up to where he could no longer handle it with himself and one helper. The Court must determine the critical period – which generally covers the time frame when the employee is injured. To be subject to the Act, the employer must regularly employ four or more employees during the relevant time period. "Regularly employed" is defined as "employment of the same number of persons throughout the period with some constancy." Hernandez-Zuniga v. Tickle, 647 S.E.2d 691, 374 S.C. 235 (Ct. App. 2007). In determining the relevant time period, the Commission must consider: "(1) the employer's established mode of operation; (2) whether the employer generally employs the jurisdictional number at any time during his operation, and (3) the period during which employment is definite and recurrent rather than occasional, sporadic, or indefinite." Id. The relevant time period here was the period during July and August 2010 when Ferguson worked with regularity. See

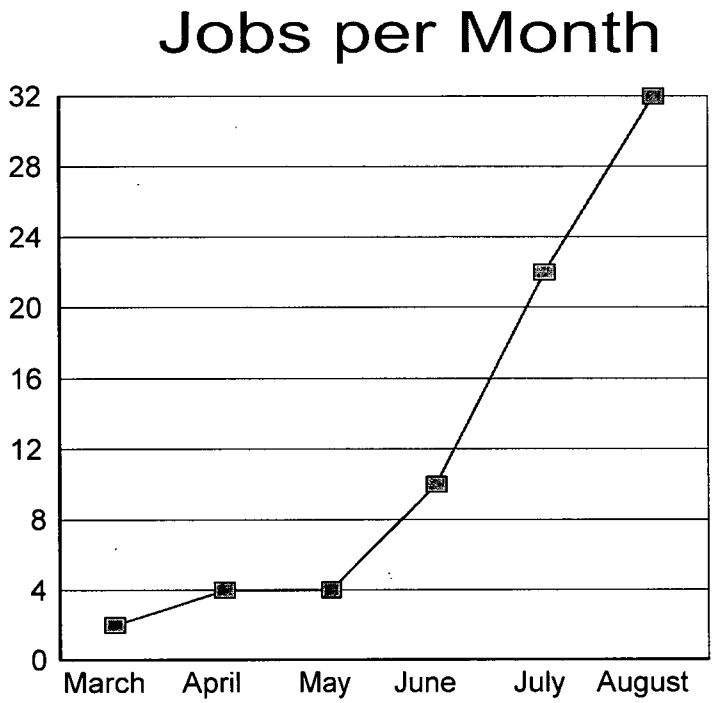
Harding v. Plumley, 329 S.C. 580, 584, 496 S.E.2d 29, 31 (Ct.App.1998)(where worker was injured on first day of employment, relevant time period for determining the number of regularly employed workers corresponded to the period of construction).

Ferguson only worked a couple of jobs during April, May and June 2010. During July and August, Ferguson worked as many as five jobs a week. [R. p. 49, lines 15-22]. When business picked up for United Stand, so did the number of employees.

Ferguson himself worked with 3 other employees at various times (plus Unterkoefler): David Coates, Arly Barr and Kenneth Hill. [R. p. 48, lines 19-25; R. p. 152: Tr. page 69, lines 19-25]. Unterkoefler testified to one other employee named Josh. [R. p. 152 Tr. page 69, lines 19-25]. The records from customer surveys show Josh working at least two jobs. They also mention various other employees by name including "David", "Mark", "Mike", "CJ", "Tyrone," and "Josh." [R. p. 241-252]. The surveys are particularly telling as they are from customers. Notably CJ and Tyrone did a job on August 19, 2010 – two days before Ferguson was injured.

In August, Unterkoefler was doing more one job every day. United Stand was scheduled to work 38 jobs – yet could only complete 32. A trickle of business was now a flood. Everyone who worked for United Stand had other full time jobs. There was no way for Unterkoefler to do this much work without multiple crews – each crew included at least two men.

This number of employees makes logical sense when you look at how many jobs Unterkoefler did during the critical period. The drastic increase is illustrated with the graph below:



The numerical data is on the chart:

	March	April	May	June	July	August
Days	31	30	31	30	31	31
Scheduled	8	5	9	12	24	38
Completed	2	4	4	10	22	32
% completed	25%	80%	44%	83%	92%	84%

These numbers confirm that July and August 2010 would be the relevant period. Ferguson, Barr, Coates, Hill, Josh, CJ and Tyrone all worked during that period. In fact, during the week Ferguson was injured, there are four specifically identifiable employees who worked: Ferguson and Hill on one crew; CJ and Tyrone on another. The Court should reverse the Commission and find Unterkoefler is an uninsured employer subject to the Act.

IV. A remand is required as Ferguson is entitled to temporary compensation and medical treatment for the injuries to his right hand, right arm, right knee, and right shoulder.

The Appellate Panel did not rule on all the injured body parts nor on the benefits to which Ferguson should be entitled. The evidence showed he injured his right hand, right arm, right knee, and right shoulder. [R. p. 53, line 14-page 55, line 19]. He is not at MMI and requires additional medical treatment, as well as a period of temporary compensation. [R. p.76-114].

No rulings were made on these issues, presumably because the claim was denied on the employment relationship issues. The Court should reverse on the employment issues and remand for a hearing to award benefits. See Pack v. State Dept. of Transp., 673 S.E.2d 461, 381 S.C. 526 (Ct. App. 2009)(remanding for additional findings on issues not addressed or incompletely addressed by Commission). It should be noted that a determination of the average weekly wage and compensation rate was held in abeyance, so the remand should also include that issue as a matter of judicial economy.

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
June 22, 2014

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,

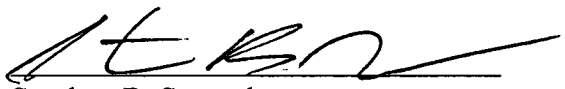
and

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR.

Respectfully Submitted



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