

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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S.C. Supreme Court

Gregory A. Collins
(deceased), Employee, Claimant Respondent,

v.

Seko Charlotte and Nationwide Mutual
Ins. Co. Petitioners,

v.

West Expedited & Delivery Service, Inc., ... Defendant,

v.

Seko Worldwide and Federal Ins. Co., ... Defendants,

v.

Uninsured Employers Fund, ... Respondent.

PETITIONERS' BRIEF

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QUESTION PRESENTED

- I. DID THE COURT OF APPEALS ERR IN HOLDING THAT CLAIMANT WAS THE STATUTORY EMPLOYEE OF SEKO CHARLOTTE AT THE TIME OF HIS FATAL ACCIDENT?
- II. DID THE COURT OF APPEALS ERR IN REVERSING THE COMMISSION ON THE BASIS THAT IT EMPLOYED AN IMPROPER ANALYSIS EVEN THOUGH THE COMMISSION REACHED THE CORRECT RESULT?

STATEMENT OF THE CASE

The facts of this case are not in dispute. Claimant Gregory A. Collins (“Claimant”) was employed by Morris West to drive a van for West Expedited and Delivery Services, Inc. (“West Expedited”). (R. 200, lines 5-12). Seko Charlotte, Inc. (“Seko Charlotte”) contracted with West Expedited to pick up parts from Ina Bearing Company in Spartanburg, South Carolina on September 7, 2007 and deliver them to Wauwatosa, Wisconsin. (Suppl. R. 2, lines 4-18) (R. 239, lines 6-25). Claimant made the deliveries in Wisconsin as contracted. On September 8, 2007, while he was returning to South Carolina, Claimant was fatally injured as the result of a motor vehicle collision in Kentucky. (Stipulation No. 5, Decision and Order of the Single Commissioner, R. 30 (June 24, 2010) (“Single Commissioner Order”)) (R. 201, line 25 – 202, line 13).

For the delivery in question, Seko Charlotte paid West Expedited for mileage on a one-way basis, from the pick up point to the delivery point. (R. 201, lines 14-22). Once the deliveries were made in Wisconsin, the contractual relationship between Seko Charlotte and West Expedited ended, and West Expedited was free to contract with another entity for hauling or delivery services on the return trip. Although West Expedited did not contract with another entity for return deliveries on this particular trip, it had done so in the past. (R. 208, line 12 – 209, line 6) (*see also* R. 249, lines 5-16 (noting that most of the companies Seko Charlotte contracts with for long-distance deliveries “try to find something else up in that area going from that area to another area ...”)). Seko Charlotte did not pay West Expedited any more or less depending on whether there was a return-trip delivery for another entity – instead, Seko Charlotte and West Expedited’s contractual relationship was based entirely on one-way transportation

service and was entirely concluded once the deliveries to Wisconsin were completed. (R. 208, lines 12-15) (R. 241, line 6 – 242, line 1). In fact, had Seko Charlotte wanted West Expedited to carry items for it on the return trip to South Carolina, Seko Charlotte would have had to have entered into a separate contract with West Expedited for that return-trip service. Instead, Seko Charlotte had no relationship whatsoever with West Expedited after the delivery was made in Wisconsin. (R. 209, line 25 – 210, line 14) (R. 241, line 6 – 242, line 1).

Seko Charlotte is a world-wide logistics company, providing transportation logistic services to and from different points in the world. (R. 238, line 15 – 239, line 1) (R. 144, lines 19-24). Although Seko Charlotte hires its own drivers for local Charlotte, North Carolina deliveries, deliveries over 50 miles from Charlotte are usually sub-contracted out. None of Seko Charlotte's drivers make any deliveries beyond a 100-mile radius of Charlotte, North Carolina. (R. 243, lines 2-23) (*see also* R. 170, lines 9-17).

Following Claimant's fatal accident, Claimant's dependents filed a workers' compensation claim seeking benefits.¹ Because West Expedited did not carry workers' compensation insurance at the time of Claimant's fatal accident, (R. 105-106), the South Carolina Uninsured Employers' Fund ("UEF") was brought into this case. Seko Charlotte was added to the proceeding following a motion to add by Seko Worldwide, LLC.² (R. 196, lines 1-7).

A hearing was conducted on May 12, 2010 before Single Commissioner David Huffstetler, who issued his Decision and Order on June 24, 2010. The Single

¹ Issues were contested below regarding the number of dependents entitled to compensation; however, those issues are not raised in this appeal.

² Although Seko Worldwide, LLC initially was named as a party, the Commission dismissed the claims against Seko Worldwide, LLC, and the UEF has not appealed that dismissal. (Appx. p. 373).

Commissioner found, among other things, that at the time of Claimant's fatal accident, Seko Charlotte was Claimant's statutory employer and that its insurer, Nationwide Insurance Company, was liable for compensation. (Single Commissioner Order, R. 40, 42).

Seko Charlotte timely appealed this decision to the Full Commission, which heard oral argument on October 6, 2010. The Full Commission reversed the Single Commissioner and instituted its own order. (Full Commission Decision & Order, dated January 24, 2011, R. 9 ("Commission Decision"). The Full Commission held that Seko Charlotte was not Claimant's statutory employer at the time of his accident under any theory of employment. Instead, the Commission held that, "Claimant was no longer a 'statutory employee' of Seko Charlotte at the time of his accidental death," and that "West Expedited was Claimant's only employer at the time of the accident." (Commission Decision, R. 24) (*see also* R. 27 (holding that "the statutory employment relationship between Claimant and Seko Charlotte, Inc. and Nationwide Insurance Company did not extend beyond completion of the contracted for services and, at the time of the injury, Claimant was under the exclusive control of West Expedited & Delivery Service, Inc."))).

Although a statutory employment relationship was created on the out-going delivery leg of the trip, the Commission explained that Seko Charlotte had no relationship with Claimant, including no "continuing interest, right, or exercise of control over the Claimant once the delivery was complete." (Commission Decision, p. 21). Because there are no South Carolina cases addressing the situation where a statutory employee relationship is alleged to exist after completion of the contracted task and where there is

no evidence of continued control on the part of Seko Charlotte, the Commission relied on the Georgia case of Farmer v. Ryder Truck lines, Inc., 245 Ga. 734, 266 S.E.2d 922 (Ga. 1980), in support of its conclusion that “once a delivery is complete if there is no control remaining on the return trip, then there is no statutory employment.” (Commission Decision, R. 26).

The Commission specifically found, based on unrefuted evidence in the record, that:

Under the single Commissioner’s theory the return trip was still part of the contract with Seko Charlotte, if this were true Seko Charlotte would have had the ability to have Claimant haul a load back to South Carolina; in reality Seko Charlotte would have had to pay a separate fee to transport something back to South Carolina. The Claimant’s representative and West Expedited both admit that Seko Charlotte only paid for a one way trip and Claimant was not carrying a return load.

(Commission Decision, R. 23).

The Commission also determined that Claimant was not in the course and scope of employment with Seko Charlotte on the return trip, and could not be considered Seko Charlotte’s employee under exceptions to the Coming and Going rule. (Commission Decision, R. 21-23, 25). Addressing the Single Commissioner’s discussion of the traveling employee doctrine, the Commission clarified that, on the return trip, Claimant was a traveling employee of West Expedited only. (Commission Decision, R. 22-23, 25). The Commission also held that, because any compensation that was paid to Claimant for the return trip came from West Expedited, to the extent Claimant could be considered Seko Charlotte’s statutory employee for that leg, he would be a gratuitous worker and not an employee for hire for purposes of workers’ compensation coverage. Finally, the Commission pointed out that, although Seko Charlotte was not Claimant’s statutory employer at the time of his accident, Claimant is not without recovery because he was

employed by West Expedited at that time and the UEF was, therefore, liable for paying the compensation. (Commission Decision, R. 23). As a result, the claims against Seko Charlotte and its insurer were dismissed. (Commission Decision, R. 24, 26, 28).

Respondent UEF timely appealed the Commission Decision to the Court of Appeals, which held that “the Commission erroneously utilized the ‘employee/independent contractor’ test to determine whether Collins was Seko’s statutory employee.” Without analyzing whether a contractual relationship existed between Seko Charlotte and West Expedited at the time of Claimant’s accident, the Court of Appeals simply applied this Court’s three-part test from Olmstead v. Shakespeare, 354 S.C. 421, 581 S.E.2d 483 (2003) and determined that “Collins was Seko’s statutory employee during the entire trip.” The Court of Appeals reversed the Commission and reinstated the Single Commissioner’s Decision. Collins v. Seko Charlotte, 400 S.C. 50, 732 S.E.2d 630 (2012) (Appx. 347-354). Petitioner moved for rehearing (Appx. 355-366), which was denied by the Court of Appeals. (Appx. 344-345).

Petitioner timely appealed to this Court.

STANDARD OF REVIEW

Judicial review of a Commission decision is directed by the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(A)(5) (Supp. 2010). Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). The existence of an employer/employee relationship – statutory or otherwise – is a jurisdictional question, which must be proved by a preponderance of the evidence, and appellate review is plenary. Voss v. Ramco, Inc., 325 S.C. 560, 565, 482 S.E.2d 582, 584-85 (Ct. App. 1997). As such, this Court’s review

is governed by the preponderance of evidence standard. Hernandez-Zuniga v. Tickle, 374 S.C. 235, 243, 647 S.E.2d 691, 694 (Ct. App. 2007).

“Workers’ compensation awards are authorized only if an employer-employee relationship exists **at the time of the injury**.” *E.g.*, Edens v. Loris Bellini, S.p.a., 359 S.C. 433, 439, 597 S.E.2d 863, 866 (Ct. App. 2004) (emphasis added); *see also* Gray v. Club Group, Ltd., 339 S.C. 173, 184, 528 S.E.2d 435, 441 (Ct. App. 2000) (holding that “[a] Workers’ Compensation award will not be made unless an employment relationship existed **at the time of the alleged injury** for which the claim is made. [citations omitted] Before the provisions of the Workers’ Compensation Act can apply, an employer-employee relationship must exist; this is an initial fact to be established”) (emphasis added). Because “the factual circumstances from which [statutory employment] controversies arise are so varied . . . no single bright line test is readily available. [citation omitted] Each situation, therefore, must be evaluated on a case-by-case basis.” Meyer v. Piggly Wiggly No. 24, Inc., 331 S.C. 261, 265, 500 S.E.2d 190, 192 (Ct. App. 1998). “Although doubts about jurisdiction are resolved in the claimant’s favor in accordance with the inclusive purposes of the Act, this Court is bound by the Act as written and does not have the power to expand the jurisdictional reach of the Act.” Voss, 325 S.C. at 565, 482 S.E.2d at 585; Hernandez-Zuniga, 374 S.C. at 256, 647 S.E.2d at 702. “In a case raising a novel question regarding the interpretation of a statute, the appellate court is free to decide the question with no particular deference to the lower court.” New York Times Co. v. Spartanburg County Sch. Dist. No. 7, 374 S.C. 307, 310, 649 S.E.2d 28, 29 (2007).

ARGUMENTS

I. The Court of Appeals erred in holding that Claimant was the statutory employee of Seko Charlotte at the time of his fatal accident.

The Court of Appeals only focused on one part of the statutory employer provisions of the Workers' Compensation Act and failed to analyze whether a contract existed between the "owner" (Seko Charlotte) and the "subcontractor" (West Expedited) at the time of Claimant's accident. 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 (emphasis added). The Court of Appeals erred in failing to consider an important requirement of Section 42-1-400, *i.e.*, the requirement that a contractual relationship exist between the owner and the subcontractor. See Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 693 (1996) (in analyzing a statutory provision, "a court should not focus on any single section or provision but should consider the language of the statute as a whole").

A. Claimant was not a statutory employee of Seko Charlotte at the time of his accident because the contractual relationship between West Expedited and Seko Charlotte had terminated.

Where a statutory employment relationship is alleged, that relationship flows from the owner to the subcontractor to the subcontractor's employees. S.C. Code Ann. § 42-1-400. Thus, the subcontractor is the linchpin. Whether a contractual relationship exists between the upstream owner/general contractor and the subcontractor at the time of

the accident is a critical step in the analysis, which the Court of Appeals erroneously failed to consider. See Meyer, 331 S.C. at 265, 500 S.E.2d at 192 (explaining that “[t]he crucial inquiry here is whether Piggly Wiggly contracted with Derst for the performance of work ...” at the time of the accident).

In fact, in Murray v. Aaron Mizell Trucking Co., 286 S.C. 351, 334 S.E.2d 128 (Ct. App. 1985), the Court of Appeals focused specifically on whether there was a contractual relationship between Davis, the alleged statutory employer, and Mizell, the claimant’s direct employer at the time of the accident. “The sole issue, as we see it, is whether there was an actual or implied contract between Davis and Mizell that Mizell would haul for Davis. If so, the statute would make Murray the statutory employee of Davis.” 286 S.C. at 355, 334 S.E.2d at 130. Logically, the converse is also true: if there was **no** actual or implied contract between Davis and Mizell at the time of the accident, then Murray would **not** be the statutory employee of Davis for purposes of workers’ compensation benefits.

Where there is no contractual relationship between the subcontractor and the owner, there cannot be a statutory employment relationship between the subcontractor’s employee and the owner. In its Opinion, the Court of Appeals erroneously failed to account for the fact that there was no contractual relationship between Seko Charlotte and West Expedited at the time of Claimant’s accident. Functionally, the Court of Appeals’ Opinion would impose, by judicial fiat, a contractual relationship on Seko Charlotte that it simply did not enter into.

The following facts are undisputed in this case: Seko Charlotte contracted with West Expedited for a one-way delivery of goods from Spartanburg, South Carolina to

Wisconsin. For this delivery, Seko Charlotte paid West Expedited for mileage on a one-way basis, from the pick up point to the delivery point. (R. 201, lines 14-22). Mr. West testified that, after the deliveries were made in Wisconsin, Seko Charlotte did not pay for the trip home. (Suppl. R. 15, line 17 – 18, line 14). Hence, Seko Charlotte only contracted and paid for the outgoing delivery.

Once Claimant made the deliveries in Wisconsin, the contractual relationship between West Expedited and Seko Charlotte ended. West Expedited was free to contract with another entity for hauling or delivery services on the return trip, which it had done in the past, although it did not do so on this particular trip. (R. 208, line 12 – 209, line 6) (*see also* R. 249, lines 5-16 (noting that most of the companies Seko Charlotte contracts with for long-distance deliveries “try to find something else up in that area going from that area to another area ...”)). Seko Charlotte did not pay West Expedited any more or less depending on whether there was a return-trip delivery for another entity – instead, Seko Charlotte and West Expedited’s contractual relationship was based entirely on one-way transportation service and ended once the deliveries to Wisconsin were completed. (R. 208, lines 12-15) (R. 241, line 6 – 242, line 1). In fact, had Seko Charlotte wanted to engage West Expedited to carry items for it on the return trip to South Carolina, Seko Charlotte would have had to have entered into a separate contract with West Expedited for that return-trip service. Instead, Seko Charlotte had no relationship whatsoever with West Expedited after the delivery was made in Wisconsin. (R. 209, line 25 – 210, line 14) (R. 241, line 6 – 242, line 1). There is absolutely no evidence in this record to the contrary. Consequently, because there was no relationship whatsoever between Seko

Charlotte and West Expedited at the time of Claimant's accident, Seko Charlotte was not and could not have been Claimant's statutory employer at the time of his accident.

Other jurisdictions are in accord. A decision of the Virginia Supreme Court, analyzing virtually identical statutory language, confirms the requirement of a contractual relationship between the owner and the subcontractor in order to establish a statutory employment relationship. Moore v. Virginia Int'l Term., Inc., 720 S.E.2d 117 (Va. 2012).³ In Moore, the Virginia Supreme Court held that, regardless of whether the work performed by the subcontractors' employee was part of the owner's "trade, business, or occupation," there was no statutory relationship between the port owner and the subcontractor's employee because there was no contract between the port owner and the subcontractor at the time of the accident. The Court held that the plain language of the statutory employment provision of the Virginia workers' compensation statute, "establishes that two discrete elements must be present for a statutory employer/employee relationship to exist: (1) the work must be part of the owner/contractor's trade, business or occupation, and (2) the owner/contractor must have contracted with another to have work performed." 283 Va. at 236-37, 720 S.E.2d at 119. Where no such contractual relationship exists, there can be no statutory employment relationship. This Court should reach the same result in this case.

³ Virginia's statutory employer provision reads, in pertinent part, "[w]hen any person (referred to in this section 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 (referred to in this section 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 any worker employed in the work any compensation under this title which he would have been liable to pay if the worker had been immediately employed by him." Va. Code § 65.2-302(A). South Carolina's provision is virtually identical. See S.C. Code Ann. § 42-1-400; Corollo v. S.S. Kresge Co., 456 F.2d 306, 312-313 (4th Cir. 1972) (noting that the Virginia statutory employment provisions are "identical with the South Carolina statute").

Hudson v. Jarrett, 606 S.E.2d 827 (Va. 2005), another Virginia case, reaches the same result. In Hudson, the claimant was injured while unloading a barge. After analyzing various agreements between the claimant's immediate employer and the purported statutory employer, the Virginia Supreme Court concluded that none of those agreements constituted a contract to load or unload the barge. "In the absence of any contractual relationship" between the purported "owner" and the subcontractor for the loading and unloading of the barge, the "owner" could not qualify as the claimant's statutory employer. 606 S.E.2d at 830.⁴

Any other result nullifies the provision "**and contracts with any other person ...** for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner ..." S.C. Code Ann. § 42-1-400 (emphasis added). It is presumed that the legislature "intended to accomplish something by its choice of words and would not do a futile thing." Florence County Democratic Party v. Florence County Republican Party, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012) (admonishing that courts "should seek a construction that **gives effect to every word** of a statute rather than adopting an interpretation that renders a portion meaningless") (emphasis added); TNS Mills, Inc. v. South Carolina Dept of Rev., 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998) (instructing that courts "must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something"). The Court of Appeals' Opinion improperly renders the phrase "and contracts with any other person" meaningless.

⁴ Conversely, the Fourth Circuit held that a plaintiff was limited to recovery under the Virginia Workers' Compensation Act because, "at the time of the accident [the "subcontractor's"] obligations under its contract with [the "owner"] had **not** been completed. Evans v. B.F. Perkins Co., 166 F.3d 642, 652 (4th Cir. 1999) (emphasis added).

The Commission explained that, “[t]he statutory employment case law in South Carolina all deals with employees actively involved in their **contracted** duties.” (Commission Decision, R. 16-17) (emphasis added). After noting that no South Carolina case deals with the situation where the question is whether a claimant remained a statutory employee “despite completion of their task and lack of evidence of control,” (Commission Decision, R. 16, 25), the Commission properly looked to cases from other jurisdictions, including Farmer v. Ryder Truck Lines, Inc., 245 Ga. 734, 266 S.E.2d 922 (Ga. 1980).⁵ The facts essential to the statutory employment analysis are similar in both this case and Farmer, and the result in both cases should also be the same. Neither the Court of Appeals nor Respondent has cited a single case from South Carolina or any other jurisdiction supporting the conclusion that, even once the contractual relationship between an owner and a subcontractor has ended, the statutory relationship between the owner and employees of the subcontractor continues to exist.

There is a good reason for this. As explained in more detail below, such a finding runs counter to the policy underlying the statutory employer doctrine and imposes liability on private parties based on a judicially-created and judicially-imposed contractual relationship that does not actually exist among any of the parties. The salient point to be drawn from Farmer is that the statutory employment relationship ends when the contracted job has been completed and the first owner no longer has any relationship with or control over the subcontractor and/or its employee. Other jurisdictions are in accord. See Dupre v. Exxon Pipeline Co., 738 S.2d 1118, 1121 (La. Ct. App. 1994) (finding claimant was not a statutory employee at the time of the accident because the

⁵ “When there is no case on point in South Carolina, our courts may look to other states to determine if the issue has been decided and if the decision is persuasive authority.” Bass v. Isochem, 365 S.C. 454, 477, 617 S.E.2d 369, 381 (Ct. App. 2005).

work day was over, he was on his way home, and the employer did not provide transportation); Walls v. Food Lion, L.L.C., 66 Va. Cir. 26, 2004 Va. Cir. LEXIS 341 (Va. Cir. Ct. 2004) (the statutory employment relationship still existed at the time of the claimant's injury precisely "because the delivery had not yet been completed").

A different result may well have been warranted had Seko Charlotte contracted with West Expedited to make a series of deliveries from South Carolina to Wisconsin and other locations, requiring Claimant to return to South Carolina in order to perform further acts under an on-going contract between Seko Charlotte and West Expedited. That is not the case here. Alternatively, this case might have warranted a different outcome if Seko Charlotte's contract with West Expedited reserved the right for Seko Charlotte to use its drivers for return-trip deliveries. As noted above, that is not the case here, as Seko Charlotte would have had to have entered into a second contract with West Expedited in order to employ Claimant's services for a return-trip delivery. This might even be a different case if West Expedited did not reserve the right to engage paying return trips as it had done in the past, even though it did not engage a paying return trip on this particular occasion. But, again, those are not the facts of this case.

As the Commission found, "[i]t would be an unduly harsh result to find that a former statutory employer can still be held liable for accidents after completion of its contract and after it had given up all control over the employee in question." (Commission Decision, R. 16). The statutory employment relationship flows from the owner to the subcontractor to the subcontractor's employees. The subcontractor is the linchpin. Logically, if there is no contractual relationship between the owner and the

subcontractor, there simply cannot be any statutory employment relationship between the owner and the subcontractor's employees.

Transportation companies employ all manner of arrangements in order to run their businesses, and it makes sense for a company like West Expedited to line up return-trip deliveries in order to maximize efficiencies of fuel and time. West Expedited was free to make such arrangements but did not do so on this particular trip for reasons of its own. To have Seko Charlotte's liability hinge, as the Court of Appeals has done, on whether West Expedited chose to make a return-trip contract with Seko Charlotte, with some other company, or to send Claimant on some errand of its own, is untenable and runs counter to South Carolina workers' compensation goals and policies. Such a result imposes liability on an entity that had absolutely no connection to the employee at the time of injury.

The crux of this case is whether a statutory employment relationship continues to exist between the employee of a subcontractor and an owner, after the contractual relationship between the subcontractor and the owner has completely concluded. The Commission correctly held that, once the deliveries to Wisconsin were completed and the contractual relationship between Seko Charlotte and West Expedited ended, "Claimant was no longer a 'statutory employee' of Seko Charlotte at the time of his accidental death." (Commission Decision, R. 21-26).

This Court should reverse the Court of Appeals and hold that, for purposes of S.C. Code Ann. § 42-1-400, once the contractual relationship between the owner and the subcontractor has ended, any statutory employment relationship between the owner and the subcontractor's employees also ceases to exist.

B. Claimant's relationship to Seko Charlotte at the time of his accident does not meet any of the prongs of the test for statutory employment.

The Commission correctly held that, "[p]ursuant to §42-1-400, Claimant was no longer a 'statutory employee' of Seko Charlotte at the time of his accidental death." (Commission Decision, R. 24). For purposes of S.C. Code § 42-1-400, a claimant is a statutory employee if:

(1) the activity of the subcontractor is an important part of the owner's trade or business; (2) the activity performed by the subcontractor is a necessary, essential, and integral part of the owner's business; or (3) the identical activity performed by the subcontractor has been performed by employees of the owner.

Voss, 325 S.C. at 568, 482 S.E.2d at 586. In order to find a statutory employment relationship, only one of these three tests needs to be satisfied. Id., 482 S.E.2d at 586.

The Court of Appeals misapplied the statutory employment test to the facts of this case in at least two respects. First, the Court of Appeals analyzed this case as if Claimant were injured on his way to Wisconsin to make the deliveries, instead of after that job had been completed and the contractual relationship between Seko Charlotte and Claimant's employer had ended. Those are not the facts of this case. For example, while the Court of Appeals cites testimony by Mr. Burks as to the importance of deliveries like the one Claimant made, the fact remains that Seko Charlotte is not in the business of returning drivers from long-distance hauls to South Carolina. As a result, the Court of Appeals' Opinion is based on facts that simply do not exist (that, on his return trip, Claimant was doing anything that was part of Seko Charlotte's "trade, business, or occupation"), and certainly are not supported by the record.

Second, even if the Court of Appeals' analysis of Seko Charlotte's "trade, business, or occupation" had some support in the record, which Petitioners do not

concede, the cases on which the Court of Appeals relies in its analysis of whether a statutory relationship existed between Claimant and Seko Charlotte are readily distinguishable from the case at hand. In Voss, the claimant was injured during the course of selling products for Ramco. The Court of Appeals held that the claimant was Ramco's statutory employee because selling equipment was "an essential part of Ramco's business, an activity without which Ramco could not remain in business." 325 S.C. at 568, 482 S.E.2d at 586. Similarly, in Marchbanks v. Duke Power Co., 190 S.C. 336, 2 S.E.2d 825 (1939), the claimant was injured while he was painting a Duke Power Company utility pole. This Court found that the claimant was a statutory employee of the power company because painting and maintaining the posts that held up its transmission lines was necessary for the company to conduct its business. 190 S.C. at 365-66, 2 S.E.2d at 837. In each of these cases, the activity performed by the subcontractor's employee at the time they were injured was essential to the owner's ability to conduct its business.

In both Voss and Marchbanks, the upstream owner realistically could not continue to conduct its business without the subcontracted activities. Voss, 325 S.C. at 568, 482 S.E.2d at 586 (holding "[c]learly then, selling the equipment it manufactures is an essential part of Ramco's business, an activity without which Ramco could not remain in business"); Marchbanks, 190 S.C. at 365, 2 S.E.2d at 365 (noting that Duke Power admitted that, "in order to carry on its business as dispense and vender of electricity ... it is necessary for the said defendant corporation to construct and maintain many wires over which electric current is transmitted [and] that in order to protect said posts from the weather ... the defendant has, from time to time, caused said posts to be painted"). By

way of contrast, in this case the activity Claimant was performing at the time of his accident – returning from an inter-state delivery of several 100 miles – is not an essential or even an important part of Seko Charlotte’s business. (R. 246, line 25 – 247, line 19 (Mr. Burks testifying that it was not essential to have drivers in the Spartanburg, South Carolina area)).

Furthermore, even conceding for the sake of argument that it may have been important to Seko Charlotte to ship goods out of state for its customers, Claimant was not injured while performing this task. He was injured returning to South Carolina to perform additional duties for his direct employer, West Expedited. He was not returning to perform any duty or service for Seko Charlotte. Returning drivers to the state of South Carolina from distances beyond 100 miles simply is not an important part of Seko Charlotte’s business. Abbott v. The Limited, Inc., 338 S.C. 161, 526 S.E.2d 513 (2000) is instructive on this point: “[t]he fact that it was important to Retailer to receive goods does not render the delivery of goods an important part of [the] Retailer’s business.” 338 S.C. at 163, 526 S.E.2d at 514. Similarly, even accepting that it may have been important to Seko Charlotte to make long-distance deliveries does not render the return of West Expedited’s drivers to South Carolina so that they can perform other services for West Expedited an important part of Seko Charlotte’s business.

As noted above, in conducting the statutory employment analysis, courts must look at the activity being performed at the time the accident occurred. *See, e.g., Miller v. Lawrence Robinson Trucking*, 333 S.C. 576, 579, 510 S.E.2d 431, 433 (Ct. App. 1998) (noting that “**at the time of the accident**, [the claimant] was performing work as a subcontractor for” the upstream contractor) (emphasis added); Parker v. Williams &

Madjanik, Inc., 275 S.C. 65, 67, 267 S.E.2d 524, 525 (1980) (general contractor held to be statutory employer of construction worker, employed by a subcontractor, who was fatally injured **while working on the construction job**); Posey v. Proper Mold & Eng'g, Inc., 378 S.C. 210, 222, 661 S.E.2d 395, 401-02 (Ct. App. 2008) (holding that “**at the time of his injuries**, PME/Autegra [the general contractor] **had contracted with Tiger** [the subcontractor] to provide supplemental transportation because PME/Autegra’s own employees were unavailable for pick up or delivery”) (emphasis added)). In fact, in Posey, cited by the Court of Appeals, the claimant was deemed a statutory employee of PME/Autegra precisely because he was injured during part of the job that PME/Autegra required (unloading) as part of the delivery service. 378 S.C. at 215, 661 S.E.2d at 398.

The activity Claimant was performing at the time of his accident – returning from an inter-state delivery of several 100 miles – is not an activity performed by Seko Charlotte’s employees. Although Seko Charlotte hires its own drivers for deliveries around the Charlotte, North Carolina area, any delivery over 50 miles from Charlotte is usually sub-contracted out. (R. 243, lines 2-20) (*see also* R. 170, lines 9-17). The record in this case establishes that Seko Charlotte’s employees **never** travel beyond a 100-mile radius of Charlotte. (R. 243, lines 2-23). In addition, Seko Charlotte has a different interest with regard to their own employees who make deliveries – they need to get them back for their own business purposes, *i.e.*, Seko Charlotte’s own employees have other and ongoing responsibilities for Seko Charlotte. Claimant had no responsibility to or tasks to perform for Seko Charlotte after making the delivery in Wisconsin. In contrast, he did have on-going responsibilities to West Expedited, who was his sole employer at

the time of his accident. Thus, Claimant was not Seko Charlotte's statutory employee at the time of his accident.

C. The Court of Appeals' Opinion does not advance the goals of the statutory employer doctrine.

The "manifest purpose" of the statutory employment doctrine, "is to afford the benefits of compensation to men who are exposed to the risks of its business, and to place the burden of paying compensation upon the organizer of the enterprise." Parker, 275 S.C. at 73, 267 S.E.2d at 528. In the case presently before this Court, the only "organizer of the enterprise" at the time Claimant was injured was West Expedited, who was free to choose to engage a return-trip delivery or not, a decision over which Seko Charlotte had no control or say.

Imposing statutory liability on an owner when it has no contractual relationship with the subcontractor does not further the goals of either the statutory employer doctrine or the Workers' Compensation Act. According to the Court of Appeals' Opinion, Seko Charlotte's status as a statutory employer depends entirely on a business decision made by West Expedited for its own commercial purposes: the decision as to whether or not to contract with a third party for Claimant to make a delivery on his return leg, to perform some service for West Expedited, or to allow Claimant to attend to personal business. This makes Seko Charlotte's potential exposure to workers' compensation liability depend entirely on a business decision made by a third party, West Expedited. At the time of Claimant's accident, Seko Charlotte had absolutely no control over or knowledge of the business decisions made by West Expedited. As noted above, it is undisputed that, had Seko Charlotte wanted to employ West Expedited and Claimant to make a return delivery, Seko Charlotte would have had to have entered into another contract with West

Expedited. It did not do so. It is also undisputed that West Expedited was entirely free to contract with another company for services on the return route, or to another location, or even to send Claimant on its own errand or on vacation. Seko Charlotte had no control over what Claimant did after the conclusion of the deliveries precisely **because** its contractual relationship with West Expedited had ended. To hold an owner liable under the statutory employer doctrine based on business decisions made by a totally separate entity does not advance any goals of the Workers' Compensation Act and smacks of unfairness.

The following hypothetical scenarios illustrate the critical distinction that the Court of Appeals overlooked. Compare two different drivers, Driver A and Driver B, both of whom are directly employed by Subcontractor, who has been hired by Owner X to make an out of state delivery.

1. Owner X contracts with Subcontractor to deliver parts from South Carolina to another state. Subcontractor, who employs Driver A, sends him to make the delivery. Driver A completes his delivery, and the job for Owner X is now complete. Because the job for Owner X is completed, and Subcontractor has contracted with Owner Y to deliver something from out of state to South Carolina, Subcontractor tells Driver A to pick up a load for Owner Y and bring it back to South Carolina. During this return trip, Driver A has an accident and is injured.
2. Owner X contracts with Subcontractor to deliver parts from South Carolina to another state. Subcontractor, who employs Driver B, sends him to make the delivery. Driver B completes his delivery, and the job for Owner X is now complete. Because the job for Owner X is completed, and Subcontractor has no return trip job for him, Driver B simply returns home to South Carolina. During this return trip, Driver B has an accident and is injured.

In the first scenario, Owner Y is clearly the statutory employer of Driver A at the time of the injury – Owner X has absolutely no connection to Owner Y, Subcontractor or Driver A on the return trip in this scenario and cannot possibly be held to be Driver A's statutory

employer at the time of the accident. Even Respondent agreed that, if there had been an “upstream employer” on the return trip, “this would be a vastly different case,” and that Seko Charlotte “would not, in all likelihood, even be a party to the case.” (Appx. 395). Respondent is bound by that concession. “An issue conceded in a lower court may not be argued on appeal.” TNS Mills, 331 S.C. at 617, 503 S.E.2d at 474.

The same result with respect to Owner X should be reached in scenario 2 as is reached in scenario 1. In that scenario, on the return trip there is only Subcontractor, and no statutory employer. To hold Owner X liable in the second scenario, when it clearly is not liable in the first scenario, is to impose liability on Owner X based solely on the business decisions made by entities over which Owner X has absolutely no control – Subcontractor and Owner Y. Such a result, in fact the result reached by the Court of Appeals in this case, subverts the policy behind the statutory employee doctrine (placing the risk and responsibility of workers’ compensation payments on the entity organizing the enterprise and benefitting from the employee’s labor) and is inherently and unacceptably unfair. Courts “will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention.” New York Times, 374 S.C. at 312, 649 S.E.2d at 30. Holding an upstream employer liable as a statutory employer when it has no contractual relationship with the claimant’s direct employer is absurd and plainly not what the legislature intended in Section 42-1-400.

This Court should reverse the Court of Appeals’ Opinion and hold that there was no statutory employment relationship between Claimant and Seko Charlotte at the time of Claimant’s accident.

II. The Court of Appeals erred in reversing the Commission on the basis that it employed an improper analysis even though the Commission reached the correct result.

The Court of Appeals erred by reversing the Commission Decision, which reached the correct result even if it may have applied the wrong analysis in arriving at that result. As is noted above, the Commission found that, “[p]ursuant to §42-1-400, Claimant was no longer a ‘statutory employee’ of Seko Charlotte at the time of his accidental death,” (Commission Decision, R. 22), even though it also analyzed this case under the independent contractor, coming and going, and gratuitous worker rules. In the end, even if the Commission analyzed this case under the wrong tests, it reached the correct result and should have been affirmed. *See, e.g., Barron v. Labor Finders*, 393 S.C. 609, 614, 713 S.E.2d 634, 636 (2011) (finding the lower court “erred in its analysis” but nonetheless affirming the result reached by the court); *Baxter v. City Ins.*, 368 S.C. 510, 514, 630 S.E.2d 42, 44 (2006) (affirming lower court ruling that “failed to address the proper issue, [but which] reached the correct result”); *Mizell v. Raybestos-Manhattan, Inc.*, 281 S.C. 430, 434, 315 S.E.2d 123, 125 (1984) (finding circuit court’s application of the wrong standard of review harmless error where the outcome was correct); *Case v. Hermitage Cotton Mills*, 236 S.C. 515, 534, 115 S.E.2d 57, 68 (1960) (circuit court’s error in incorrectly staying weekly compensation payments during appeal harmless error in light of this Court’s determination that the claim was barred); *Gray*, 339 S.C. at 192, 528 S.E.2d at 445 (harmless error where the circuit court applied the wrong standard of review but reached the correct outcome). It is beyond dispute that an appellate court may affirm on any ground appearing in the record. *Wright v. Bi-Lo, Inc.*, 314 S.C. 152, 150, 442 S.E.2d 186, 191 (Ct. App. 1994); Rule 220(c), SCACR (same).

The Court of Appeals focused on whether the Commission employed an improper analyses in this case (by analyzing this case under the independent contractor analysis, and the going and coming, gratuitous worker, and traveling employee doctrines); however, as explained above, the Commission reached the correct conclusion – that Seko Charlotte is not liable to Claimant for workers’ compensation benefits because, at the time of the accident, Seko Charlotte had no contractual relationship whatsoever with West Expedited. Consequently, the Court of Appeals should have upheld the Commission’s finding that Seko Charlotte was not Claimant’s statutory employer at the time of the accident, even if the Commission reached that conclusion via an incorrect analysis.

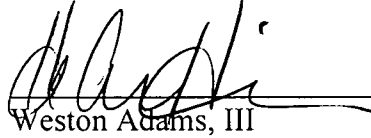
Conclusion

For all the reasons stated herein, Petitioners Seko Charlotte and Nationwide Mutual Insurance Company respectfully request that this Court reverse the Court of Appeals' Opinion No. 5022, and uphold the Commission's finding that Seko Charlotte was not Claimant's statutory employer at the time of his accident.

Respectfully submitted,

McANGUS GOUDELOCK & COURIE LLC

November 6, 2014



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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

SCWCC File No. 0719222

Gregory A. Collins
(deceased), Employee, Claimant Respondent,

v.

Seko Charlotte and Nationwide Mutual
Ins. Co. Petitioners,

v.

West Expedited & Delivery Service, Inc., ... Defendant,

v.

Seko Worldwide and Federal Ins. Co., ... Defendants,

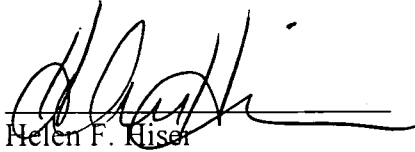
v.

Uninsured Employers Fund, ... Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Petitioners' Brief of Seko Charlotte and Nationwide Mutual Insurance Company complies with Rule 211(b), SCACR. The undersigned also certifies that this Petitioners' Brief complies with the South Carolina Supreme Court's April 16, 2014 Order re: Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.

November 6, 2014



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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

RECEIVED

NOV - 7 2014

SCWCC FILE No. 0719222

S.C. Supreme Court

Gregory A. Collins
(deceased), Employee, Claimant Respondent,

v.

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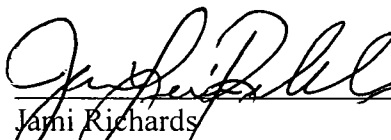
Uninsured Employers Fund, ... Respondent.

PROOF OF SERVICE

I certify that on the 6th day of November 2014, I served the **Respondents' Brief** and **Appendix** on the parties of record by depositing a copy of it in the United States Mail, postage prepaid, addressed to their respective attorneys as follows:

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November 6, 2014

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NOV - 7 2014

VIA U.S. MAIL

The Honorable Daniel E. Shearouse

Supreme Court of South Carolina

P.O. Box 11330

Columbia, SC 29211

S.C. Supreme Court

RE: Gregory A. Collins (deceased) v. Seko Charlotte, Inc. and Nationwide Insurance Company
Date of Accident: September 8, 2007
WCC File No.: 0719222
Our File No.: 20302.10004
Claim No.: 6132WC220180 09082007 51
Appeal No.: 2012-213425

Dear Mr. Shearouse:

Enclosed for filing please find:

1. the original and 15 copies of Petitioners' Brief in the above-referenced matter;
2. the original and 15 copies of the Appendix (Petitioners found several places where the deceased Claimant's children's names were not masked in the Record on Appeal as filed with the Court of Appeals and have corrected that issue in this filing); and
3. the original and one copy of the Proof of Service for items one and two.

Please file these documents and return clocked in copies in the enclosed, self-addressed stamped envelope.

If you have any questions, please contact me.

Very truly yours,

McAngus Goudelock & Courie, LLC



Helen F. Hiser

Enclosures

cc: Timothy B. Killen, Esquire
Linda B. McKenzie, Esquire

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