

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.

**APPENDIX
VOL. II**

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20302-10004

The South Carolina Court of Appeals

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

v.

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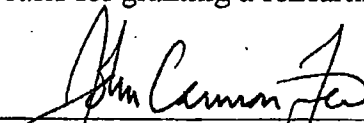
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Uninsured Employers Fund, Appellant.

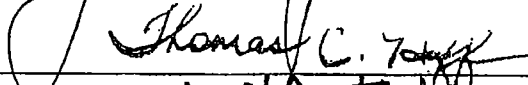
Appellate Case No. 2011-184326

ORDER

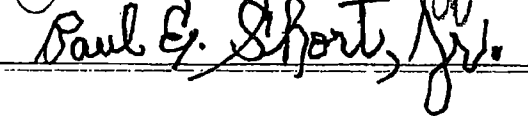
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



C.J.



J.



J.

Columbia, South Carolina

cc:

Timothy Blair Killen
Weston Adams, III
Helen Faith Hiser
Linda Byars McKenzie

FILED

18 Oct 2012



The South Carolina Court of Appeals

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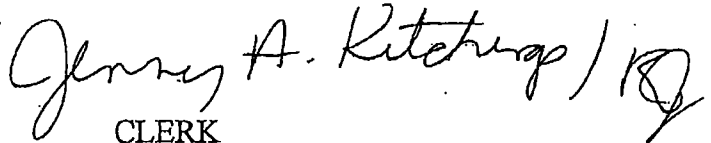
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Re: Collins, Gregory v. Uninsured Employers
Appellate Case No. 2011-184326

Dear Counsel:

Enclosed is the decision of the Court. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,


CLERK

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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Seko Charlotte and Nationwide Mutual Insurance Co.,
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v.

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Seko Worldwide and Federal Insurance Co., Defendants,

v.

South Carolina Workers' Compensation Uninsured
Employers' Fund, Appellant.

Appellate Case No. 2011-184326

Appeal From The Workers' Compensation Commission

Opinion No. 5022
Heard May 8, 2012 – Filed August 15, 2012

REVERSED

Timothy B. Killen, of Columbia, for Appellant.

Weston Adams, III, and Helen F. Hiser, both of
McAngus Goudelock & Courie, LLC, of Columbia, for
Respondents Seko Charlotte and Nationwide Mutual
Insurance Co.

Linda Byars McKenzie, of Bowen McKenzie & Bowen,
LLP, of Greenville, for Respondent Gregory Collins.

SHORT, J.: The dependents of Gregory Collins (deceased) filed this workers' compensation claim against West Expedited & Delivery Service, Inc. (West), Seko Worldwide, Federal Insurance Co., Seko Charlotte (Seko), Nationwide Mutual Insurance Co., and the South Carolina Workers' Compensation Uninsured Employers' Fund (the Fund). The Fund appeals the order of the Appellate Panel of the South Carolina Workers' Compensation Commission (the Commission), arguing it erred in: (1) finding Collins was not Seko's statutory employee; (2) finding the "going and coming rule" barred Collins' recovery as to West, but not as to Seko; (3) finding Collins was a "traveling employee" as to West, but not as to Seko; (4) finding the method of payment was dispositive in determining the statutory employment relationship; (5) applying Georgia law; and (6) finding Collins would have been a gratuitous worker if considered a statutory employee of Seko at the time of his accident. We reverse.

FACTS

Collins, a South Carolina resident, was hired by West, a South Carolina expedited delivery company, to drive a delivery van. Seko Charlotte (Seko) contracted with West for a delivery of parts from Ina Bearing Company in Spartanburg, South Carolina, to Wauwatosa and Menomonee Falls, Wisconsin. On September 7, 2007, Collins picked up the parts and delivered them to Seko's customers in Wisconsin. While driving back to South Carolina on September 8, Collins was killed in an automobile accident. This claim was filed. At the time of the accident, West's workers' compensation coverage had lapsed, and the Fund participated in the case.

Ronald Burks, Seko's general manager, testified that Seko is a transportation logistics company providing regional, national, and international transportation services. Seko employed three drivers among its sixteen employees. These drivers made deliveries within a hundred miles of Charlotte. Seko subcontracted longer trips to companies such as West.

Burks testified West provided "express hot deliver[y]" services, which are required when a customer needs immediate delivery and cannot wait for a full truck load to deliver in their area. As he explained, West provided services for cargo that "needs to get . . . somewhere faster than an LTL [less than a truck load] truck would" be able to deliver.

Burks testified Seko did not have a written contract with West. Seko paid West \$1.20 per loaded mile, one way. Seko utilized West's services approximately two to three times per month and contracted with four or five companies comparable to West, similarly paying them per mile, one way. Seko's contention was that once a delivery was made, its agreement with West ceased. In this case, Collins had no cargo in the van during the return trip to South Carolina, and Seko accordingly maintained he was no longer its statutory employee.

Burks admitted that if Collins had been Seko's employee at the time of the injury, he would have a valid workers' compensation claim against Seko. He conceded that the Seko drivers were covered by Seko's workers' compensation insurance on their entire trips, rather than just on the way to the delivery site. Burks admitted he knew West's drivers would return to South Carolina because they were based here, but insisted Seko's relationship with Collins ceased after he made his deliveries in Wisconsin. Burks conceded such deliveries were an important and necessary part of Seko's business.

West's president, Morris West, testified the drivers generally do not have cargo on their return trips to South Carolina, and in Collins' case, he did not have cargo on his return trip. Morris also testified West was free to contract with another company for return loads, and Seko had no relationship with his drivers once a delivery was made.

The single commissioner found Seko was Collins' statutory employer. Seko appealed to the Commission. At the hearing before the Commission, Seko conceded it was Collins' statutory employer for the trip from South Carolina to Wisconsin. It maintained Collins was West's employee during the return trip.

Seko argued it no longer had control over Collins after his delivery in Wisconsin, and its status as a statutory employer thus ceased upon delivery. The Fund argued the issue of control was not relevant to a determination of statutory employment.

The Commission found Collins was Seko's statutory employee during his trip to Wisconsin, but Seko did not maintain the degree of control over Collins during the return trip to continue the employment relationship. Furthermore, the Commission found Collins was no longer Seko's employee within the "going and coming rule." Finding this a case of first impression in South Carolina, the Commission relied on Georgia and North Carolina law to conclude Collins was no longer Seko's statutory employee at the time of the accident. Therefore, the Commission found the Fund was liable for the claim. The Fund appealed.

STANDARD OF REVIEW

Coverage under the Workers' Compensation Act (the Act) depends on the existence of an employment relationship. *Posey v. Proper Mold & Eng'g, Inc.*, 378 S.C. 210, 216, 661 S.E.2d 395, 398 (Ct. App. 2008). "Whether or not an employer-employee relationship exists is a jurisdictional question." *Id.* Where the issue involves jurisdiction, the appellate court can take its own view of the preponderance of the evidence. *Id.* at 216-17, 661 S.E.2d at 399. "It is the policy of South Carolina courts to resolve jurisdictional doubts in favor of the inclusion of employers and employees under the Workers' Compensation Act." *Id.* at 217, 661 S.E.2d at 399; *see Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 300, 676 S.E.2d 700, 702 (2009) (rejecting the analytical framework of distinguishing between an employee and an independent contractor that "most assuredly skews the analysis to a finding of employment" while "remain[ing] sensitive to the general principle sanctioned by the Legislature that workers' compensation laws are to be construed liberally in favor of coverage").

LAW/ANALYSIS

The Fund argues the Commission erred in finding Collins was no longer Seko's statutory employee at the time of his accident. We agree.

Statutory employment is an exception to the general rule that coverage under the Act requires the existence of an employer-employee relationship. *Posey v. Proper Mold & Eng'g, Inc.*, 378 S.C. 210, 217, 661 S.E.2d 395, 399 (Ct. App. 2008). "The statutory employee doctrine converts conceded non-employees into employees for

purposes of the Workers' Compensation Act. The rationale is to prevent owners and contractors from subcontracting out their work to avoid liability for injuries incurred in the course of employment." *Glass v. Dow Chem. Co.*, 325 S.C. 198, 201 n.1, 482 S.E.2d 49, 50 n.1 (1997). "The effect of these [statutory employment] provisions when brought into operation is to impose the absolute liability of an immediate employer upon the owner and/or general contractor although it was not in law the immediate employer of the injured workman." *Parker v. Williams & Madjanik, Inc.*, 275 S.C. 65, 72, 267 S.E.2d 524, 527-28 (1980).

The statutory employment section of the Act provides:

When any person, in this section . . . 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 . . . 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 (1985).

The Commission found Collins was not Seko's statutory employee based primarily on Seko's lack of control over Collins at the time of his accident. See *Wilkinson*, 382 S.C. at 299, 676 S.E.2d at 702 (recognizing the four-factor test to determine whether a worker is an employee or an independent contractor: (1) right to, or exercise of, control; (2) furnishing of equipment; (3) method of payment; and (4) right to fire).¹ The Commission also relied on case law from Georgia and North

¹ In discussing the going and coming, gratuitous worker, and traveling employee doctrines, the Commission likewise focused on Seko's method of payment or control over Collins at the time of the accident. See *Whitworth v. Window World, Inc.*, 377 S.C. 637, 641, 661 S.E.2d 333, 336 (2008) ("Under the going and coming rule, an employee going to or coming from the place where his work is to be performed is not engaged in performing any service growing out of and incidental to his employment. Therefore, an injury sustained by accident at such time is not

Carolina to find no statutory employment relationship. In *Farmer v. Ryder Truck Lines, Inc.*, 266 S.E.2d 922 (Ga. 1980), the Georgia Supreme Court began its analysis of control stating the statutory employment statute was inapplicable in that case. *Farmer*, 266 S.E.2d at 924. In *Lewis v. Barnhill*, 148 S.E.2d 536 (N.C. 1966), the North Carolina Supreme Court employed the borrowed servant doctrine² without mentioning a statutory employment statute in Lewis' tort action. *Lewis*, 148 S.E.2d at 543.

We find the Commission erroneously utilized the "employee/independent contractor" test to determine whether Collins was Seko's statutory employee. We also find neither the Georgia nor North Carolina case relied on by the Commission is dispositive.

In *Voss v. Ramco, Inc.*, 325 S.C. 560, 566, 482 S.E.2d 582, 585 (Ct. App. 1997), this court found that whether the employee was an independent contractor of the alleged statutory employer was irrelevant. The court concluded that "section 42-1-400 imposes liability on an upstream employer if the injured worker is an employee of the *subcontractor*, but not if the worker is an independent contractor of the *subcontractor*." 325 S.C. at 566-67, 482 S.E.2d at 585. The Fourth Circuit Court of Appeals likewise stated that whether the statutory employer exercised control over the employee is not the issue in South Carolina:

compensable under the Workers' Compensation Act because it does not arise out of and in the course of his employment."); *Kirksey v. Assurance Tire Co.*, 314 S.C. 43, 45, 443 S.E.2d 803, 804 (1994) (holding gratuitous workers are not employees); *Hall v. Desert Aire, Inc.*, 376 S.C. 338, 357, 656 S.E.2d 753, 762 (Ct. App. 2007) ("It is well settled that 'traveling employees are generally within the course of their employment from the time they leave home on a business trip until they return, for the self-evident reason that the traveling itself is a large part of the job.'") (quoting Arthur Larson, *Larson's Worker[s]' Compensation Law*, § 14:01 (Lexis-Nexis 2004)).

² Under South Carolina's borrowed servant doctrine, "when a general employer lends an employee to a special employer, that special employer is liable for workers' compensation if: (1) there is a contract of hire between the employee and the special employer; (2) the work being done by the employee is essentially that of the special employer; and (3) the special employer has the right to control the details of the employee's work." *Cooke v. Palmetto Health Alliance*, 367 S.C. 167, 175, 624 S.E.2d 439, 443 (Ct. App. 2005).

Suffice it to say that no South Carolina case has been found involving this statute in which an owner's liability either for payment of compensation or tort damages has been made to rest upon the degree of control retained by the owner over the injured employee of a subcontractor. On the contrary, once it is established that the work being done by the subcontractor is a part of the owner's general business, the employees of the subcontractor become statutory employees of the owner even though their immediate employer is an independent contractor.

Corollo v. S. S. Kresge Co., 456 F.2d 306, 311 (4th Cir. 1972).

Once the Commission determined Collins was an employee of Seko's subcontractor, West, which the parties in this case did not dispute, the Commission should have looked to whether Collins' activities were part of Seko's trade, business, or occupation. See S.C. Code Ann. § 42-1-400 (1985) (providing statutory employment requires the claimant to be engaged in an activity that "is a part of [Seko's] trade, business[,] or occupation"). South Carolina has applied three tests and concludes the statutory requirement is met if the activity (1) is an important part of the owner's business or trade; (2) is a necessary, essential, and integral part of the owner's business; or (3) has previously been performed by the owner's employees. *Olmstead v. Shakespeare*, 354 S.C. 421, 424, 581 S.E.2d 483, 485 (2003). If the activity meets any of these three criteria, the injured employee qualifies as a statutory employee. *Id.* In this case, Burks admitted deliveries like the one Collins made were an important and necessary part of Seko's business. We agree that Seko's utilization of West's services two to three times per month for "express hot deliveries" is an important part of Seko's delivery business. Accordingly, we find Collins was Seko's statutory employee during the entire trip. See *Voss*, 325 S.C. at 568, 482 S.E.2d at 586 (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); *Marchbanks v. Duke Power Co.*, 190 S.C. 336, 351, 2 S.E.2d 825, 837-38 (1939) (affirming the trial court's finding that maintenance of Duke Power's transmission lines and utility poles was an important and essential part of its trade or business and, therefore, finding Duke Power the statutory employer of the employee of a subcontractor hired to paint utility poles).

CONCLUSION

Based on the foregoing, we find the Commission employed improper analyses in reversing the single commissioner. Under our own view of the preponderance of the evidence, we find Collins was Seko's statutory employee. Accordingly, we reverse the Commission and reinstate the single commissioner's order.

REVERSED.

HUFF, J., concurs.

FEW, C.J., concurring: I concur in the majority opinion. I write separately to further explain why it was error for the commission to use the independent contractor test to determine whether Collins was Seko's statutory employee. There is no reason to consider whether a claimant is a statutory employee unless the claimant or his direct employer has an independent contractor relationship with the defendant. Therefore, it is nonsensical to determine Collins was not the statutory employee of Seko because of the independent contractor relationship between Seko and West. Rather, Collins can be a statutory employee of Seko only if there is an independent contractor relationship between Seko and West.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

RECEIVED

AUG 29 2012

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v.
South Carolina Workers' Compensation Uninsured
Employers Fund,.....Appellant.

**RESPONDENTS SEKO CHARLOTTE AND
NATIONWIDE MUTUAL INSURANCE COMPANY
PETITION FOR REHEARING**

Pursuant to Rules 221 and 240, SCACR, Respondents Seko Charlotte, Inc. and Nationwide Mutual Insurance Co. hereby petition this Court for rehearing of its Opinion No. 5022, filed August 15, 2012 ("Opinion"). Respondents respectfully submit that this Court overlooked or misapprehended at least three critical points in reaching its decision

in the above-captioned appeal. First, this Court failed to consider and rule on Respondents' argument that, once its contractual relationship with West Expedited & Delivery Service, Inc. ("West Expedited") terminated, there could be no statutory employment relationship between Seko Charlotte and West Expedited's employees. Second, this Court failed to properly consider and/or rule on Respondents' argument that imposing statutory liability on Seko Charlotte under the facts of this case does not advance the goals of the statutory employer doctrine. Third, this Court improperly applied the test for a statutory employee set forth in S.C. Code Ann. § 42-1-400 (2007) and Voss v. Ramco, Inc., 325 S.C. 560, 482 S.E.2d 582 (Ct. App. 1997) to the facts of this case. Respondents address each of these errors in turn.

I. This Court overlooked and/or misapprehended the significance of the fact that there was no contractual relationship between Seko Charlotte and West Expedited at the time of Claimant's accident.

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. p. 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. p. 15, line 17 – p. 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. p. 208, line 22 – p. 209, line 6) (R. p. 249, lines 5-22). 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. p. 208, lines 12-15) (R. p. 241, line 6 – p. 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. p. 209, line 25 – p. 210, line 14) (R. p. 241, line 6 – p. 242, line 1).¹

The statutory employment relationship flows from the subcontractor's employee to the subcontractor to the owner. The subcontractor is the linchpin. Simply put, if there is no relationship between the subcontractor and the owner, there can be no statutory employment relationship between the subcontractor's employee and the owner. In its Opinion, this Court 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. This Court's Opinion would impose, by judicial fiat, a contractual relationship on Seko Charlotte that it did not enter into.

A recent decision of the Virginia Supreme Court, analyzing virtually identical statutory language, confirms the requirement of a contractual relationship between the

¹ 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. p. 23).

owner and the subcontractor in order to establish a statutory employment relationship. Moore v. Virginia Int'l Term., Inc., 283 Va. 232, 720 S.E.2d 117 (2012).² In Moore, the Virginia Supreme Court held that, regardless of whether the work performed was part of the owner's "trade, business, or occupation," there was no statutory relationship between the port owner and the subcontractor stevedoring company's employees because there was no contract between the port owner and the subcontractor stevedoring company. 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.

As this Court held in Voss, "[a]lthough 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." 325 S.C. at 565, 482 S.E.2d at 585; *see also* Hernandez-Zuniga v. Tickle, 374 S.C. 235, 256, 7 S.E.2d 691, 702 (Ct. App. 2007).

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

² Virginia's statutory employer provision reads, in pertinent part, "When 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.

their task and lack of evidence of control,” (Commission Decision, R. pp. 16, 25),³ the Commission looked to cases from other jurisdictions, including Farmer v. Ryder Truck Lines, Inc., 245 Ga. 734, 266 S.E.2d 922 (Ga. 1980). 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 this Court nor Appellant has not cited a single case from South Carolina or any other jurisdiction supporting the conclusion that, even once the contractual relationship between the owner and the 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-imposed contractual relationship that does not actually exist between 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. Dupre v. Exxon Pipeline Co., 738 S.2d 1118, 1994 La. App. LEXIS 1619 (La. Ct. App. 1994), and Walls v. Food Lion, L.L.C., 66 Va. Cir. 26, 2004 Va. Cir. LEXIS 341 (Va. Cir. Ct. 2004) are in accord.

A different result may well be 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

³ As the Commission noted, “[t]he statutory employment case law in South Carolina all deals with employees actively involved in their contracted duties.” (Commission Decision, R. pp. 16-17).

case here. Alternatively, this case might have 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.

The crux of this case is precisely whether a statutory employment relationship continues to exist between the employee of a subcontractor and the owner, after the contractual relationship between the subcontractor and 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. pp. 21-26). For all the reasons stated herein, this Court should uphold the Commission's conclusion that Seko Charlotte was not Claimant's statutory employer at the time of his accident.

II. This Court overlooked and/or misapprehended that the result reached in its 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 v. Williams and Madjanik, Inc., 275 S.C. 65, 73, 267 S.E.2d 524, 528 (1980). In the case presently before the 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 this Court's 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. This makes Seko Charlotte's potential exposure to workers' compensation liability entirely dependent on a business decision made by a third party. At this point in time, 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 and 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 employer liable under the statutory employer doctrine based on business decisions made by an entirely separate entity is extremely unfair and does not advance any goals of the Workers' Compensation Act.

Respondents repeat here the hypothetical contained in their Brief, as it illustrates the distinction this Court has overlooked. Compare two different drivers, Driver A and Driver B, both of whom are contracted out by Subcontractor to make a delivery from South Carolina for Owner X.

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 either 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 Appellant 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." (App. Br. p. 30).

The same result with respect to Owner X should be reached in the second scenario. 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 it has absolutely no control – Subcontractor and Owner Y. Such a result 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.

West Expedited could have contracted for a paying return trip from Wisconsin. It was free to do so and had in the past but did not do so on this particular trip, entirely for reasons of its own that had nothing to do with Seko Charlotte. To have Seko Charlotte's liability hinge on whether West Expedited chose to make a return-trip contract with some other company or to send Claimant on some errand of its own, as this Court has done, is untenable and runs counter to South Carolina workers' compensation goals and policies. Such a result would impose liability on an entity that had absolutely no connection to either the subcontractor or the employee at the time of injury. 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. p. 16).

III. This Court misapplied the statutory employment test to the facts of this case.

This Court misapplied the statutory employment test to the facts of this case in at least two respects. First, this Court 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. Those are not the facts of this case, however. For example, while this Court 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, this Court's 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 this Court's analysis of Seko Charlotte's "trade, business, or occupation" had some support in the record, which Respondents do not concede, the cases on which this Court 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 v. Ramco, Inc., 325 S.C. 560, 482 S.E.2d 582 (Ct. App. 1997), this Court 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 South Carolina Supreme 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 other words, the owner realistically could not continue to conduct its business without the subcontracted activities. In contrast, making long-distance express deliveries is not essential to the conduct of Seko Charlotte's business. While those deliveries might be important to the individual customers, Seko Charlotte's main business is logistics and making deliveries in and around the Charlotte, North Carolina area. Seko Charlotte could conduct its business without the type of long-distance express deliveries that West Expedited and Claimant performed for it.

IV. This Court should uphold the Commission Decision which reached the correct result even if it applied the wrong reasoning.

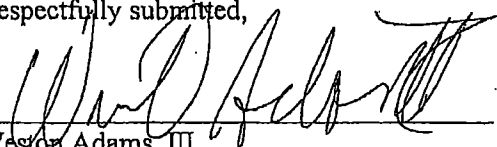
In the end, even if the Commission analyzed this case under the wrong tests, it reached the correct result and should be affirmed. *See, e.g., Barron v. Labor Finders*, 393 S.C. 609, 614, 713 S.E.2d 634, 636 (2011) (finding the lower court “erred in its analysis” but nonetheless affirming the result 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”). This Court focused on whether the Commission employed 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 relationship whatsoever with West Expedited. Therefore, this Court should uphold 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 improper analysis.

Conclusion

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

August 29, 2012

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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 Insurance Co., Respondents

v.

West Expedited & Delivery Service, Inc.,Defendant

v.

Seko Worldwide and Federal Ins. Co., Defendants

v.

Uninsured Employers' Fund, Appellant

**FINAL BRIEF OF APPELLANT
SOUTH CAROLINA WORKERS' COMPENSATION
UNINSURED EMPLOYERS' FUND**

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II. WHETHER THE APPELLATE PANEL ERRED IN FINDING AND CONCLUDING THAT THE COMING AND GOING RULE ACTS AS A BAR TO CLAIMANT'S RECOVERY AGAINST SEKO.

III. WHETHER THE APPELLATE ERRED IN FINDING AND CONCLUDING THAT THE CLAIMANT WAS NOT TRAVELLING EMPLOYEE OF SEKO AT THE TIME OF HIS ACCIDENT.

IV. WHETHER THE APPELLATE PANEL ERRED IN FINDING AND CONCLUDING THE EQUATION USED TO CALCULATE COST OF A DELIVERY IS DISPUTATIVE IN SHOWING THAT THE CLAIMANT'S STATUTORY EMPLOYMENT RELATIONSHIP TERMINATED AT THE POINT OF DELIVERY.

V. WHETHER THE APPELLATE PANEL ERRED IN CONCLUDING THAT GEORGIA CASE LAW SUPPORTS IS CONCLUSION THAT THE STATUTORY EMPLOYMENT RELATIONSHIP WAS SERVERED AT THE POINT OF DELIVERY.

VI. WHETHER THE APPELLATE PANEL ERRED IN FINDING AND CONCLUDING THAT IF THE CLAIMANT WERE A STATUTORY EMPLOYEE OF SEKO AT THE TIME OF HIS INJURIES, HE WOULD HAVE BEEN A GRATUITOUS WORKER ONLY.

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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE CLAIMANT'S FATAL INJURIES AROSE OUT OF HIS STATUTORY EMPLOYMENT WITH SEKO CHARLOTTE, INC. WHEN HE SUFFERED A MOTOR VEHICLE COLLISION DURING THE RETURN LEG OF A BUSINESS DELIVERY MADE IN FURTHERANCE OF SEKO CHARLOTTE'S BUSINESS.
- II. WHETHER THE APPELLATE PANEL ERRED IN FINDING AND CONCLUDING THAT THE COMING AND GOING RULE ACTS AS A BAR TO CLAIMANT'S RECOVERY AGAINST SEKO.
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- VI. WHETHER THE APPELLATE PANEL ERRED IN FINDING AND CONCLUDING THAT IF THE CLAIMANT WERE A STATUTORY EMPLOYEE OF SEKO AT THE TIME OF HIS INJURIES, HE WOULD HAVE BEEN A GRATUITOUS WORKER ONLY.

STATEMENT OF THE CASE

This Workers' Compensation case arises out of fatal work-related injuries suffered by the Claimant, Gregory A. Collins, on September 8, 2007, as a result of a motor vehicle collision in Kentucky. At the time of his fatal accident, the Claimant was directly employed as a driver by WEST EXPEDITED AND DELIVERY SERVICE, INC. (WEST), a courier service based in South Carolina. When Claimant was injured, he was traveling back home on the return leg of a trip to Wisconsin as part of a delivery trip made on behalf of SEKO CHARLOTTE, INC (SEKO). SEKO, which holds itself out to the public as a personalized global freight transportation and logistics provider, subcontracted these particular deliveries to WEST, the Claimant's direct employer.

As a matter of course, SEKO utilized WEST's and other companies' drivers for the entirety of its long haul deliveries. SEKO's business model called for subcontracting its long haul deliveries, even though it did employ its own delivery drivers for deliveries of fifty (50) or fewer miles.

The Claimant, after dropping off two (2) delivery items at locations in Wisconsin determined by SEKO, and without being engaged by any other contractor, courier service, or logistics provider to perform any further deliveries, and without deviating from his assigned duties, fell asleep while driving through Kentucky. As a result, he suffered a fatal motor vehicle collision.

The issue before the South Carolina Workers' Compensation Commission, as it related to the SOUTH CAROLINA WORKERS' COMPENSATION UNINSURED EMPLOYERS' FUND (Fund), was whether the Claimant's upstream employers, SEKO CHARLOTTE, INC., and/or SEKO WORLDWIDE, LLC, and their Carriers,

NATIONWIDE MUTUAL INS. CO. (NATIONWIDE) and/or FEDERAL INSURANCE CO., were responsible for the payment of benefits to Claimant's beneficiaries under a statutory employment analysis.¹

The Single Commissioner heard the case on May 12, 2010. On June 24, 2010, the Single Commissioner entered his Decision and Order. As a part of his Order, the Single Commissioner found, inter alia:

- (4) That Seko Charlotte, Inc. was the statutory employer of the Claimant and Nationwide is their workers compensation carrier.
- (5) At the time of decedent's fatal injuries, he was the statutory employee of Seko Charlotte, Inc. The Claimant's direct employer was engaged by Seko Charlotte, inc. to make interstate deliveries. Though Seko Charlotte, Inc. employed drivers of its own, it subcontracted its interstate deliveries through West and operations like West. Because its business was national (and worldwide), such interstate deliveries are an integral and necessary part of Seko Charlotte, Inc.'s business. Accordingly, in order to remain a viable business with its unique purpose, it is necessary for Seko Charlotte to subcontract its interstate deliveries. ("I would say so, yeah. Every part of business that we do is important to us." Deposition of Ron Burks, p. 32 – 33 (Fund's APA, p. 79 – 80); "So, yeah, we needed to make that delivery, if we want to keep in business." Deposition of Ron Burks, p. 33 (Fund's APA, p. 80)). Accordingly, the requirements for a statutory employment relationship were created here. See Voss v. Ramco, Inc., 325 S.C. 560, 482 S.E.2d 582 (Ct.App. 1997).
- (6) The South Carolina Uninsured Employers' Fund . . . [is] without liability in this case due to Seko Charlotte, Inc. being the statutory employer and having Workers' Compensation insurance through Nationwide.
- (7) The Claimant herein did not deviate from the most direct route to return him to South Carolina. There is no allegation or evidence that the Claimant was, at any part of his trip, engaged by any employer other than the employer who engaged him on the first leg

¹ Seko Charlotte, Inc. has stipulated that it is downstream from its operating partner, Seko Worldwide, LLC. Accordingly, should there be a finding that the statutory employment relationship continued on the return leg of the trip, then Seko Charlotte, Inc. and its Carrier would be the liable parties, and Seko Worldwide, LLC and its Carrier would have no liability.

of his trip. As such, because the Claimant was a "traveling employee," he was within the course of his employment during the return leg of his trip, which was when he suffered his fatal injuries.

Within the statutory period, Counsel for SEKO and NATIONWIDE (collectively Respondents herein) filed an Application for Review of the Single Commissioner's Decision and Order. By appeal, the Respondents herein submitted to the Full Commission that the Single Commissioner erred in finding that SEKO was the Claimant's statutory employer at the time of his accident because the Claimant was on the return leg of his delivery trip and Claimant returned to the exclusive control of his direct employer, West Expedited.

The Claimant/Respondent appealed the Single Commissioner's Order on other grounds. Those grounds are not relevant to this appeal and will not be addressed herein.

The matter was heard by the Appellate Panel of the South Carolina Workers' Compensation Commission on October 26, 2010. On January 24, 2011, the Appellate Panel entered its Decision and Order, reversing the Order of the Single Commissioner insofar as the statutory employment findings were concerned. The Appellate Panel found that "Seko Charlotte did not sustain the degree of control necessary to maintain an employment relationship [with the Claimant] on the return trip." (R. p. 19, Appellate Panel Decision and Order, p. 19.

On February 1, 2011, Appellant served the Notice of Appeal on Respondents.

STATEMENT OF FACTS

As outlined in the Single Commissioner's Decision and Order,

The facts in this case with regard to Mr. Gregory Collins and his fatal accident are fairly simple Mr. Collins was hired by Mr. Morris West[, principal of West Expedited and Delivery Services, Inc.,] to drive a van and operate as an employee of . . . West Expedited and Delivery Services Inc. As part of his employment he was sent to Ina Bearing Company in Spartanburg, South Carolina on September 7, 2007 to pick up parts and deliver them to Wauwatosa, Wisconsin. After delivering the parts Mr. Collins was on his way home when he was killed in an automobile accident.

The issues in this case are several but the facts are fairly straightforward. Mr. Collins was killed while returning from a delivery. He was an employee of West Expedited and Delivery Services, Inc. West Expedited and Delivery Services, Inc. was owned by Morris West. Mr. West through his company had contracted with Seko Charlotte. The evidence establishes that Mr. West was contacted by Seko Charlotte with a request to pick up parts at Ina Bearing in Spartanburg, South Carolina and deliver them to Wisconsin.

(R. pp. 32 – 33, Order of the Single Commissioner, pp. 4 – 5).

Though the facts are straightforward, the fulcrum upon which this litigation tilts is the cost-basis in the contract between WEST and SEKO, which was determined by the mileage between the point of pick-up to the point of delivery, and that the Claimant was killed returning home after dropping off the items for SEKO. The Appellate Panel found that, “[i]t is apparent that a statutory relationship was created with Seko Charlotte when the Claimant picked up the load in Spartanburg, SC; however, it is also clear that Seko Charlotte did not maintain the degree of control necessary to continue *an employment relationship* on the return trip.” (R. p. 10, Appellate Panel Decision and Order, p. 8) (emphasis added).

Essentially, the fundamental issue in this case is whether a common carrier can subcontract a delivery that is necessary and essential to its business while taking on no

risks or liability with regards to delivery driver's return to his base of operations, where (1) the common carrier admits to the existence of a statutory employment relationship with the Claimant on the first leg of the trip; (2) where the second leg of the trip is necessarily incidental to the job the Claimant was undertaking in furtherance of the business of the common carrier; (3) where the driver did not deviate from the most direct route between the point of delivery and his base of operations; and (4) where the driver was not hired by any other party to perform any further duties other than the original assignment. The Fund's position, put simply, is that you can't send somebody eight hundred (800) miles away as part of your business and then wash your hands of all responsibility when something unfortunate happens to the man on the return home.

STANDARD OF REVIEW

In an appeal from the Commission, the Court of Appeals may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law. Hamilton v. Bob Bennett Ford, 336 S.C. 72, 518 S.E.2d 599 (Ct.App. 1999); see also Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct.App. 2002). The Court of Appeals' review is limited to deciding whether the Commission's decision is unsupported by substantial evidence or is controlled by some error of law. See Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E. 2d 304 (1981).

Where the issue is jurisdictional, including whether the Court and Commission has subject matter jurisdiction to hear the case, the question is one of law. Gray v. Club Group, Ltd., 339 S.C. 173, 183, 528 S.E.2d 435, 440 (Ct.App. 2000). "The issue of whether an employer regularly employs the requisite number of employees to be

subject to the Workers' Compensation Act is jurisdictional." Harding v. Plumley, 329 S.C. 580, 584, 496 S.E.2d 29, 31 (Ct.App.1998).

In such cases,

the appellate court's standard of review in cases involving jurisdictional questions is not a substantial evidence standard. Our precedent lucidly establishes that an appellate court reviews jurisdictional issues by making its own findings of fact without regard to the findings and conclusions of the Appellate Panel. . . .The appellant bears the burden of showing that the [lower] court's decision is against the preponderance of evidence.

Hernandez-Zuniga v. Tickle, 374 S.C. 235, 244, 647 S.E.2d 691, 695 - 96 (Ct.App. 2007) (emphasis in original) (internal citations omitted).

"The determination of whether a worker is a statutory employee is jurisdictional and, therefore, the question on appeal is one of law." Posey v. Proper Mold and Engineering, Inc., 378 S.C. 210, 216, 661 S.E.2d 395, 398 - 99 (Ct.App. 2008) (citing Harrell v. Pineland Plantation, Ltd., 337 S.C. 313, 320, 523 S.E.2d 766, 769 (1999); Glass v. Dow Chem. Co., 325 S.C. 198, 201-02, 482 S.E.2d 49, 51 (1997)). "As a result, this court has the power and duty to review the entire record and decide the jurisdictional facts in accord with its view of the preponderance of the evidence. Id.; see S.C. Workers' Comp. Comm'n v. Ray Covington Realtors, Inc., 318 S.C. 546, 459 S.E.2d 302 (1995).

ARGUMENT

- I. **WHETHER THE CLAIMANT'S FATAL INJURIES AROSE OUT OF HIS STATUTORY EMPLOYMENT WITH SEKO CHARLOTTE, INC. WHEN HE SUFFERED A MOTOR VEHICLE COLLISION DURING THE RETURN LEG OF A BUSINESS DELIVERY MADE IN FURTHERANCE OF SEKO CHARLOTTE'S BUSINESS.**

The question herein is which party is responsible for the payment of benefits to the Claimant's dependents. WEST, at all relevant times, was uninsured, and that is why

the Fund is a party. The Fund is an agency of the State of South Carolina created under S.C. Code Ann. § 42-7-200 to "ensure payment of workers' compensation benefits to injured employees whose employers have failed to acquire necessary coverage for employees in accordance" with Title 42 of the South Carolina Code. As this Court has held in Miller v. Lawrence Robinson Trucking, 510 S.E.2d 431, 435, 333 S.C. 576, 583 (Ct.App. 1998), if an injured Claimant's statutory employer was properly covered at the time of his accident, then the Fund is not liable for payments regardless of whether the Claimant's direct employer was uninsured.

In this case, there is a clear and admitted statutory employer-employee relationship between the Claimant and SEKO, which contracted with Claimant's direct employer to make two (2) shipments to Wisconsin. (See Supp. R. pp. 3 – 48, Deposition of Morris West); (See R. pp. 138 – 188); (R. pp. 112 – 119, FUND's APA Submissions pp. 23 – 30, SEKO Documents received pursuant to Form 27). SEKO doesn't dispute that Claimant performed the deliveries to Wisconsin in contract with them. Resp. Brief, p. 1. SEKO, was at all times relevant hereto, properly covered by NATIONWIDE.

SEKO admitted to its statutory relationship with the Claimant on the first half of his delivery trip. However, because the Claimant was killed on the return leg of the trip, and because SEKO's contract with WEST was based on dollars per mile between the point of shipment and the point of delivery, the Appellate Panel agreed with SEKO's position that its contract with WEST was complete at the point of delivery, and that SEKO was no longer exposed to any workers' compensation liability following the

deliveries. (R. pp. 3 – 28, Appellate Panel Decision and Order). The Fund respectfully submits that this is an error of law.²

Among other things, the Order of the Appellate Panel overlooks the unavoidable conclusion that the return trip was necessarily incidental to the Claimant's statutory employment with SEKO. Because the return trip flows naturally from the SEKO delivery and, unless interrupted by another delivery or a substantial deviation from the Claimant's route and/or duties, the return trip "follow[s] as a natural incident of the work . . ." Douglas v. Spartan Mills, 245 S.C. 265, 269, 140 S.E.2d 173, 175 (1965).

The conclusion of the Appellate Panel that the method used to calculate the price of a job between delivery companies ignores the statutory responsibilities both employers have to the employee acting in furtherance of their businesses. The Supreme Court has determined that such machinations used to maximize profit and escape liability where it would normally lie are ineffectual:

Whatever the parties contract to call their relationship is not controlling in a statutory employment analysis. See S.C. Code Ann. § 42-1-610 (1985) ("No contract or agreement, written or implied, and no rule, regulation or other device shall in any manner operate to relieve any employer, in whole or in part, of any obligation created by this Title except as otherwise expressly provided in this Title."); see also Wilson v. Daniel Intern. Corp., 260 S.C. 548, 197 S.E.2d 686 (1973) (stating that the terminology used by the parties is not controlling of their relationship).

Harrell v. Pineland Plantation, LTD, 337 S.C. 313, 523 S.E.2d 766, 770 (1999).

Secondly, the Appellate Panel used the incorrect analyses in coming to its conclusion that the statutory employment relationship between the Claimant, a delivery

² Also appealed herein are the findings, conclusions, and orders of the Appellate Panel related to statutory employment, including Findings of Fact Five (5), Six (6), Seven (7), Eight (8), Nine (9), Ten (10), Eleven (11), and Nineteen (19), as well as Conclusions of Law One (1), Two (2), Three (3), Four (4), Five (5), Six (6), Seven (7), Eight (8), Nine (9), Ten (10), Eleven (11), as well as all Orders on pages Twenty-Five (25) and Twenty-Six (26) of the Appellate Panel Decision and Order.

driver, and the SEKO, a delivery company, was severed immediately upon drop-off his second shipment. The Appellate Panel incorrectly analyzed this relationship using criteria set forth to determine the existence of a direct employment relationship; the Appellate Panel relied, in error, on the factors as set forth in Wilkinson v. Palmetto State Transportation Co., 382 S.C. 295, 676 S.E.2d 700 (2009). This is a significant error of law.

A. IN GENERAL.

Under S.C. Code Ann. § 42-1-400, when a principal contractor

undertakes to perform or execute any work which is a part of his trade, business or occupation 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, the owner [principal contractor] shall be liable to pay any workman employed in the work any such compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him.

(emphasis added).

Under the Statutory Employment Doctrine, any employee of a subcontractor may look to an upstream employer for benefits. The effect of the statutory employment provisions of the Workers' Compensation Act is to impose absolute liability upon the general contractor even though it was not the immediate, direct or actual employer of the injured claimant. Parker v. Williams & Madjanik, Inc., 275 S.C. 65, 267 S.E.2d 524 (1980). According to the Supreme Court, "The manifest purpose is to afford the benefits of compensation to the 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 v. Williams & Madjanik, Inc., 275 S.C. 65, 72, 267 S.E.2d 524, 528 (1980) (emphasis

added); Miller v. Lawrence Robinson Trucking, 33 S.C. 576, 510 S.E.2d 431 (Ct.App. 1998).

The analysis used to determine whether the activity of a South Carolina Claimant is sufficient to qualify him as a statutory employee of an employer is based upon a three-part test. Only one prong of the three-part test needs to be met in order for the injured worker of the subcontractor to be considered the statutory employee of the contractor or owner. The three-part is: (1) whether the activity is an important part of the contractor's or owner's trade, business, or occupation; (2) whether the activity is a necessary, essential, and integral part of the contractor's trade, business, or occupation; or (3) whether the identical activity has been previously performed by the contractor's employees. Voss v. Ramco, Inc., 325 S.C. 560, 482 S.E.2d 582 (Ct.App. 1997). "[T]he guidepost is whether or not that which is being done is or is not a part of the general trade, business or occupation of the owner." Hopkins v. Darlington Veneer Co., 208 S.C. 307, 311, 38 S.E.2d 4, 6 (1946).

Apparently confusing the test for determining whether an employment relationship exists with the test for determining whether a statutory employment relationship exists, the Appellate Panel found that

The Claimant was not under the course and scope of employment with Seko Charlotte at the time of his death. Viewing the Wilkinson factors neutrally between the parties (as required by case law), it is clear that no employment relationship existed between the Claimant and Seko-Charlotte at the time of the accident.

(R. p. 17, Appellate Panel Decision and Order, p. 19.) The Appellate Panel further went on to find that SEKO's control over the Claimant ceased at the point of delivery, SEKO didn't furnish equipment to the Claimant, SEKO had no control over how the Claimant's

direct employer paid him, and that SEKO had no right to fire the Claimant at the time of his accident. Though these factors may be relevant in determining whether a claimant is an employee or an independent contractor, they are not relevant in determining whether a statutory employment relationship exists.

B. WHETHER SEKO WAS CLAIMANT'S STATUTORY EMPLOYER.

Without argument, SEKO routinely engaged the Claimant's direct employer to make deliveries, and such deliveries were in the trade, business, or occupation of SEKO. SEKO employed drivers of its own to "make a local route delivery, local pick-up and deliveries in the area, usually within a 50 mile radius." (R. p. 243, Hrg. Tr. p. 54, lines 5 – 7). In order to maximize profits, though, SEKO subcontracted the majority of its long-range interstate deliveries through operations like WEST. Because its business is national (and even worldwide), such interstate deliveries are an integral and necessary part of SEKO's business. Accordingly, in order to remain a viable business with its unique purpose, it was necessary for SEKO to subcontract its interstate deliveries. (R. p. 169 – 170, FUND's APA Submissions, pp. 79 – 80, Deposition of Ron Burks, p. 32, line 25 – p. 33, line 3) ("I would say [that Mr. Collins' deliveries were an important part of Seko's business], yeah. Every part of business that we do is important to us."); (R. p. 170, FUND's APA Submissions, p. 80, Deposition of Ron Burks, p. 33, lines 6 – 8) ("So, yeah, we needed to make that delivery, if we want to keep in business.").

At the hearing before the Single Commissioner, Ron Burks, an employee and representative of SEKO, testified as follows:

Q. Was this trip that Mr. Collins was on, was it a necessary part of your business?

A. It was important to the customer that they get something to their customer, so it was definitely important that we try to serve the customer.

Q. So, it was a necessary part of your business, correct?

A. Yes.

(R. p. 244, Hrg. Tr., p. 55, lines 11 – 18).

Considering the foregoing, it's clear that each of the three (3) ways to create a statutory employment relationship were created between the Claimant and SEKO are present here. See Voss v. Ramco, Inc., 325 S.C. 560, 482 S.E.2d 582 (Ct.App. 1997).

C. WHETHER CLAIMANT'S INJURIES AROSE OUT OF HIS STATUTORY EMPLOYMENT RELATIONSHIP WITH SEKO.

The Supreme Court has held that

It (the injury) arises 'out of' the employment, when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment . . . It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence.'

Voss v. Ramco, Inc., 325 S.C. 560, 482 S.E.2d 582 (Ct.App. 1997).

Furthermore, our case law dictates that

It is well settled that 'traveling employees are generally within the course of their employment from the time they leave home on a business trip until they return, for the self-evident reason that the traveling itself is a large part of the job.' Arthur Larson, *Larson's Worker' Compensation Law*, §

14.01 (Lexis-Nexis 2004). However, this general rule is subject to challenge when an injury occurs while the employee has deviated from his business route or purpose.

Hall v. Desert Aire, Inc., 656 S.E.2d 753, 762, 376 S.C. 338, 357 (Ct.App. 2007) (emphasis added).

The Claimant herein did not deviate from the most direct route to return him to South Carolina. There is no allegation or evidence that the Claimant was, at any part of his trip, engaged by any other employer than the employer who engaged him on the first leg of his trip. As such, because the Claimant was a "traveling employee," he was within the course of his employment during the return leg of his trip, which was when he suffered his fatal injuries.

Furthermore, the certainty that the Claimant would need to return to his base of operations, coupled with the likelihood that he would face perils on the roadway from his point of delivery, is directly connected to Claimant's statutory employment with SEKO. See Stone v. Traylor Bros., Inc., 360 S.C. 271, 275, 600 S.E.2d 551, 552-53 (Ct.App. 2004) (stating the injury need not be expected or even foreseeable but must appear to have originated in a risk connected to the employment and to have flowed from that source as a rational consequence). Inarguably, the Claimant would not have been returning from Wisconsin had he not been statutorily employed by SEKO to make the deliveries to Wisconsin. That being the case, the Claimant's death on his return from Wisconsin is directly attributable to (therefore arising out of and in the course of) his statutory employment with SEKO.

Additionally, SEKO benefited from WEST drivers being located in South Carolina. If the return trip were not a necessary and/or implied part of the contract

between SEKO and WEST and its other South Carolina subcontractors, SEKO's business model would have failed. It relied on subcontractors like WEST to make these long-range deliveries functions. SEKO relied on WEST, and contractors like WEST, to have drivers locally who could handle its "hot" or important and time-sensitive shipments, according to Ron Burks, SEKO's general manager. At his deposition, Mr. Burks testified:

Q. If you ever wanted to use Mr. West's services again, wouldn't you expect that his drivers would return [to South Carolina]?

A. Well, I would expect that would be part of his logistics that he would do, but I would expect, since that's their home base, they would eventually return. Sure.

(R. p. 162, FUND's APA Submissions, p. 72, Transcript of Deposition of Ron Burks, p. 25, lines 10 – 16). More directly, Mr. Burks testified as follows:

Q. Does Seko Charlotte see any benefit from Mr. Morris having a fleet of vans in Spartanburg, in the Spartanburg area?

A. Yes.

(R. p. 172, FUND's APA Submissions, p. 82, Transcript of Deposition of Ron Burks, p. 35, lines 20 – 23).

Clearly, this testimony makes it clear that the return trip was contemplated by SEKO as being necessary and incidental to the delivery.

At the hearing before the Appellate Panel, counsel for SEKO called it was "absurd" to consider the return trip as a necessarily incidental to the contract, and said that ". . . Seko Charlotte didn't care if Gregory Collins came back" from his trip furthering SEKO's business. (R. p. 280, App. Panel Hrg. Tr., p. 14, lines 21 and 25; R. p. 281, App. Panel Hrg. Tr. p. 15, lines 2 – 3). Regardless of whether SEKO had other

resources to utilize in replacing the Decedent, its lack of concern for those it employs and its motivating need for profits does not obviate the obligations it owes to its employees, statutory or otherwise.

In Ardis v. Combined Insurance Co., 380 S.C. 313, 669 S.E.2d 628 (Ct.App. 2008), the Employer/Carrier denied benefits to an employee who died in a hotel fire following the conclusion of his duties. Not unlike SEKO and its Carrier, the Employer/Carrier in Ardis maintained that the employment relationship ceased at the point the traveling employee completed his official duties. See Ardis v. Combined Insurance Co., 380 S.C. 313, 669 S.E.2d 628 (Ct.App. 2008). The Employer/Carrier maintained that Claimant's

presence at the hotel on Saturday night was outside the scope of his employment since he was no longer in the performance of his duties. The seminar and Ardis' official business duties may have ended earlier that day, but it is reasonably foreseeable and incidental to the fulfillment of his duties for Ardis and Connor to have spent the night in Marietta before making the five-hour drive back to Wedgefield. See Beam v. State Workmen's Comp. Fund, 261 S.C. 327, 332, 200 S.E.2d 83, 86 (1973) (stating 'an employee, to be entitled to compensation, need not be in the actual performance of the duties for which he was expressly employed in order for his injury or death to be in the 'course of employment' [as long as] the employee is engaged in a pursuit or undertaking . . . which in some logical manner pertains to . . . his employment'); see also Broughton v. South of the Border, 336 S.C. 488, 498, 520 S.E.2d 634, 639 (Ct.App.1999) (stating an employee is within the course of employment for purposes of coverage under the Act if injured while fulfilling work-related duties or engaging in something incidental to those duties).

Ardis v. Combined Insurance Co., 380 S.C. 313, 323, 669 S.E.2d 628, 633 (Ct.App. 2008).

The same rationale is applicable to the facts herein. Additionally, allowing SEKO to realize profits from the delivery that proved fatal to the Claimant, but only exposing SEKO to half of the risk, would prove contrary to the scope and purpose of the Workers'

Compensation Act. Simply because distance between one point and another allowed SEKO and WEST to put monetary value on a delivery by no means abrogates any of the parties' duties to their employees, statutory or otherwise.

In fact, the purpose of our statutory employer doctrine

is to bring within the operation of the Workers' Compensation Act all persons engaged in any work that is a part of the trade, business or occupation of the original party who undertakes as owner, or contracts as contractor, to perform that work, and to make liable to every employee engaged in that work every such owner, contractor or subcontractor above such employee.

Miller v. Lawrence Robinson Trucking, 510 S.E.2d 431, 435, 333 S.C. 576, 583 (Ct.App. 1998). Denying coverage for the return trip would turn the foregoing basis for our statutory employment law on its head. Because traveling employees are covered from the time they leave until the time they return home, it cannot be reasonably argued that the statutory relationship wouldn't extend to the return trip, as well. Additionally, to require the FUND to pay benefits in such a situation would be contrary to its statutory purpose. Such an Order "would enable all those who benefited from the worker's employment and immunity under the Act to escape liability totally." Miller v. Lawrence Robinson Trucking, 510 S.E.2d 431, 434, 333 S.C. 576, 581 (Ct.App. 1998).

II. WHETHER THE APPELLATE PANEL ERRED IN FINDING AND CONCLUDING THAT THE COMING AND GOING RULE ACTS AS A BAR TO CLAIMANT'S RECOVERY AGAINST SEKO.

The Appellate Panel found that "Claimant's accident does not meet the requirements of the Going and Coming Doctrine as it relates to Seko-Charlotte; however, it does meet the requirements as it relates to West Expedited." (R. p. 18, Appellate Panel Decision and Order, p. 20).

An analysis under the "Coming and Going Rule" as set forth in Sola v. Sunny Slope Farms, 244 S.C. 6, 135 S.E.2d 321 (1964) is not applicable to the facts herein. That case, of course, involves the exceptions to the "general rule [that] an employee going to or coming from the place where his work is to be performed is not engaged in performing any service growing out of and incidental to his employment" Sola v. Sunny Slope Farms, 244 S.C. 6, 14, 135 S.E.2d 321, 326 (1964).

It cannot be reasonably argued that the Claimant was either going to or coming from a place where his work was to be performed. The Claimant herein was charged with the duty to ensure that goods were transferred from South Carolina to Wisconsin. Such a task could not have been performed without a reasonable expectation of a return trip. That being the case, at the time he was injured, the Claimant, a delivery driver engaged by SEKO was undertaking the very service he was to perform.

Even under Sola v. Sunny Slope Farms, the statutory employment relationship between the Claimant and SEKO wouldn't be suspended at the point of delivery precisely because the return trip forms a necessary part of the delivery because "the making of that journey, whether or not separately compensated for, is in itself a substantial part of the service for which the worker is employed." Sola v. Sunny Slope Farms, 244 S.C. 6, 15, 135 S.E.2d 321, 326 (1964) (quoting Larson on Workmen's Compensation Law, Vol. I, section 16.00, page 222) (emphasis added).

This finding by the Appellate Panel is clearly error. The Coming and Going rule cannot apply to one employer and not the other. Under the Statutory Employment Doctrine, any employee of a subcontractor may look to an upstream employer for benefits. The effect of the statutory employment provisions of the Workers'

Compensation Act is to impose absolute liability upon the general contractor even though it was not the immediate, direct or actual employer of the injured claimant. Parker v. Williams & Madjanik, Inc., 275 S.C. 65, 267 S.E.2d 524 (1980). Accordingly, because the statutory employment doctrine imposes absolute liability on the statutory employer, the Claimant's recovery is either barred by the Coming and Going rule or it isn't.

If the Appellate Panel were so inclined to find, it would have been sufficient to say that the Claimant was not the statutory employee of SEKO at the time of his accident. However, there is no basis in law for its further finding that the Coming and Going rule was applicable to SEKO and not to WEST.

III. WHETHER THE APPELLATE PANEL ERRED IN FINDING AND CONCLUDING THAT THE CLAIMANT WAS NOT TRAVELLING EMPLOYEE OF SEKO AT THE TIME OF HIS ACCIDENT.

The Appellate Panel found that the "Claimant was a 'traveling employee' as to West Expedited only." (R. 18, Appellate Panel Decision and Order, p. 20). The Appellate Panel supported this finding on control:

Control is the main factor. If the employee is outside of the control of an employer, an accident while traveling is not attributable to that employer At the time of the accident, Seko Charlotte had not continuing control over the Claimant, while West Expedited maintained exclusive control over him. Therefore, West Expedited and the Uninsured Employers Fund are the proper parties liable for the accident.

Id.

The Fund does not appeal the Appellate Panel's finding as to WEST, but does appeal the Appellate Panel's finding that the Claimant was not SEKO's traveling employee at the time of his accident.

The Supreme Court has written that

It is well settled that 'traveling employees are generally within the course of their employment from the time they leave home on a business trip until they return, for the self-evident reason that the traveling itself is a large part of the job.' Arthur Larson, *Larson's Worker' Compensation Law*, § 14.01 (Lexis-Nexis 2004). However, this general rule is subject to challenge when an injury occurs while the employee has deviated from his business route or purpose.

Hall v. Desert Aire, Inc., 656 S.E.2d 753, 762, 376 S.C. 338, 357 (Ct.App. 2007) (emphasis added).

The Appellate Panel found Hall to be inapplicable to the statutory employment relationship. (R. p. 19, Appellate Panel Decision and Order, p. 21) ("Hall deals with the continuance of an 'employee' relationship, **not** a 'statutory employee' relationship." emphasis in original). However, under S.C. Code Ann. § 42-1-400, a principal contractor is "liable to pay [employees of a subcontractor] . . . any such compensation . . . which he would have been liable to pay if the workman had been immediately employed by him." In the absence of an argument under S.C. Code Ann. § 42-1-415, the liability of the principal contractor is absolute.

Whether SEKO had potential or actual control over the Claimant at the time of his accident is not applicable to the statutory employment analysis. As set forth above, control is not a factor in establishing the statutory employment relationship. Control is relevant only in the determination of whether a direct employment relationship was in effect. The statutory employment relationship, on the other hand, has its roots in the nature of the work itself and whether the work being performed is part of the trade, business, or occupation of the statutory employer, not in the control exercised by one party over another.

This finding by the Appellate Panel is clearly error. The Claimant cannot be a traveling employee for one delivery company, his direct employer, and not a traveling employee of another delivery company, his statutory employer. Accordingly, because the statutory employment doctrine imposes absolute liability on the statutory employer, if the Claimant is considered a traveling employee of his direct employer, then he is also a traveling employee of his statutory employer

If the Appellate Panel were so inclined to find, it would have been sufficient to say that the Claimant was not the statutory employee of SEKO at the time of his accident. However, there is no basis in law to further find the Claimant is a traveling employee in relation to his direct employer but not in relation to his statutory employer.

Imagine the same argument made in the construction arena: under such a scenario, SEKO would be the general contractor and the Claimant would be, for example, the employee of a roofing subcontractor. If the Claimant in that hypothetical case were to complete a roofing job, and then he were to fall from the house while climbing down from the roof, it would be both laughable and an exercise in injustice for the principal contractor to put forth the same arguments put forth by the Appellants herein. In that case, it's clear that a roofer must descend from a roof. In this case, it's clear that a delivery driver must return from Wisconsin.

IV. WHETHER THE APPELLATE PANEL ERRED IN FINDING AND CONCLUDING THE EQUATION USED TO CALCULATE COST OF A DELIVERY IS DISPOTIVE IN SHOWING THAT THE CLAIMANT'S STATUTORY EMPLOYMENT RELATIONSHIP TERMINATED AT THE POINT OF DELIVERY.

The Appellate Panel found 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.

(R. p. 19, Appellate Panel Decision and Order, p. 21). The evidence in this case does not, in any way, show an agreement only "for a one way trip." There is no such thing in a courier service. In this case, the contract was based on a certain amount per "loaded mile." (R. p. 209, Hrg. Tr. p. 19, lines 16 – 19). What that means is that the evidence shows that the basis for payment was a certain amount per mile between the pick-up and delivery points. Before the Single Commissioner, Morris West, WEST's principal, testified as follows:

Q. . . . How did [SEKO] pay you?

A. They paid me per mile.

Q. How much did they pay you per mile?

A. At that time, I think it was \$1.30, I'm not sure. \$1.20 or thirty.

Q. \$1.20 or \$1.30 per mile. Is that the distance between the pick-up point and the delivery point?

A. Yes.

(R. p. 201, Hrg. Tr. p. 11, lines 15 – 22). Importantly, Mr. West testified that:

Q. Now, when you contracted with Seko Charlotte to figure out the price per mile, did you consider all of your expenses that would be incurred in making such a delivery?

A. Yes.

Q. So, that includes wear and tear?

A. Yeah.

Q. That includes what it would cost you in gasoline to get a truck all the way to Wisconsin and back?

A. Yes.

(R. 202, Hrg. Tr. p. 12 lines 14 – 23). This is a method used to calculate the cost of a shipment. If they cut the price in half and paid for a round trip, the obligations from employer (including a statutory employer, whose liability is absolute) to an employee remain the same. Those duties, including the obligation to provide workers' compensation coverage to a courier, cannot be abrogated because of a number picked by two (2) corporate entities to use as a divisor in as part of contract negotiations.

Additionally, the Appellate Panel's finding and conclusion ignores the fact that the return trip is necessarily incidental to the job being performed. As stated supra, the statutory employment relationship is intact when the duties being performed by that Claimant are

incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence.

Voss v. Ramco, Inc., 325 S.C. 560, 482 S.E.2d 582 (Ct.App. 1997). It would strain credulity to believe that the return leg of a delivery trip is not absolutely and necessarily incidental to the character of the business being performed.

V. WHETHER THE APPELLATE PANEL ERRED IN CONCLUDING THAT GEORGIA CASE LAW SUPPORTS IS CONCLUSION THAT THE STATUTORY EMPLOYMENT RELATIONSHIP WAS SERVERED AT THE POINT OF DELIVERY.

The Appellate Panel found that "Georgia case law supports a finding that once a delivery is complete, if there is no control remaining on the return trip, then there is no

statutory employment relationship." (R. p. 22, Appellate Panel Decision and Order, p. 24). The Appellate Panel points to the 1980 Georgia case of Farmer v. Ryder Truck Lines, Inc., 245 Ga. 734, 266 S.E.2d 922 (1980) to support its conclusion. The Fund asserts this is an error of law, as the case is distinguishable from the one before the Court and, of course, cases interpreting Georgia statutes have no precedential authority upon the Commission.

Contrary to the conclusions of the Appellate Panel and the assertions of SEKO, the facts underlying Farmer v. Ryder Truck Lines are not almost identical to the facts herein. A reading of Farmer v. Ryder Truck Lines, Inc. shows that these cases are clearly distinguishable. In fact, the Court in Farmer held that Georgia's statutory employer Code section (Ga. Code Ann. § 114-112) was "inapplicable here for the reason that no claim for compensation was first instituted against the immediate (direct) employer, Martin, as required by that section." Farmer v. Ryder Truck Lines, Inc., 245 Ga. 734, 737, 266 S.E.2d 922, 924 (1980).

Nevertheless, in Farmer, the Claimant drove a truck for and individual named Dan Martin. Dan Martin leased his truck to Hames Trucking Company. Under the equipment lease, Martin was to furnish a driver for the truck.

The Georgia Claimant then made an outbound delivery for Hames Trucking Company. Unlike the case herein: "[u]pon delivering a load . . . to Chicago for Hames Trucking Company, Farmer went to Ryder Truck Lines, Inc., in Chicago and obtained a load of regulated commodities for a return haul to Georgia. Farmer signed a trip lease agreement [with Ryder] as agent of . . . Martin." Farmer v. Ryder Truck Lines, Inc., 245 Ga. 734, 734, 266 S.E.2d 922, 923 (1980) (emphasis added).

As part of the trip lease agreement for the return trip, Claimant and his direct employer agreed that Claimant would be "under the 'exclusive possession, control, and use' of Ryder, a second upstream employer, who assumed 'full responsibility in respect to the equipment it is operating to the public, the shippers, and all regulatory bodies having jurisdiction.'" Farmer v. Ryder Truck Lines, Inc., 245 Ga. 734, 735, 266 S.E.2d 922, 923 (1980).

This facts in that case are clearly different from those herein. First, Farmer involves an equipment lease as opposed to statutory employment principles. Second, Farmer involves an upstream employer on the return leg with whom the Claimant entered into a second contract on behalf of his direct employer. This case has nothing at all to do with whether the direct employer "regained the exclusive right of control over the employee." (R. p. 21, Appellate Panel Decision and Order, p. 19).

If there were an upstream employer with whom WEST contracted for the Claimant to perform a delivery on the return leg, this would be a vastly different case. In fact, under such a scenario, SEKO and its Carrier would not, in all likelihood, even be a party to the case. However, the Farmer facts aren't the facts of this case, and SEKO and its Carrier are parties and should be held liable.

Third, Farmer is not a statutory employment case, at least as far as it relates to the Georgia code (which, obviously, has no bearing on this case). Fourth, Farmer clearly shows that the Georgia Court considers the return trip to relevant to a statutory employment analysis; however, because there was a second upstream employer who was contractually bound to the Claimant's direct employer on the return trip, that second

employer – not the Claimant's direct employer – becomes liable. That fact was clearly overlooked by the Appellate Panel.

The Fund respectfully submits that this finding and conclusion amount to an error of law and should be reversed.

VI. WHETHER THE APPELLATE PANEL ERRED IN FINDING AND CONCLUDING THAT IF THE CLAIMANT WERE A STATUTORY EMPLOYEE OF SEKO AT THE TIME OF HIS INJURIES, HE WOULD HAVE BEEN A GRATUITOUS WORKER ONLY.

For all the reasons set forth above, the Fund respectfully submits that this conclusion of law (Conclusion of Law Ten (10)) is an error of law and should be reversed. For the reasons stated above, if the Claimant's statutory employment relationship continued past the point of delivery, SEKO would be liable for payment of benefits just as if the Claimant had been directly employed by SEKO. Any finding to the contrary is clearly an error of law.

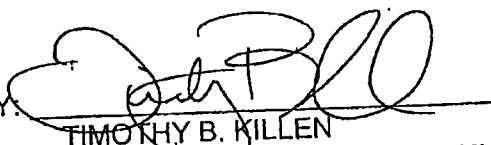
Had the Claimant been a gratuitous employee at the time of his injuries, he would not be entitled to any benefits. To argue he is entitled to benefits from one employer, WEST, and not from his statutory employer, SEKO, clearly runs afoul of all known logic. The Claimant himself was paid by his WEST per loaded mile, one-way.

For these reasons and those that may be put forth, if necessary, at oral arguments, the Fund respectfully requests that this conclusion of law be reversed.

CONCLUSION

As argued herein and at the hearing of the Appeal and for all the grounds and reasons cited, the Appellant Fund seeks the a reversal of the Decision and Order of the Appellate Panel of the South Carolina Worker's Compensation Commission. The Appellant Fund seeks a finding and order that SEKO and NATIONWIDE are liable for payment of all benefits due to Claimant's beneficiaries under S.C. Code Ann. 42-1-400 and the Statutory Employment Doctrine.

Respectfully Submitted,

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July 19, 2011
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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 Insurance Co., Respondents
v.
West Expedited & Delivery Service, Inc.,Defendant
v.
Seko Worldwide and Federal Ins. Co., Defendants
v.
Uninsured Employers' Fund, Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant S.C. Workers' Compensation Uninsured Employers' Fund complies with Rule 211(b), SCACR. The undersigned also certifies that this Final Brief complies with the South Carolina Supreme Court's August 13, 2007, Order re: Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.

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July 19, 2011
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE CIRCUIT COURT OF
WYOMING COUNTY IN SA 11-00000000000000000000

Case No. 11-00000000000000000000

Gregory A. Collins
(Appellant), Respondent, v. [Name obscured]
[Name obscured] and [Name obscured] (Appellees)

[Name obscured] (Appellee)

Wyoming County, Delaware Service, Inc. (Appellee)

[Name obscured] (Appellee)

[Name obscured] (Appellee)

HONORABLE PRESIDENT OF THE
SICILIA CIRCUIT COURT OF WYOMING
MUTUAL INSURANCE COMPANY

Wyoming County, Delaware Service, Inc.
[Name obscured]
Mr. [Name obscured] & [Name obscured] LLC
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STATEMENT OF ISSUES ON APPEAL

- I. Whether the Commission correctly held that Claimant was not the statutory employee of Seko-Charlotte at the time of his fatal accident?
- II. Whether the Commission's decision is consistent with policy concerns underlying both the statutory employment doctrine and the establishment of the UEF?
- III. Whether Claimant can be considered an employee of Seko-Charlotte under other theories of employment?
- IV. Whether the Commission properly held that, if Claimant were considered Seko-Charlotte's statutory employee on the return trip when his accident occurred, he would have been a gratuitous worker and not entitled to workers' compensation benefits?

STATEMENT OF THE CASE

As noted by the Commission, the facts of this case are not complicated. Claimant Gregory A. Collins ("Claimant") was employed by Morris West to drive a van for West Expedited and Delivery Services, Inc. ("West Expedited"). (R. p. 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 to deliver them to Wauwatosa, Wisconsin. (Suppl. R. p. 2, lines 4-18) (R. p. 239, lines 6-25). After he made the deliveries in Wisconsin and was returning to South Carolina, Claimant was fatally injured on September 8, 2007 as the result of a motor vehicle collision in Kentucky. (Stipulation No. 5, Decision and Order of the Single Commissioner, R. p. 30 (June 24, 2010) ("Single Commissioner Order")) (R. p. 201, line 25 – p. 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. p. 201, lines 14-22). West Expedited was free to contract with another entity for hauling or delivery services on the return trip, although it did not do so on this particular trip. (R. p. 208, line 22 – p. 209, line 6) (R. p. 249, lines 5-22). 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. p. 208, lines 12-15) (R. p. 241, line 6 – p. 242, line 1). 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. p. 209, line 25 – p. 210, line 14) (R. p. 241, line 6 – p. 242, line 1).

Seko-Charlotte is a world-wide logistics company, providing transportation logistic services to and from different points in the world. (R. p. 238, line 15 – p. 239, line 1) (R. p. 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. (R. p. 243, lines 2-20) (*see also* R. p. 170, lines 9-17).

Following Claimant's fatal accident, Claimant's dependents filed a workers' compensation claim seeking benefits. Because West Expedited did not carry workers' compensation insurance at the time of Claimant's fatal accident, (R. pp. 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.¹ (R. p. 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. (Single Commissioner Order). The Single Commissioner found that, at the time of his fatal accident, Seko-Charlotte was Claimant's statutory employer and that its insurer, Nationwide Insurance Company, was liable for compensation. (Single Commissioner Order, R. pp. 40, 42).²

Seko-Charlotte timely appealed this decision to the Full Commission, which heard oral argument on October 6, 2010. The Full Commission reversed the Single

¹ Although Seko Worldwide, LLC was added as a party, the Commission dismissed the claims against Seko Worldwide, LLC and the UEF does not appear to be appealing that dismissal. (App. Br. p. 8). As a result, Seko Worldwide, LLC is not a party to this appeal.

² Issues were raised below regarding the number of dependents entitled to compensation; however, those issues are not raised in this appeal.

Commissioner and instituted its own Order. (Commission Decision, R. p. 9, dated January 24, 2011). 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. p. 24) (*see also* R. p. 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, 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, R. 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 control, 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. p. 26).

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. pp. 21-23, 25). In response to 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. pp. 22-23, 25). The Commission also held that, because any compensation Claimant was paid for the return trip came from West Expedited, to the extent he 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 payment of compensation. (Commission Decision, R. pp. 23). As a result, the claims against Seko-Charlotte and its insurer were dismissed. (Commission Decision, R. pp. 24, 26, 28).

The UEF timely appealed the Commission Decision 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). Gray v. Club Group, Ltd., 339 S.C. 173, 528 S.E.2d 435 (Ct. App. 2000); Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). A reviewing court may not substitute its own judgment for that of the Full Commission as to the weight of the evidence on a question of fact, but may reverse if the decision is affected by errors of law. S.C. Code Ann. §1-23-380(A)(5). The Administrative Procedures Act "mandates that the commission take the evidence, judge the credibility and weight of that evidence, and from that judgment determine the

facts of the case.” Rogers v. Kunja Knitting Mills, Inc., 312 S.C. 377, 381, 440 S.E.2d 401, 403 (Ct. App. 1994) (emphasis added). The Full Commission is the ultimate fact finder in workers’ compensation cases. Ross v. American Red Cross, 298 S.C. 490, 381 S.E.2d 728 (1989). Where there is a conflict in the evidence, either by different witnesses or the testimony of the same witnesses, the finding of facts of the Commission are conclusive. Anderson v. Baptist Med. Ctr., 343 S.C. 47, 541 S.E.2d 526 (2001).

The existence of an employer/employee relationship is a jurisdictional question, which must be proved by a preponderance of the evidence, and appellate review is plenary. Patently, “[w]orkers’ compensation awards are authorized only if an employer-employee relationship exists *at the time of the injury*.” Porter v. Labor Depot, 372 S.C. 560, 571, 643 S.E.2d 96, 102 (Ct. App. 2007) (emphasis added); *see also Gray*, 339 S.C. at 184, 528 S.E.2d at 441 (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).

Determination of whether a statutory employment relationship exists is jurisdictional. Voss v. Ramco, Inc., 325 S.C. 560, 482 S.E.2d 582 (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, 647 S.E.2d 691 (Ct. App. 2007). 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, 912 (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.

ARGUMENTS

I. The Commission correctly held that Claimant was not the statutory employee of Seko-Charlotte at the time of his fatal accident.

A. 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. p. 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. Contrary to assertions of Appellant, none of these tests is satisfied with regard to Claimant's accident and, therefore, the Commission properly held that Seko-Charlotte is not responsible for any workers' compensation benefits.

As noted above, Seko-Charlotte is a world-wide logistics company, providing transportation for customers to and from different points in the world. (R. p. 238, line 16

– p. 239, line 1) (R. p. 144, lines 19-24). Delivering items for its customers is an important part of Seko-Charlotte's trade or business. Bringing drivers back to South Carolina, however, is *not* an important part of Seko-Charlotte's trade or business. The fact that it was important to Seko to ship goods out of state for its customers does not render the return of drivers to the state of South Carolina an important part of Seko's business, in the same way that "[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." Abbott v. The Limited, Inc., 338 S.C. 161, 163, 526 S.E.2d 513, 514 (2000). The argument advanced by Appellant UEF – that returning drivers to South Carolina was an important part of Seko-Charlotte's business – fails for the same reason that South Carolina courts have refused to impose a statutory employment relationship between delivery drivers and retail merchants. Yes, without inventory, retailers would have to close their doors. Yes, if every driver Seko-Charlotte ever sub-contracted out to make an inter-state delivery for it from South Carolina failed to return, Seko-Charlotte would have to make other arrangements to make those deliveries. Both propositions move beyond what is reasonably considered to be important to an employer's business to the realm of the absurd. If this Court extends the statutory relationship between Seko-Charlotte and Claimant to the return trip on the basis that Seko-Charlotte had an interest in having drivers brought back to South Carolina, as is urged by Appellant, there would be no end to the statutory employer status.

This would be a different analysis if Seko-Charlotte had hired West Expedited to make the deliveries in Wisconsin and then bring something back for Seko-Charlotte. It would also be a different analysis if Seko-Charlotte had hired West Expedited to make

the deliveries and then send the driver back to make another delivery or perform some other task. But those are not the facts of this case.

The record in this case does not support the conclusion asserted by Appellant that it is "clear that the return trip was contemplated by SEKO as being necessary and incidental to the delivery." (App. Br. p. 20). Instead, what the quoted testimony by Ron Burks, General Manager of Seko-Charlotte, establishes is that he imagined West Expedited somehow arranged for its drivers to return home and that Seko-Charlotte benefited from West Expedited (as well as other courier services) having vans in the area. (R. p. 246, line 18 – p. 247, line 25). In fact, Mr. Burks testified that if none of West Expedited's vans were in the area, Seko-Charlotte "would see if there were any other companies in that area that could perform the service." (R. p. 161, lines 5-9). This falls woefully short of an acknowledgement that the return trip, which was performed after the contract between Seko-Charlotte and West Expedited had concluded, was contemplated by Seko-Charlotte or necessary and incidental to the delivery. In addition, Mr. Morris West, owner of West Expedited, flatly rejected the suggestion that it was "necessary for people who did business with [West Expedited] such as Seko-Charlotte that you kept a fleet of ready vehicles here in South Carolina . . ." (R. p. 203, lines 2-6). In sum, the return of Claimant from his inter-state delivery was not an essential, integral or necessary part of Seko-Charlotte's business.

Finally, 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. p. 243, lines 2-20) (*see also* R. p. 170, lines 9-17). The record in this case establishes that Seko-Charlotte's employees do not travel beyond a 100-mile radius of Charlotte. (R. p. 243, lines 2-23). In addition, Seko-Charlotte has a different interest in this regard with their own employees who make deliveries – they need to get them back for their own business purposes because 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 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, 510 S.E.2d 431 (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 and Madjanik, Inc.*, 275 S.C. 65, 267 S.E.2d 524 (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 *Harrell v. Pineland Plantation, Inc.*, 337 S.C. 313, 523 S.E.2d 766 (1999), relied on heavily by Appellant, the South Carolina Supreme Court advised that the statutory test differentiates “between work done for an owner where it would be

unfair to allow the owner to escape compensation responsibility and work provided to the business that would be outside the policy of the statutory section. In making this determination, 'it is often a matter of extreme difficulty to decide whether the work in a given case falls within the designation of the statute. It is in each case largely a question of degree and of fact.'" 337 S.C. at 323, 523 S.E.2d at 771.³

Appellant attempts to blur the line between establishing that Claimant's injury arose out of and was in the course and scope of his employment with West Expedited and using those same facts and reasoning in an attempt to prove that Seko-Charlotte was his statutory employer at the time of the fatal accident. (See App. Br. pp. 18, 19, 20). Claimant's injuries arose out of and were incurred in the course and scope of his employment with West Expedited, who needed him to return to South Carolina for other deliveries. The record establishes that Seko-Charlotte, in contrast, had no business interest whatsoever in Claimant returning to South Carolina. (R. p. 161, lines 5-9) (R. p. 203, lines 2-6). Claimant's injuries did not occur during the course of or arise out of the delivery of bearings to Wisconsin. After the deliveries were made, the contract between Seko-Charlotte and West Expedited was completed; at that point in time, Seko-Charlotte had no right or ability to provide instruction to or direct Claimant's activities in any way because it had no contractual relationship with Claimant's employer. West Expedited, on

³ In Harrell, the Court first determined whether the claimant was a statutory employee of the upstream employer, and then analyzed whether the claimant's injuries arose out of and in the scope of his employment. Under the facts of that case, the Court concluded that focusing for purposes of the statutory employment analysis "solely on the activity of the worker at the time the injury collapses our two step analysis into one. If the Court adopted Harrell's approach, employees of a subcontractor would constantly move in and out of workers' compensation coverage throughout the workday based on the type of work they were engaged in at that very moment." 337 S.C. at 324, 523 S.E.2d at 771. In Harrell, the claimant's duties included maintaining land and equipment, planning timber harvest, managing wildlife and entertaining guests at the plantation. The claimant was injured in what the Court concluded was part of his on-going entertainment responsibilities at the plantation. In contrast, the case presently before the Court presents no such "in and out" problem. At the conclusion of the contractual arrangements between Seko-Charlotte and West Expedited, the statutory employment relationship between Seko-Charlotte and Claimant ended as well.

the other hand, was free to direct Claimant to pick up another paying load, to return back to South Carolina or to perform some other task. Thus, while the return trip was necessary and incidental to Claimant's employment with West Expedited, the same is not true with respect to Seko-Charlotte.

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. p. 16). The statutory employee relationship flows from the statutory employee to the direct employer to the statutory employer. The direct employer is the linchpin. Logically, if there is no relationship between the direct employer and the statutory employer, there can be no statutory employee relationship.

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 do so but did not do so on this particular trip for reasons of its own. To have Seko-Charlotte's liability hinge on whether West Expedited chose to make a return-trip contract with Seko-Charlotte, some other company or to send Claimant on some errand of its own, as Appellant would have this Court do, is untenable and runs counter to South Carolina workers' compensation goals and policies. Such a result would impose liability on an entity that had absolutely no connection to the employee at the time of injury.

B. The Commission properly examined the contractual arrangements between Seko-Charlotte and West Expedited in its analysis.

Appellant argues that the Commission improperly relied on the payment structure between Seko-Charlotte and West Expedited in making its determination that Claimant

was not Seko-Charlotte's statutory employee at the time of his accident. (App. Br. pp. 14, 26-28). There was nothing improper in the Commission's examination of the payment structure in this case. For example, in Voss, this Court reviewed the details of the business arrangements between the subcontractor and Ramco before determining that the subcontractor's employee, who was injured while selling small industrial equipment for Ramco, was a statutory employee of Ramco. 325 S.C. at 568-69, 482 S.E.2d at 586-87; see also Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 300, 676 S.E.2d 700, 702 (2009) (in considering whether the claimant was an employee or an independent contractor, the Supreme Court said it was "guided initially by the parties' independent contractor agreement," but that "more importantly, we are guided by the parties' conduct, which mirrored the terms of the contract"); Wilson v. Daniel Int'l Corp., 260 S.C. 548, 553, 197 S.E.2d 686, 688 (1973) (holding that, although the "terminology used by the parties [in a contract] is not controlling of their relationship," in that case it accurately and realistically reflected the nature of the contractual relationship); Meyer, 331 S.C. at 265, 500 S.E.2d at 192 (relying on the contractual relationship between the parties in order to analyze the statutory employment controversy).

Furthermore, the payment method employed between Seko-Charlotte and West Expedited was not merely a "machination[] used to maximize profit and escape liability where it would normally lie . . .," as is suggested by Appellant. (App. Br. p. 14). Instead, the payment structure between Seko-Charlotte and West Expedited accurately reflected the extent of the contractual relationship between Seko-Charlotte and West Expedited.

As noted by the Commission:

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. p.23).

Reliance on the "contract" and how the job was paid is not an attempt to contract away workers' compensation liability, as was the case in Neese v. Michelin Tire Corp., 324 S.C. 465, 477-79, 478 S.E.2d 91, 97-98 (Ct. App. 1996), but, rather, reflects the beginning and end of any relationship between Claimant and West Expedited, on one side, and Seko-Charlotte, on the other. Here, Seko-Charlotte would have paid (and did pay), and West Expedited would have received (and did receive) the same amount regardless of whether Claimant took on another job on his return trip home, or did not return home that following day, week, month or at all.

C. Case law from other states supports the Commission's Decision.

Appellant argues that it was legal error for the Commission to rely on Farmer v. Ryder Truck lines, Inc., 245 Ga. 734, 266 S.E.2d 922 (Ga. 1980), in support of its finding that the statutory employment relationship between Seko-Charlotte and Claimant ended once the deliveries were completed in Wisconsin.⁴ (App. Br. pp. 28-31). This was not legal error. The Commission noted that no South Carolina case deals with the situation where an employee remained a statutory employee "despite completion of their task and lack of evidence of control." (Commission Decision, R. pp. 16, 25). Instead, as the Commission noted; "[t]he statutory employment case law in South Carolina all deals with

⁴ To the extent Appellant is suggesting that it is never proper for South Carolina courts to rely on cases from other jurisdictions, Bass v. Isochem, 365 S.C. 454, 617 S.E.2d 369 (Ct. App. 2005), holds otherwise. "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." 365 S.C. at 477, 617 S.E.2d at 381.

employees actively involved in their contracted duties.” (Commission Decision, R. pp. 16-17). Tellingly, Appellant has not cited a single South Carolina case supporting its assertion that, even once the contractual relationship between the general contractor and the subcontractor has ended, the statutory relationship between the general contractor and employees of the subcontractor continues to exist.

In addition, although Appellant asserts that Farmer is distinguishable from the instant case, the factual differences between the two cases do not go to the essential point to be drawn from Farmer. In Farmer, the claimant drove a truck owned by Dan Martin, who leased his trucks to Hames Trucking Company under an equipment lease agreement. Under the terms of that agreement, Martin received a certain portion of outbound shipping charges and was solely responsible for finding return loads. 245 Ga. at 734, 266 S.E.2d at 923. On the date of his injury, the claimant first delivered a load for Hames and then proceeded to Ryder Truck Lines, Inc., where he picked up a load for his return trip. He was injured on the return trip and brought suit against both Hames and Ryder. The administrative law judge found that both Hames and Ryder were the claimant’s employers, setting forth many of the same arguments Appellant made below. In particular, the administrative law judge found that the return haul was of benefit to Hames, that the truck was being returned to Hames, and that Hames “could not send an employee to a distant location and then deny any responsibility for his return.” 245 Ga. at 735, 266 S.E.2d at 923. The Georgia workers’ compensation board reversed the administrative law judge’s decision and held that Ryder was liable for compensation because it exercised control over the claimant at the time of the accident and, conversely, Hames was not liable because it “neither had the right to nor exercised any control over

Farmer on his return trip to Georgia.” 245 Ga. at 736, 741, 266 S.E.2d at 924, 926. The Georgia Supreme Court affirmed this part of the Commission’s finding. 245 Ga. at 741, 266 S.E.2d at 926. Thus, the point to be drawn from Farmer is that the statutory employment relationship ends when the contracted job has been completed and the first upstream employer no longer has any control over the subcontractor’s employee.

Finally, Appellant asserts that Farmer demonstrates that the Georgia Supreme Court considered the return trip relevant to a statutory employee analysis and that “because there was a second upstream employer who was contractually bound to the Claimant’s direct employer on the return trip, that second employer – not the Claimant’s direct employer – becomes liable.” (App. Br. p. 30). Appellant’s assertion implies that the second, upstream employer (Ryder) was liable in place of the direct employer (Martin) for all purposes. What Appellant fails to note is that in Farmer, as in the present case, the direct employer did not have workers’ compensation insurance. 245 Ga. at 734, 266 S.E.2d at 923. Therefore, the Georgia court was not saying that any upstream employer is always liable in place of the direct employer but that, in a case where the direct insurer does not have workers’ compensation insurance, the upstream employer who exercised control over the driver at the time of the accident is liable. Here, because there was no upstream employer at the time of the accident, liability attaches to the direct employer (West Expedited) who was uninsured and, therefore, compensation becomes Appellant UEF’s responsibility.

Other states that apply a statutory employment test similar to South Carolina’s also recognize that that relationship ends when the contracted job has been completed. For instance, in Dupre v. Exxon Pipeline Co., 738 S.2d 1118, 1994 La. App. LEXIS 1619

(La. Ct. App. 1994), the Louisiana Court of Appeals considered whether a plaintiff was Exxon's statutory employee at the time he was injured. Exxon hired the plaintiff's immediate employer, Pitre Welding Service, Inc., to perform repairs and welding services on a pipeline. Pitre provided transportation for its employees to the Exxon job site. On the date in question, one of Pitre's trucks was broken, so some of his employees, including the plaintiff, rode to the jobsite in an Exxon truck. After completing the day's work, the employees were riding back to the Exxon yard before returning to their various homes. At some point, the Exxon truck in which the plaintiff was riding got stuck in mud and, as the driver was attempting to free it, he backed into a tree, injuring the plaintiff.

Exxon argued that it was the plaintiff's statutory employer so that the plaintiff could not sue in tort but, instead, was limited to recovery under the workers' compensation act. The court concluded that, had the plaintiff been injured while he was working on the pipeline, he would have been Exxon's statutory employee. However, the court held that the plaintiff was not Exxon's statutory employee at the time of the accident because the plaintiff was injured after the work day had ended and "at the time of the accident, . . . he had already left the Exxon jobsite." 738 S.2d at 1120-21, 1994 La. App. LEXIS 1619 at **8-9. The court found "nothing in the contract which mentioned the responsibility of transporting Pitre employees to and from work sites. Thus, Exxon was not concerned with getting Pitre's employees to and from work; that was Pitre's obligation to the employees pursuant to his employment agreement with them." *Id.*, 1994 La. App. LEXIS-1619, at **8.⁵

⁵ Noting that the going and coming rule "appl[ies] to statutory as well as ordinary employees," 738 S.2d 1121, 1994 La. App. LEXIS 1619 at **10, the Louisiana Court of Appeals took the analysis one step further and examined whether the plaintiff could be considered Exxon's statutory employee under an

Virginia recognizes a similar distinction between an accident that occurs while an employee is "employed in the trade, business or occupation" of the statutory employer and an accident that occurs when this relationship has terminated. Walls v. Food Lion, L.L.C., 66 Va. Cir. 26, 2004 Va. Cir. LEXIS 341 (Va. Cir. Ct. 2004) involved a truck driver who was injured while he was making a delivery to a Food Lion store. The plaintiff argued that he was not a statutory employee of Food Lion at the time of his injury because he had completed the delivery, was waiting to receive paperwork and "thus was no longer involved in making the delivery." 66 Va. Cir. at 26-27, 2004 Va. Cir. LEXIS 341 **2-3. The court explained that, once an employee "has completed the unloading of freight, his delivery as a statutory employee of Food Lion is completed and, as he is awaiting the bill of lading, he is currently employed in the trade, occupation, or business of his immediate employer as an independent contractor." The same logic should be applied in the case presently before the Court – because the task West Expedited and Claimant had been hired to do was entirely completed, there was no longer a statutory employment relationship between Seko-Charlotte and Claimant.

II. The Commission's decision is consistent with policy concerns underlying the statutory employment doctrine.

Appellant UEF claims that the result obtained by the Commission Decision contravenes the policy underlying the statutory employment doctrine. (App. Br. pp. 15, 21-22). The policy underlying the statutory employer doctrine holds upstream employers liable for injuries to the employees of subcontractors "because an owner should not be able to avoid workers' compensation liability by subcontracting out the work of their business." Harrell, 337 S.C. at 322, 523 S.E.2d at 770. Stated in other terms, the

exception to the going and coming rule. The Court concluded that he could not despite the fact that "an Exxon truck and employee was transporting plaintiff on the date of the accident . . ." Id.

"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 the 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 liability when an employer has no control over the work, status, route or performance of a subcontractor's employee does not further the goals of either the statutory employer doctrine or the Workers' Compensation Act.⁶ According to Appellant's argument, the fact that West Expedited could have contracted for Claimant to make a delivery on his return for someone other than Seko-Charlotte is of no import in this case because West Expedited did not so contract. This makes Seko-Charlotte's potential exposure to liability entirely dependent on a business decision made by a third party over which Seko-Charlotte has absolutely no control. It is undisputed that, had Seko-Charlotte wanted to employ West Expedited and Claimant to make a delivery after the deliveries to Wisconsin had been completed, Seko-Charlotte would have had to have entered into another contract with West. It did not do so and 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-

⁶ Contrary to Appellant's assertion that "allowing SEKO to realize profits from the delivery that proved fatal to the Claimant, but only exposing SEKO to half of the risk, would prove contrary to the scope and purpose of the Workers' Compensation Act," (App. Br. p. 21), is both unfounded and incorrect. Both Seko-Charlotte and West Expedited are in business in order to make profits - there is nothing nefarious or underhanded in that aspect of the arrangement. Seko-Charlotte was exposed to the risks inherent in being a statutory employer so long as a contractual relationship with West Expedited existed. As noted above, when that relationship concluded and West Expedited was free to contract with another entity for delivery services, Seko-Charlotte's "risk" under the statutory employer doctrine simply ended.

Charlotte had no control over or interest in what Claimant did after the conclusion of the deliveries and its contractual relationship with West Expedited ended. To hold an employer liable under the statutory employer doctrine because of fortuitous circumstances entirely out of its control is neither fair nor advances any goals of the Workers' Compensation Act. Instead, to hold Seko-Charlotte liable as a statutory employer under these circumstances would mean that employees of subcontractors with whom a purported statutory employer has no contractual relationship may be held to be statutory employees.

The hypothetical on page 26 of Appellant's Brief is inapplicable to the case presently before the Court because the facts of the hypothetical bear no resemblance to the facts of this case. This is not a construction case where the claimant is injured on site while descending a ladder after immediately completing the work. Instead, a more useful hypothetical would be to compare two different drivers, Driver A and Driver B, both of whom are contracted out by Subcontractor to make a delivery from South Carolina for General Contractor X.

1. General Contractor 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 General Contractor X is now complete. Because the job for General Contractor X is completed, and Subcontractor has contracted with General Contractor Y to deliver something from out of state to South Carolina, Subcontractor tells Driver A to pick up a load for General Contractor Y and bring it back to South Carolina. During this return trip, Driver A has an accident and is injured.
2. General Contractor 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 General Contractor X is now complete. Because the job for General Contractor 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, General Contractor Y is clearly the statutory employer of Driver A at the time of the injury – Subcontractor is the direct employer and General Contractor Y is the statutory employer. General Contractor X has absolutely no connection to or interest in 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. The same result should be reached for Driver B with respect to General Contractor X. In the second scenario, there is only a direct employer, Subcontractor, and no statutory employer. To hold General Contractor X liable in the second scenario, when it clearly is not liable in the first scenario, is to impose liability on General Contractor X based on the decisions made by parties over which it has absolutely no control – Subcontractor and General Contractor Y. Such a result subverts the policy behind the statutory employee doctrine (placing the risk and responsibility of workers' compensation payments on the entity organizing the enterprise and benefiting from the employee's labor) and is inherently and unacceptably unfair.

In its attempt to distinguish Farmer, Appellant essentially admits the logic behind the two scenarios discussed above involving Driver A and Driver B. (App. Br. p. 30 (Appellant stating 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")). Appellant would thus have the determination of Seko-Charlotte's status and liability as a statutory employer turn exclusively on the decisions made by third parties over which it has absolutely no control. As noted above, such a result is patently unfair and should be rejected.

Respondents agree that the statutory employment doctrine imposes absolute liability on the statutory employer where a proper statutory employment relationship exists. However, that doctrine does not impose liability on a general contractor whose contractual relationship with a subcontractor has ended.

Appellant's reliance on Miller v. Lawrence Robinson Trucking, 333 S.C. 576, 510 S.E.2d 431 (Ct. App. 1998), (App. Br. pp. 13, 16, 22), in this respect is misplaced. In Miller, there was no question raised as to whether an employment relationship, whether statutory or direct, existed at the time of the accident. 333 S.C. at 579, 510 S.E.2d at 433 (noting that "[a]t the time of the accident, Robinson was performing work as a subcontractor for Sealand Services, Inc."). The contracting party, Sealand Services, carried workers' compensation insurance whereas the subcontracting party, Robinson Trucking, did not and, as a consequence, the UEF was added as a party. Sealand objected to being held solely responsible for payment of all compensation and benefits, not because the statutory relationship had ended, but because it believed the UEF should be liable for some or all of the benefits. The distinction between this case and Miller is that, in the case presently before the Court, neither Claimant nor his immediate employer, West, were working for Seko-Charlotte at the time the accident occurred. A different result may well be 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. That is not the case here. Alternatively, this case might have 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.

Furthermore, the quote from Miller that appears on page 22 of Appellant's Brief is taken out of context and is part of a longer quote that clarifies what "situation" this Court held would be contrary to the Act's purpose:

Our cases hold that where the subcontractor has worker's compensation insurance, the contractor has already indirectly paid the premiums through the contract price. [citation omitted] When the subcontractor does *not* have insurance, however, the contractor would not ordinarily have paid premiums on behalf of the subcontractor's employees. To allow the contractor to recover from the Fund, as appellants urge, would enable all those who benefitted from the worker's employment and immunity under the Act to escape liability totally.

333 S.C. at 581, 510 S.E.2d at 434. This Court further emphasized that the UEF only comes into play "after execution is unsatisfied against those individuals who have primary responsibility." 333 S.C. at 584, 510 S.E.2d at 435.

In this case, it is reasonable to assume that the contract price Seko-Charlotte paid to West Expedited for the trip from South Carolina to Wisconsin did not include workers' compensation insurance premiums. However, that point misses the issue in the instant case. Had West Expedited arranged for a return-trip delivery or other job for Claimant after he completed his job for Seko-Charlotte, that contract price also presumably would not have included workers' compensation insurance premiums. The question in the case presently before the Court is not whether an upstream employer can be held liable to pay 100% of workers' compensation benefits where a statutory employment relationship exists, but whether such relationship existed at all at the time of Claimant's accident. The crux of this case is precisely whether a statutory employment relationship continues to

exist between the employee of a subcontractor and the general contractor, after the contractual relationship between the general contractor and subcontractor has completely concluded. The Commission held that the statutory employment relationship ended once the deliveries to Wisconsin were completed and the contractual relationship between Seko-Charlotte and West Expedited ended, and that, therefore, "Claimant was no longer a 'statutory employee' of Seko Charlotte at the time of his accidental death." (Commission Decision, R. pp. 21-26). For all the reasons stated herein, this Court should uphold the Commission's factual and legal findings on this point.

III. Claimant cannot be considered an employee of Seko-Charlotte under other theories of employment.

A. The Commission correctly held that Claimant was not a traveling employee of Seko-Charlotte at the time of his fatal accident.

Appellant argues that the Commission erred by not finding that Claimant was a traveling employee of Seko-Charlotte at the time of his fatal accident. (See App. Br. pp. 18-19, 21, 22, 24-26). Appellant's arguments with respect to the application of Hall v. Desert Aire, Inc., 376 S.C. 338, 656 S.E.2d 753 (Ct. App. 2007) and other traveling employee cases, (as well as the application of the exceptions to the statutory employer doctrine under S.C. Code Ann. § 42-1-415 (App. Br. p. 25)), assume the very question on appeal in this case: whether a statutory employment relationship between Seko-Charlotte and Claimant existed at the time of his injury.

Contrary to Appellant's assertions, the traveling employee doctrine applies in this case only with respect to West Expedited. That doctrine does not apply to Seko-Charlotte because any relationship, contractual or otherwise, between Seko-Charlotte and either Claimant or West Expedited had concluded well before Claimant's accident. To

the extent it is even relevant, Ardis v. Combined Ins. Co., 380 S.C. 313; 669 S.E.2d 628 (Ct. App. 2008), is readily distinguishable from the instant case. In Ardis, the claimant was employed by Combined Insurance before, during and it was assumed that he would continue to be employed after the business trip. There was no question raised in that case that the claimant's injury would have arisen out of and been in the course of his employment had he been injured during, or traveling to or from the conference. The issue there was whether his personal decision to stay an extra night at the hotel after the conference had concluded took him outside of his employment relationship. Pointedly, Ardis did not address the statutory employment issue. Thus, while Ardis may be applicable to an analysis of whether Claimant's injuries arose out of and were incurred in the course and scope of his employment with West Expedited, it is not relevant to the key question in this case, *i.e.*, whether the statutory employment relationship with Seko-Charlotte still existed at the time Claimant was injured.

There is a sound basis in both law and fact to find, as did the Commission, that at the time of his accident, Claimant was a traveling employee in relation to his direct employer, West Expedited, but not in relation to Seko-Charlotte. At the time of the accident, there was no employment relationship whatsoever between Claimant and Seko-Charlotte and this Court should so hold.

B. The Commission correctly held that Claimant was not under the control of Seko-Charlotte on his return trip.

It is clear from the facts of this case that Claimant was not an employee of Seko-Charlotte, statutory or otherwise, at the time of his accident. As found by the Commission, the relationship between Seko-Charlotte and Claimant fulfills none of the factors set forth in Wilkinson, 382 S.C. at 300, 676 S.E.2d at 702. Seko-Charlotte

admittedly did business with West Expedited encompassing deliveries to the Milwaukee, Wisconsin area; however, at the time of the accident Claimant was under the control of his primary employer, West Expedited. As was the case in DeBerry v. Coker Freight Lines, 234 S.C. 304, 313, 108 S.E.2d 114, 119 (1959), Claimant's "activities on behalf of each employer are separable and can be identified with one employer or the other." Prior to the completion of the delivery, Claimant was under the control of Seko-Charlotte as to the details and deadlines related to his Wisconsin deliveries. Upon completion of this task, Claimant returned to the exclusive control of West Expedited Delivery Service.

"When this separate identification can clearly be made, th[e] particular employer whose work was being done at the time of injury will be held exclusively liable." DeBerry, 234 S.C. at 313, 108 S.E.2d at 119; *see also* Larson's Workers' Compensation Law § 48.00 (1998). The entity with exclusive control over Claimant at the time of the accident was West Expedited.

"Under settled law, the determination of whether a claimant is an employee focuses on the issue of control, specifically whether the purported employer had the right to control the claimant in the performance of his work. [*Citations omitted*]. In evaluating the right of control, the Court examines four factors which serve as a means of analyzing the work relationship as a whole: (1) direct evidence of the right or exercise of control; (2) furnishing of equipment; (3) method of payment; (4) right to fire. [*Citations omitted*]." Wilkinson, 382 S.C. at 299, 676 S.E.2d at 702. These factors "should be evaluated in an evenhanded manner in determining whether the questioned relationship is one of employment or independent contractor." Id. at 307, 676 S.E.2d at 706.

It is clear from the facts of this case that Seko-Charlotte exhibited no right or exercise of control over the Claimant at the time of the injury. Seko-Charlotte had no right to determine the means and methods of Claimant's services to West Expedited. Even though Seko-Charlotte contracted with West Expedited for the deliveries to Wisconsin, its control over Claimant ended as soon as the deliveries were made. West Expedited exercised complete control over the means of travel and methods of Claimant's return. Seko-Charlotte had no input on when Claimant should return home, whether he should pick up another load, where he should report to, what route he should take, how to complete his task, or any other measure of control. Furthermore, Claimant was returning to South Carolina for West Expedited's benefit, *not* Seko-Charlotte's.

Claimant was driving West Expedited's truck at the time of his accident (not Seko-Charlotte's); therefore, Seko-Charlotte had no involvement in the furnishing of equipment. Seko-Charlotte had no control over the method Claimant would be paid. Claimant's contract with West Expedited was outside the scope of the Wisconsin deliveries or whether a return haul would be taken. Seko-Charlotte took no part in any business process once the deliveries were completed and was completely disinterested in whatever means, methods, or other jobs Claimant might take.

Finally, Seko-Charlotte had no right to fire Claimant at the time of his accident. The job for Seko-Charlotte was over and there was no expectation of additional trips at the time. Seko-Charlotte had absolutely zero vested interest in whether Claimant took instructions from West Expedited for a return delivery or even continued to perform the job, much less if he did it well, or whether he should be fired.

Viewing the Wilkinson factors neutrally between the parties, it is clear that no employment relationship existed between Claimant and Seko-Charlotte at the time of the accident. Therefore, at the time of the accident, Claimant could not be considered a covered employee of Seko-Charlotte.

C. The Commission correctly held that Claimant was not an employee of Seko-Charlotte under any of the exceptions to the Coming and Going Rule.

Appellant takes issue with the Commission's finding that Claimant's accident does not fall within the so-called "coming and going rule" with respect to Seko-Charlotte, but does fall within that doctrine with respect to West, (*see* App. Br. pp. 22-24), arguing that it is inapplicable to the case at hand. However, Appellant then proceeds to cite Sola v. Sunny Slope Farms, 244 S.C. 6, 135 S.E.2d 321 (1964) for the proposition that "the statutory employment relationship between the Claimant and SEKO wouldn't be suspended at the point of delivery precisely because the return trip forms a necessary part of the delivery because the making of that journey, whether or not separately compensated for, is in itself a substantial part of the service for which the worker is employed." (App. Br. p. 23, *quoting from Sola*, 244 S.C. at 15, 135 S.E.2d at 326 (emphasis provided by Appellant)). Appellant's apparent attempt to mix the traveling employee and coming and going rule concepts fails here. In Sola, the question was whether the claimant was barred from workers' compensation recovery because his injury occurred on his way back to a labor camp after a day's work. The Court held that he was not because he was expected to perform additional job duties at the labor camp and, therefore, his travel from the job-site to the labor camp benefited the employer. 244 S.C. at 15-16, 135 S.E.2d at 326-27. In the instant case, Claimant's returning home may be considered a "substantial part of the service" he provided to his employer, West

Expedited in that he could have been directed to perform another task on his way home or, if not, West Expedited needed him back in South Carolina in a timely fashion to perform the next job. It was not in any way a "substantial part of the service" he provided to Seko-Charlotte, who had absolutely no commercial interest in whether Claimant picked up another delivery on his way home or whether the next inter-state delivery made by them was through West Expedited or not, or, if through West Expedited, whether Claimant was the driver or not.

Appellant is incorrect that the Commission is clearly in error on this point, and that the "Coming and Going rule cannot apply to one employer and not the other." (App. Br. p. 23). Precisely for the reason stated above – that there was no employment relationship between Claimant and Seko-Charlotte at the time of his accident, statutory or otherwise – to the extent the coming and going rule applies in this case, it applies to West Expedited and not to Seko-Charlotte.

The Commission's finding on this point simply serves to demonstrate that there is no workers' compensation theory under which Seko-Charlotte can be held liable for Claimant's injury. If, in fact, it was error to have made a factual finding on this point, which Respondents do not concede, it was at most harmless error as there are additional points on which the Commission's Decision can and should be upheld.

IV. The Commission properly held that, if Claimant were considered Seko-Charlotte's statutory employee on the return trip when his accident occurred, he would have been a gratuitous worker and not entitled to workers' compensation benefits.

Appellant argues that it is illogical to conclude that, under the gratuitous worker doctrine, Claimant would be entitled to benefits from one employer (West Expedited) but not from a statutory employer who did not pay for any part of his return trip. (App. Br. p.

31). Instead, the Commission correctly concluded that, in the event Seko-Charlotte could be considered Claimant's statutory employer at the time of his accident, Claimant would have been a gratuitous worker and not entitled to compensation from Seko-Charlotte. (Commission Decision, R. p. 26).

The South Carolina Supreme Court has held that "gratuitous workers are not employees under a contract of hire." Kirksey v. Assurance Tire Co., 314 S.C. 43, 45, 443 S.E.2d 803, 804 (1994). This is because a gratuitous worker neither receives nor expects to receive any kind of pay for their services. Kirksey v. Assurance Tire Co., 311 S.C. 255, 428, 257 S.E.2d 721, 723 (Ct. App. 1993); *see also* Shuler v. Tri-County Elec. Co-op. Inc., 385 S.C. 470, 684 S.E.2d 765 (2009).

Key to the analysis of this issue is the fact that Seko-Charlotte paid the same for Claimant's services to deliver its goods to Wisconsin regardless of whether Claimant picked up and was paid for delivering goods on the return trip or not. Mr. West testified that after the deliveries were made in Wisconsin, Seko-Charlotte did not pay for the trip home. (Suppl. R. p. 15, line 17 – p. 18, line 14). Hence, Seko-Charlotte only paid for Claimant's services for the outgoing delivery. Any services that are deemed to have been performed for Seko-Charlotte after that point were gratuitous and, therefore, do not give rise to an employment relationship, statutory or otherwise.

Finally, Respondents wish to address Appellant's insinuation that counsel for Seko-Charlotte's statement that "'Seko-Charlotte didn't care if Gregory Collins came back' from his trip furthering SEKO's business," exhibits a cold-hearted "lack of concern for those it employs" and a "motivating need for profits." (App. Br. pp. 20-21). Seko-Charlotte's counsel's statement went to the point that, once its contractual relationship

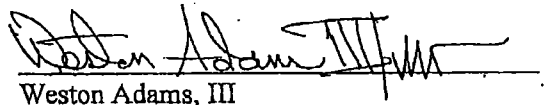
with West Expedited ended, it had no legitimate business interest in whether West Expedited directed Claimant to make a delivery for someone else, return home, or pursue some other activity. It had no interest in whether Claimant moved to some other state, took a vacation, or stopped working for West Expedited altogether. The statement did not reveal some callous disregard for Claimant and his family's loss and any such insinuation was uncalled for. Seko-Charlotte takes seriously the obligations it owes to its employees, statutory or otherwise, and had the accident occurred while Seko-Charlotte and West Expedited were in a contractual obligation, *i.e.*, during the delivery of goods for Seko-Charlotte, there is little question that Seko-Charlotte would have been Claimant's statutory employer. However, because Claimant's accident occurred after the contractual relationship between Seko-Charlotte and both West Expedited and Claimant had concluded, there was no statutory employment relationship between Seko-Charlotte and Claimant at the time of his accident.

CONCLUSION

For the reasons stated herein, this Court should uphold the Commission's findings that there was no statutory employment relationship between Seko-Charlotte and Claimant at the time of his fatal accident and that, therefore, Seko-Charlotte and its insurer, Nationwide Insurance Company, are not liable for compensation benefits payable to Claimant's dependents. Instead, this Court should find that West Expedited was Claimant's only employer at the time of his accident and, since West Expedited did not carry workers compensation insurance, Appellant UEF is responsible for payment of all benefits.

Respectfully submitted,

June 30, 2011


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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

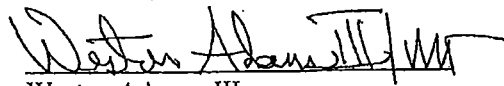
SCWCC File No. 0719222

Gregory A. Collins
(deceased), Employee, Claimant.....Respondent,
v.
Seko Charlotte and Nationwide Mutual Ins.
Co..... Defendants,
v.
West Expedited & Delivery Service, Inc.,.....Defendant,
v.
Seko Worldwide and Federal Ins. Co., Defendants,
v.
Uninsured Employers Fund,Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondents Seko-Charlotte and Nationwide Mutual Insurance Company complies with Rule 211(b), SCACR. The undersigned also certifies that this Final Brief complies with the South Carolina Supreme Court's August 13, 2007 Order re: Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.

June 30, 2011



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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 **Appendix** complies with Rule 242(e), SCACR. The undersigned also certifies that this **Appendix** 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 7, 2014



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