

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

APPEAL FROM THE SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION

SCWCC File No. 0719222

RECEIVED

DEC 5 2014

S.C. Supreme Court

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

v.

Seko Charlotte and Nationwide Mutual Insurance Co., ..... Petitioners,

v.

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

v.

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

v.

Uninsured Employers' Fund, ..... Respondent.

RESPONDENT'S BRIEF

RECEIVED

DEC 05 2014

SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE COURT OF APPEALS WAS CORRECT IN DETERMINING THAT CLAIMANT'S FATAL INJURIES AROSE OUT OF HIS STATUTOREY EMPLOYMENT RELATIONSHIP WITH SEKO CHARLOTTE, INC., WHEN HE SUFFERED A MOTOR VEHICLE COLLISION DURING THE RETURN LEG OF A BUSINESS DELIEVERY TRIP IN FURTHERANCE OF SEKO CHARLOTTE'S BUISINESS.
  
- II. WHETHER PETITIONER'S ARGUMENT THAT THE EQUATIONS USED TO CALCULATE COST OF A DELIVERY ACTS TO SEVER A DELIVERY DRIVER'S STATUTORY EMPLOYMENT AT THE POINT OF DELIVERY WHERE THE DRIVER IS NOT FURTHER ENGAGED.
  
- III. WHETHER GEORGIA, VIRGINIA, AND LOUISIANA CASE LAW PROVIDES ANY SUPPORT FOR PETITIONER'S ASSERTION THAT THE STATUTORY EMPLOYMENT OF DELIVERY DRIVER IS SEVERED AT THE POINT OF DELIVERY WHERE THE DRIVER IS NOT FURTHER ENGAGED.

## 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 similar 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 in Wisconsin at locations 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.<sup>1</sup>

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 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.

R. pp. 40 – 41.

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<sup>1</sup> Seko Charlotte, Inc. stipulated that it is downstream from its operating partner, Seko Worldwide, LLC. Accordingly, because Seko Charlotte, Inc. was properly insured, Seko Charlotte, Inc. and its Carrier are the proper parties for this analysis.

Within the statutory period, Counsel for SEKO and NATIONWIDE (collectively Petitioner herein) filed an Application for Review of the Single Commissioner's Decision and Order. By appeal, Petitioner 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.

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. 21, Appellate Panel Decision and Order, p. 19).

The Fund timely appealed to the Court of Appeals. The Court of Appeals found that Single Commissioner's analysis was proper and correct, determining that the Claimant's statutory employment relationship with Petitioner remained intact during the return leg of the business trip he was performing for SEKO. Collins v. Seko Charlotte, 400 S.C. 50, 732 S.E.2d 630 (Ct.App. 2012) (Appx. 374 – 354).

After its Motion for Rehearing was denied, Petitioner appealed to this Court.

## 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, this litigation tilts is the basis used for figuring cost 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 on the return leg of the SEKO business trip. The Court of Appeals determined 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.” Collins v. Seko Charlotte, 400 S.C. 50, 732 S.E.2d 630 (Ct.App. 2012) (Appx. 374 – 354).

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 front leg of the trip; (2) where the return 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 Supreme Court 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). 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). "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).

### ARGUMENTS

**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 the Court of Appeals 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. Petitioner's 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, SEKO's position is 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).

Among other things, this position 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).

Petitioner's position 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. This 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).

## A. STATUTORY EMPLOYMENT 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).

**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). For its own business reasons, 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.**

This 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 an 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. 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 PETITIONER'S ARGUMENT THAT THE EQUATIONS USED TO CALCULATE COST OF A DELIVERY ACTS TO SEVER A DELIVERY DRIVER'S STATUTORY EMPLOYMENT AT THE POINT OF DELIVERY WHERE THE DRIVER IS NOT FURTHER ENGAGED.**

Espousing Petitioner's theory, the Appellate Panel of the Commission 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 made the calculations 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 Petitioner's argument 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.

**III. WHETHER GEORGIA, VIRGINIA, AND LOUISIANA CASE LAW PROVIDES ANY SUPPORT FOR PETITIONER'S ASSERTION THAT THE STATUTORY EMPLOYMENT OF DELIVERY DRIVER IS SEVERED AT THE POINT OF DELIVERY WHERE THE DRIVER IS NOT FURTHER ENGAGED.**

Petitioner 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 conclusions. Respondent asserts this reliance is misplaced. That 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 assertions of Petitioner, the facts underlying Farmer v. Ryder Truck Lines are not "are similar" to the facts herein. Petitioner's Brief p. 12. 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.

Petitioners have cited two Virginia cases (Moore v. Virginia Int'l Term. Inc., 283 Va. 232, 720 S.E.2d 117 (2012) and Hudson v. Jarrett, 606 S.E.2d 827, 269 Va. 14 (2005) as support for their position. Petitioner's Brief pp. 10 – 11. However, both cases are inapplicable to the facts herein.

As to Moore, the Fund does not dispute that a contract (either express or implied, written or oral) is required before a statutory employment relationship can be established between a general contractor and the employee of a subcontractor. On the contrary, the Fund agrees that there must be such a requirement. Nevertheless, in Moore, the Virginia Supreme Court discussed its tests for statutory employment<sup>2</sup>, which are wholly different from those employed by South Carolina courts. Moore v. Virginia Int'l Term. Inc., 283 Va. 232, 720 S.E.2d 117 (2012). In Moore, one party attempted to shield itself from civil liability utilizing those tests, despite having no contractual relationship with the other party. Certainly, Petitioners are not denying the existence of any contract between SEKO and WEST, as there is an admitted and undisputed contract between these parties. This contract required Mr. Collins to perform SEKO's business, which, in turn, required his travel to and from Wisconsin. Clearly, Moore is distinguishable.

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<sup>2</sup> The tests are referred to as the normal work test and the governmental entity test and, to the Fund's knowledge, have no corollary in South Carolina workers' compensation jurisprudence.

The analysis for Hudson would be the same. The Fund does not assert, and has never asserted, that statutory employment exists where an agreement to perform work does not.

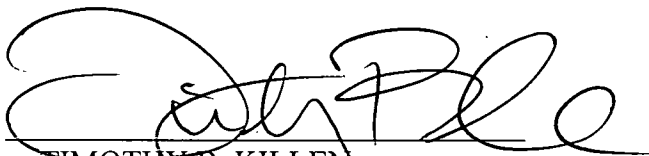
In its brief, Petitioner also cites Dupre v. Exxon Pipeline Co., 638 S.2d 1118 (La. Ct. App. 1994). That case was decided per the “going and coming rule,” which holds that a Claimant is no longer and employee after he or she leaves work (subject to exceptions).

Essentially, this is Petitioner’s whole case, in a nutshell. It claims SEKO should be resolved from liability because the Claimant was, essentially, leaving work when he was injured. It has trouble with this argument, and doesn’t make that claim directly, as it concedes that Claimant remained West’s employee at the time of accident. How do you apply the going and coming rule to a statutory employer but not to a direct employer? The Fund asserts that you cannot, at least insofar as the matter before the Court is concerned.

#### CONCLUSION

As argued herein and at the hearing of the Appeal and for all the grounds and reasons cited, the Respondent Fund seeks the affirmation of the Order of the Court of Appeals. The Respondent 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, and that they shall reimburse the Fund for all benefits paid to date.

Respectfully Submitted,

BY:   
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December 5, 2014  
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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APPEAL FROM THE SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION

---

SCWCC File No. 0719222

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

v.

Seko Charlotte and Nationwide Mutual Insurance Co., ..... Petitioners,

v.

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

v.

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

v.

Uninsured Employers' Fund, ..... Respondent.

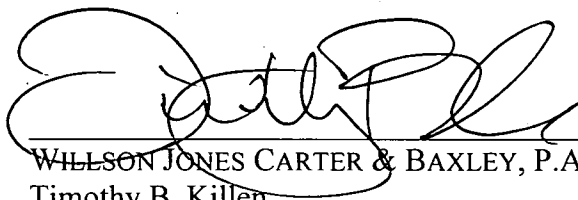
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**CERTIFICATE OF COUNSEL**

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

December 4, 2014



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THE STATE OF SOUTH CAROLINA  
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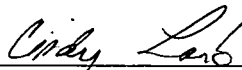
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I certify that on the 5<sup>th</sup> day of December 2014, I served the **Respondent's Brief** on the parties of record by depositing a copy in the United States Mail, sufficient postage prepaid, addressed to their respective attorneys as follows:

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December 5, 2014

**VIA HAND DELIVERY**

The Honorable Daniel E. Shearouse  
Supreme Court of South Carolina  
1231 Gervais Street  
Columbia, South Carolina 29201

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DEC 5 2014

S.C. Supreme Court

Re: Gregory Collins v. West Expedited & Delivery Service, Inc., et al.  
Appeal No.: 2012-213425  
WCC File No.: 0719222; DOI: September 8, 2007  
WJC&B File No.: 0280.00214

Dear Mr. Shearouse:

Enclosed for filing please find (1) the original and fifteen (15) copies of Respondent's Brief in the above-referenced matter; and (2) the original and one copy of the Proof of Service for the Brief. If you would, please file these documents, returning clocked copies.

Should you have any questions or concerns, please don't hesitate to contact me.

With kindest regards,

WILLSON JONES CARTER & BAXLEY, P.A.



Timothy B. Killen

Enclosures

cc: Linda B. McKenzie, Esquire (via U.S. Mail)  
Helen F. Hiser, Esquire and Weston Adams, III, Esquire (via U.S. Mail)