

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

SCWCC FILE NO. 0719222

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DEC 17 2014

S.C. Supreme Court

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

v.

Seko Charlotte and Nationwide Mutual
Ins. Co. Petitioners,

v.

West Expedited & Delivery Service, Inc., Defendant,

v.

Seko Worldwide and Federal Ins. Co., Defendants,

v.

Uninsured Employers Fund, Respondent.

PETITIONERS' REPLY BRIEF

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ARGUMENT

Like the Court of Appeals, the UEF fails to address the central argument raised by Seko Charlotte in this appeal, which is that there was not and could not be any statutory relationship between Claimant and Seko Charlotte at the time of Claimant's fatal accident because there was no contractual relationship between Seko Charlotte and Claimant's immediate employer, West Expedited, at that time. In fact, the UEF agrees that, in the absence of a contractual relationship between the general contractor and the subcontractor, there is no statutory employment relationship between the general contractor and the subcontractor's employee. (Resp. Br. p. 23). The UEF insists, however, that in this case, whether a statutory relationship existed at the time of Claimant's accident is determined by whether West Expedited made the decision to engage a paying delivery on the return trip (or send Claimant on some errand of its own). Thus, the UEF would have this Court impose statutory employer liability based on the decisions of the subcontractor, or immediate employer, as opposed to decisions made by the general contractor, or upstream owner. Such a result runs counter to the principles underlying the South Carolina Workers' Compensation Act generally and the statutory employment provision, S.C. Code Ann. §42-1-400, in particular.

The UEF focuses narrowly on "the basis used for figuring cost in the contract between WEST and SEKO ..." (Resp. Br. pp. 9, 12, 18). However, the UEF completely fails to address the facts that, not only was the contract calculated and paid on a one-way basis but, in addition, and critical to the proper analysis of this case, West Expedited was free to engage a paying delivery on the return trip, which is commonly done in the transportation industry, (R. 161, lines 13-23) (R. 240, lines 12-14), West Expedited had

done so in the past and, had it done so here, Seko Charlotte admittedly would not be liable as a statutory employer for Claimant's accident. (Resp. Br. p. 22).

The analysis of whether a statutory employment relationship existed cannot depend on whether Mr. West hedged his profit by calculating how much it would cost him in fuel to get his truck all the way to Wisconsin and back, as Respondent suggests. The amount per loaded mile charged by Mr. West was the "going rate," and not designed specifically to cover the return trip for this particular delivery. (R. 172, lines 7-19) (R. 183, lines 15-20) (R. 201, lines 14-22). Thus, it is not just Seko Charlotte's position, or a machination based on a dollars-per-mile one-way contract that drives the proper result in this case. It is the fact that Seko Charlotte's contract with Claimant's direct employer, West Expedited, was completely over that requires the conclusion that Seko Charlotte was not Claimant's statutory employer at the time of his fatal accident. Instead, at that time, West Expedited was free to engage a paying return trip, send Claimant on other West Expedited business or send him on vacation. As Mr. Burks testified, "[e]very company we contract out to has a one-way, per-mile charge. Every one we've ever dealt with has only charged per mile one way ..." (R. 183, lines 18-20) (R. 241, lines 7-17).

The UEF asserts that it is merely Seko Charlotte's "position ... that its contract with WEST was complete at the point of delivery ..." (Resp. Br. p. 12). However, both Mr. West and Mr. Burks consistently and repeatedly testified that, once the deliveries were made in Wisconsin, the contract between Seko Charlotte and West Expedited was "completed," "ended," "over." (R. 207, line 14 – 209 line 6) (R. 241, line 6 – 242, line 1). Mr. West testified at the hearing before the Single Commissioner:

Q: Did Seko Charlotte have any relationship with [West Expedited] whatsoever after the delivery was made in Wisconsin?

A: No.

(R. 210, lines 11-14) (*see also* Supp. R. 178, line 22 – 18, line 14 (Mr. West testifying that, once the delivery was made, West Expedited’s relationship with Seko Charlotte was over)). Mr. Burks confirmed that once the delivery was made, West Expedited was not performing any other services for Seko Charlotte. (R. 241, line 6 – 242, line 1). There is no evidence whatsoever to the contrary.

The UEF is simply wrong that the evidence in this case does not show an agreement for a one way trip. (Resp. Br. p. 19). In fact, all the evidence in this case demonstrates that Seko Charlotte and West Expedited entered into a one-way delivery agreement that terminated once the deliveries were made in Wisconsin. (R. 159, line 24 – 160, line 10) (R.) (Supp. R. 17, line 22 – 18, line 14). Conversely, there is no evidence to support Respondent’s assertion that “[t]here is no such thing in a courier service,” (Resp. Br. p.19), which is as wrong as it is unsupported. As the testimony demonstrates, in the past West Expedited had engaged paying deliveries on the return leg of a trip, was free to do so on this trip, but chose (for reasons of its own) not to on this particular trip.¹ (R. 207, line 11 – 209, line 6) (R. 210, lines 11-14) (R. 241, line 6 – 242, line 1) (R. 249, lines 11-16) (Supp. R. 17, line 22 – 18, line 14) (Supp. 43, lines 20-22).

Respondent’s attempts to distinguish cases arising in Virginia, such as Moore v. Virginia Int’l Term., Inc., 720 S.E.2d 117 (Va. 2012) and Hudson v. Jarrett, 606 S.E.2d

¹ Thus, while the return leg of a delivery might be “necessarily incidental” under some circumstances and with respect to some parties, it is not necessarily incidental under all circumstances and certainly not with respect to Seko Charlotte in this case. Mr. West testified that it was necessary for his business for his drivers to return to South Carolina, but not for those companies who did business with West Expedited. (R. 202, line 24 – 203, line 6).

827 (Va. 2005), are ineffectual. First, the UEF fails to acknowledge the fact that the Virginia statutory employment provision is practically identical to South Carolina's. *Compare* Va. Code § 65.2-302(A), with S.C. Code Ann. § 42-1-400; *see also* Corollo v. S.S. Kresge Co., 456 F.2d 306, 312-313 (4th Cir. 1972) (noting that the Virginia statutory employment provisions are "identical with the South Carolina statute"). Second, Respondent's reference to the normal work test and the governmental work test is merely an attempt at misdirection. The Virginia Supreme Court held that neither test was dispositive in Moore precisely because "there was no contract between" the claimant's direct employer and the putative upstream employer at the time of the accident. Moore, 606 S.E.2d at 119.

Hudson is particularly instructive because, in that case, the Virginia Supreme Court carefully analyzed the relationships between the parties and placed liability on the shoulders of the entity making the decisions. "At the time of the accident, Hudson was working on loading and unloading cargo from Columbia's barge. The decision to load or unload cargo at the terminal was the decision of Columbia, the vessel owner." Hudson, 606 S.E.2d at 829-830. In the case at hand, it was West Expedited's decision whether to engage a paying return trip, not engage a paying return trip, send Claimant on an errand for West Expedited, or send him on vacation. Seko Charlotte had no part in or influence over any decision West Expedited made once their contract was concluded upon delivery in Wisconsin. If Seko Charlotte had wanted Claimant to perform some task for it, any task, after the deliveries were made, it would have had to have entered into another contract with West Expedited.

Respondent's attempts to distinguish Farmer v. Ryder Truck lines, Inc., 245 Ga. 734, 266 S.E.2d 922 (Ga. 1980), only serve to highlight that case's applicability to the instant case. It was precisely because there was an upstream employer on the return trip (Ryder) that the upstream employer on the out-going trip (Hames) was not liable. At the time of the claimant's injury, Hames "neither had the right to nor exercised any control over Farmer on his return trip to Georgia." 266 S.E.2d at 924, 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.

In addition, Respondent 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." (Resp. Br. p. 23). Respondent's assertion implies that the second, upstream employer (Ryder) was liable in place of the direct employer (Martin) for all purposes. What Respondent fails to note is that in Farmer, as in the present case, the direct employer did not have workers' compensation insurance. 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 employer 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. Because West Expedited was uninsured, Claimant's compensation becomes Respondent UEF's responsibility.

The UEF seizes on Petitioner's cite to Dupre v. Exxon Pipeline Co., 738 S.2d 1118, 1121 (La. Ct. App. 1994), and argues that Petitioners' "whole case, in a nutshell," is that Seko Charlotte should not be held liable under the going and coming rule because Claimant was "leaving work when he was injured." (Resp. Br. p. 24). In truth, the only references to the going and coming rule in Petitioner's Brief are contained in discussions of the Commission Decision. (Pet. Br. pp. 4, 22-23).

Once again, the UEF failed to present any case, either from South Carolina or from any other jurisdiction, that holds a statutory employment relationship continues to exist even after the contract between the owner and the subcontractor has ended. There are none,² and for good reason. Such a result would be unfair, illogical and run counter to both the purpose behind the statutory employment provisions, and the "and contracts with any other person" language in S.C. Code Ann. § 42-1-400.

The UEF repeatedly emphasizes the fact that, after making the deliveries in Wisconsin, Claimant began his return trip, "without being engaged by any other contractor, courier service, or logistics provider to perform any further deliveries ..." (Resp. Br. pp. 6, 10, 12, 16, 22). The UEF repeats its concession to this Court that, had there been "an upstream employer with whom WEST contacted 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." (Resp. Br. 22). In other words, the UEF is entirely comfortable with having a

² As the Commission pointed out, "South Carolina case law is without an example of an employee remaining a statutory employee despite completion of their task and lack of evidence of control." (R. 16, 25).

purported statutory employer's liability rest on the business decisions made by totally separate entities.³

Petitioners refer this Court to the scenarios described at pages 20-21 of their Brief. The UEF continues to agree that, under scenario 1, Seko Charlotte should not be held to be Claimant's statutory employer. Holding Seko Charlotte liable as the statutory employer under scenario 2 makes that liability depend entirely on the decisions of a third party, West Expedited. It was West Expedited's choice to engage a return load or not. It admittedly had done so in the past and reserved the right to do so on this trip. According to Mr. Burks, most of the companies Seko Charlotte contracts with for long-distance deliveries "try to find something else up in that area going from that area to another area ..." (R. 249, lines 5-16) (R. 161, lines 17-21 (Mr. Burks testifying that it was a normal course of business to "try to get a load coming back, once you deliver something")). Mr. West agreed that, once Claimant made the deliveries in Wisconsin, West Expedited was free to send Claimant somewhere else to pick up another load to deliver. (R. 208, line 17 – 209, line 6).

Once Claimant made the two deliveries in Wisconsin, Seko Charlotte had no knowledge of what Claimant did – whether he picked up a return load for someone else or not. In fact, Seko Charlotte did not even know an accident had occurred until a few months before the hearing before the Single Commissioner. (R. 168, line 7 – 169, line 20). Mr. West testified that West Expedited's "agreement with Seko ended when Mr. Collins made that delivery in Wisconsin." (R. 208, lines 12-15). Mr. Burks testified that he did not know what West Expedited's drivers did after they made a delivery.

³ This situation did not arise in Farmer, where Hames had an ongoing contractual relationship with the employee's direct employer that would have served as the basis for statutory employment but for the superseding contract with Ryder.

“Sometimes, he [Mr. West] tried to get something else, but that was the normal course of business in logistics. You try to get a load coming back, once you deliver something.” (R. 161, lines 13-21).

Respondent relies on Hall v. Desert Aire, Inc., 376 S.C. 338, 656 S.E.2d 753 (Ct. App. 2007). However, as the Commission explained, “Hall does not address whether a statutory employer relationship terminates upon completion of the contract or bargained for task.” (R. 15). As the Single Commissioner’s Decision reveals, the parties stipulated that, “[t]he Claimant, Gregory Collins, died as a result of a motor vehicle accident on September 8, 2007 **while returning from a delivery for West Expedited** and Delivery Service (West).” (R. 30) (emphasis added). Furthermore, the UEF’s arguments regarding traveling employees are irrelevant and beside the point, as the Commission correctly held as a matter of fact and law, “Claimant was a ‘traveling employee’ as to West Expedited only.” (R. 22, 25).

For the same reason, Respondent’s reliance on Ardis v. Combined Ins. Co., 380 S.C. 313, 669 S.E.2d 628 (Ct. App. 2008), is misplaced. 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 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 any question of statutory employment. 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. Respondent would have the analysis for statutory employment parallel exactly the analysis of whether an injury occurs during the course of employment. That is not the analysis employed in South Carolina or in any other jurisdiction that has adopted a statutory employment concept.

The UEF also argues that, if it were not for the fact that Claimant was hired by make a delivery in Wisconsin, he would not have been returning from Wisconsin. (Resp. Br. 16). This “but for” analysis is in no way part of the statutory employment analysis applied by South Carolina courts.

The UEF appears to suggest that the outcome of this case should be different because West Expedited failed to carry workers’ compensation insurance. (Resp. Br. p. 11). Respondent’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 employment 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 Expedited, had any contractual relationship with 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. That also is not the case here, because as noted above, 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 19 of Respondent's Brief is taken entirely out of context and is part of a longer quote that clarifies what "situation" the Court of Appeals 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 434.⁴ The Court of Appeals further emphasized that the UEF only comes into play "after execution is unsatisfied against those individuals who

⁴ 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'

have primary responsibility.” 333 S.C. at 584, 510 S.E.2d at 435. In this case, the only entity that had primary responsibility for Claimant’s accident was West Expedited because the contractual relationship between West Expedited and Seko Charlotte ended at the point of delivery. Without any contractual relationship between West Expedited and Seko Charlotte, there is not and cannot be any statutory employment relationship between Seko Charlotte and Claimant.

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 correctly 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.” (R. pp. 21-26).

Once again, Respondent misleadingly suggests that Seko-Charlotte counsel’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.” (Resp. Br. p. 17). The UEF’s unsubstantiated attack is both unfair and uncalled for, and should be rejected. Seko-Charlotte’s counsel’s statement went to the point that, once its contractual relationship with West Expedited ended, Seko Charlotte had no legitimate business interest in

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, which was the issue in Miller, but whether a statutory employment relationship existed at all at the time of Claimant’s accident.

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 is 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 fulfillment of the contract between Seko-Charlotte and West Expedited, 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 West Expedited had concluded, there was no statutory employment relationship between Seko-Charlotte and Claimant at the time of his accident.

In the end, Respondent essentially concedes Petitioners' position: "The Fund does not assert, and has never asserted, that statutory employment exists where an agreement to perform work does not." (Resp. Br. p. 24). On the return leg of the journey at issue here, there was no contract between Seko Charlotte and West Expedited to perform any work. Their previous contract had concluded. Thus, despite its arguments to the contrary, even the UEF agrees that the lack of a contractual relationship between the upstream employer and a claimant's direct employer should be determinative.

Although the UEF continues to argue as though Seko Worldwide, LLC and its workers' compensation carrier Federal Insurance Company are still part of this case, (Resp. Br. pp. 6, 7 n.1), Seko Worldwide, LLC was dismissed by the Single Commissioner, (R. 17), and that ruling was never appealed by any party. (R. 189-191).

It is, therefore, the law of this case. Creech v. Ducane Co., 320 S.C. 559, 564, 467 S.E.2d 114, 117 (Ct. App. 1995) (“only issues within the application for review are preserved for the full commission”); Green v. City of Columbia, 311 S.C. 78, 80, 427 S.E.2d 685, 687 (Ct. App. 1993) (only those issues within the scope of the appellant’s exception to the full commission and its notice to the respondent are preserved for appeal to the commission), *citing* Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 712 (1940) (holding that “all findings of fact and law by the hearing commissioner became and are the law of th[e] case, except only those within the scope of the exception of defendant and the notice given to the parties by the commission”). (*See also* R. 8-9, 24, 28).

Finally, the UEF failed entirely to address Petitioner’s argument that the Court of Appeals erred in reversing the Commission on the basis that it applied an incorrect analysis even though it reached the correct result. As a result of the UEF’s omission, it can be deemed to have conceded this argument. An argument raised in an appellant’s brief that is not responded to may be deemed a concession of that point. Turner v. South Carolina Dept. of Health & Env’tl. Control, 377 S.C. 540, 547, 661 S.E.2d 118, 121 (Ct. App. 2008) (where a respondent “fails to respond to an issue in his brief, the appellate court may treat the failure to respond as a [concession] that the appellant’s position is correct”), *citing* First Union Nat’l Bank of S.C. v. FCVS Commc’ns, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996), *rev’d on other grounds*, 328 S.C. 290, 494 S.E.2d 429 (1997).

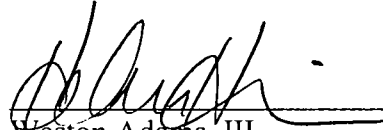
CONCLUSION

For all the reasons stated herein and in Petitioners' Brief, this Court should reverse the Court of Appeals and affirm the Commission's factual and legal findings that Seko Charlotte was not Claimant's statutory employer at the time of his fatal accident.

Respectfully submitted,

McANGUS GOUDELICK & COURIE LLC

December 15, 2014



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APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

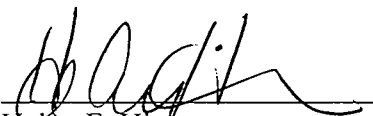
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v.
Uninsured Employers Fund, Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Petitioners' Reply 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 15, 2014


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Uninsured Employers Fund, Respondent.

PROOF OF SERVICE

I certify that on the 15th day of December 2014, I served the **Respondents' Reply Brief** on the parties of record by depositing a copy of it in the United States Mail, postage prepaid, addressed to their respective attorneys as follows:

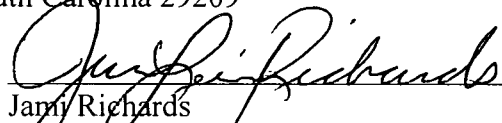
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December 15, 2014

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S.C. SUPREME COURT

VIA U.S. MAIL

The Honorable Daniel E. Shearouse
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

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

Dear Mr. Shearouse:

Enclosed for filing please find the original and 16 copies of Petitioners' Reply Brief in the above-referenced matter. Also, enclosed please find the original and one copy of the Proof of Service. Please file these documents and return clocked in copies in the enclosed, self-addressed stamped envelope.

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

If you have any questions, please contact me.

Very truly yours,

McAngus Goudelock & Courie, LLC


Helen F. Hiser

Enclosures

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