STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF COLLETON	)	FOURTEENTH JUDICIAL CIRCUIT
	)	
Samuel Washington, Jr.,	)	Case No.: 2013-CP-15-411
	)	
Plaintiff,	)	
v.	)	**ORDER**
	)	
South Carolina Electric and Gas Company; and Emerson Electric Company d/b/a Emerson Network Power, and/or Emerson Network Power,	)	
	)	
Defendants.	)	
	)	

This matter came before the Court on the Motion of Defendant South Carolina Electric and Gas Company's (hereinafter "SCE&G") seeking Summary Judgment in its favor on the grounds SCE&G is immune from suit under the South Carolina Workers' Compensation Statute and the Statutory Employer Doctrine. (S.C. Code Ann. § 42-1-400). Plaintiff was represented by Attorneys Kirk Morgan, Margie Bright Matthews and Chuck Slaughter. SCE&G was represented by Attorneys John Massalon and Ryan Neville. Defendant Emerson Process Management's (improperly identified as Emerson Electric Company d/b/a Emerson Network Power, and/or Emerson Network Power) ("Emerson") was represented by Attorneys Mike Bowers and Ian Ramsey.

Upon due consideration of the arguments of counsel, memoranda and accompanying, and accompanying materials submitted on behalf of both Plaintiff and Defendant SCE&G, Defendant's motion is hereby DENIED.

FACTUAL BACKGROUND

This is a negligence action arising out of an alleged electric shock incident involving the Plaintiff on September 28, 2011 at the SCE&G Canadys Station power plant located in Colleton County, South Carolina ("Canadys Station").

The undisputed facts establish that, in 2008, SCE&G entered into a contract with Defendant Emerson whereby Emerson would perform certain electrical installation/demolition work to upgrade SCE&G's Canadys Station power plant. Thereafter, in 2011 Emerson entered into a subcontract agreement(s) with Applied Control Technology, Inc. ("ACT") for the provision of, among other things, labor, supervision, materials and tools for the SCE&G Canady's upgrade project(s). In turn, ACT hired the Plaintiff, an electrician, through the local chapter of the International Brotherhood of Electrical Workers.

On September 28, 2011, the Plaintiff was performing electrical demolition work on a panel box at Canadys Station. As the Plaintiff began removing wires from the junction box, which he contends he was informed had been de-energized, he was shocked by SCE&G's electricity. As a result of the contact with SCE&G's energized wire(s) and the severity of the shock he received as the electric current passed through his body, the Plaintiff suffered serious and permanent injuries and damages.

The day after the incident which is the subject of this action, the South Carolina Department of Labor, Licensing and Regulation, Office of Occupational Safety and Health ("S.C. OSHA") opened an investigation into the incident and, on December 20, 2011, cited SCE&G for two (2) serious violations of the Occupational Safety and Health Regulations of the State of South Carolina. (*See* S.C. OSHA Citations).

On May 28, 2013, Plaintiff filed a Summons and Complaint in the Colleton County Court of Common Pleas against Defendant SCE&G and Defendant Emerson Electric Company d/b/a Emerson Network Power, and/or Emerson Network Power (hereinafter "Emerson").

On July 9, 2013, Defendant Emerson filed a Notice for Removal on the basis of diversity jurisdiction, alleging that SCE&G, a South Carolina citizen, was a sham defendant named only to defeat diversity jurisdiction. According to Emerson, at the time of the incident which is the subject of this action, Plaintiff was SCE&G's "statutory employee" and thus his claims against SCE&G were barred by the South Carolina Workers' Compensation Act.

Plaintiff, thereafter, sought remand asserting that the non-diverse Defendant SCE&G had not been fraudulently joined and therefore the District Court lacked jurisdiction over this action. By Order dated September 9, 2013, the Honorable Judge Richard Gergel granted Plaintiff's Motion to Remand. According to Judge Gergel:

> Construing all issues of law and fact in Plaintiffs favor, the Court finds that there is at least a "slight possibility" that Plaintiff is not a statutory employee of SCE&G. *Murphy,* 657 F. Supp. 2d at 690. Given the fact-intensive nature of the inquiry, the Court finds it is not absolutely clear at this stage that Plaintiff would have no possibility of relief against SCE&G in state court and that remand of this action is proper. *See Hartley,* 187 F.3d at 424-25.

In its present Motion, Defendant SCE&G contends that it is the Plaintiff's statutory employer, and as such, his exclusive remedy is under the Workers' Compensation Act, and SCE&G should be granted summary judgment in its favor

SUMMARY JUDGMENT STANDARD

Summary judgment is an "extreme remedy to be cautiously invoked" and is proper only when there exists no genuine issue of material fact and the moving party is thus entitled to judgment as a matter of law. *Holloman v. McAllister*, 289 S.C. 183, 186, 345 S.E.2d 723, 729 (1986); Rule 56(c), SCRCP. The party seeking summary judgment has the burden of

demonstrating the absence of a genuine issue of material fact. *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 102, 410 S.E.2d 537, 539 (1991). In ruling on a motion for summary judgment, the court must construe all ambiguities, conclusions, and inferences arising from the evidence against the moving party. *Johnston v. Bowen*, 313 S.C. 61, 64, 437 S.E.2d 45, 47 (1993).

"[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). "Moreover, summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. *Baird v. Charleston County*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999); *see also Middleboro Horizontal Prop. Regime Council v. Montedison*, 320 S.C. 470, 480, 465 S.E.2d 765, 771 (Ct.App. 1995) ("Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law."); *Murphy v. Hagan,* 275 S.C. 334, 271 S.E.2d 311 (1980) (Summary judgment should not be granted even when there is no dispute as to the evidentiary facts if there is dispute as to the conclusions to be drawn from those facts.).

ANALYSIS

It is undisputed that the Plaintiff was not a direct employee of SCE&G. Rather, in its Motion, SCE&G contends that it was the Plaintiff's statutory employer and thus "is immune from suit under the South Carolina Workers' Compensation statute and the statutory employer doctrine." South Carolina courts have long recognized that no easily applied formula can be laid down for the determination of whether an individual is a statutory employee in a given case and, as such, "each case must be decided on its own facts." *Ost v. Integrated Prods., Inc.*, 296 S.C. 241, 244, 371 S.E.2d 796, 798 (1988).

South Carolina's statutory employer law will treat the "owner" of a business that hires contractors and sub-contractors as the direct employer of a sub-contractor's employees ***only*** when the subcontractor's employees are hired to do work that would normally be done by direct employees of the owner. *See* S.C. Code Ann. § 42-1-400. The purpose of the statutory employer doctrine is to prevent a business owner from subcontracting out the core work of its business in order to evade responsibility for workers compensation payments. *Harrell v. Pineland Plantation, Ltd.*, 337 S.C. 313, 322, 523 S.E.2d 766, 771 (1999). If an owner is treated as a statutory employer, then the owner will be responsible for paying workers' compensation benefits and also be entitled to the Act's immunity from suit in tort.

South Carolina has developed three tests to determine whether or not persons such as the Plaintiff were doing work that normally would be completed by a direct employee in the general "trade or business" of the owner such as SCE&G. *See Olmstead v. Shakespeare*, 354 S.C. 421, 581 S.E.2d 483 (2003). "To determine whether the work performed by a subcontractor is a part of the owner's business, this Court must consider whether[:]

> (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 v. Ramco, Inc., 325 S.C. 560, 569, 482 S.E.2d 582, 586 (Ct. App. 1997); *see also Hopkins v. Darlington Veneer Co.*, 208 S.C. 307, 311, 38 S.E.2d 4, 6 (1946)("[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."). Each of these tests serves the overall purpose of the statutory employer doctrine:

preventing a company from outsourcing the core functions of its business to subcontractors as a way to avoid responsibility for workers' compensation payments.

When viewed in a light most favorable to the Plaintiff, an application of the facts of this case to the above-referenced tests reveal that the Plaintiff was not a statutory employee of Defendant SCE&G. As a result, the exclusivity provision of S.C. Code Ann. § 42-1-540 does not apply and Defendant SCE&G's Motion for Summary Judgment is hereby DENIED.

A. Major, Specialized Repairs are Not Part of a Manufacturer's Trade or Business.

While precedent states it is "difficult to lay down any hard and fast rule" in statutory employment cases, one rule the South Carolina Supreme Court has established is that, "where repairs are major, specialized, or of the sort which the employer is not equipped to handle with its own work force, they are not part of the business." *Glass v. Dow Chemical Co.*, 325 S.C. 198, 201, 482 S.E.2d 49, 50-51 (1997); *see also Raines v. Gould*, 288 S.C. 541, 543, 343 S.E.2d 655, 657 (Ct. App. 1986) ("Ordinarily construction work, such as building a factory structure or making electrical installations, is considered outside the trade or business of a manufacturer.").

According to the Plaintiff, at the time of his injuries, Plaintiff was one of several ACT employees performing demolition work as part of a major repair/upgrade project on SCE&G's Canadys Turbine No.3. **SCE&G employees** have testified that the work the Plaintiff and the other subcontractors were performing was "major" and "specialized" repair work:

> Q. Okay. Stepping back a little bit, it's
> my understanding that during that time, in that
> September 2011 range, there was a project going on
> at the Canadys Station plant; is that correct?
> A. Yes.
> Q. What's your understanding as to the
> reason behind that? Like what was going on?
> A. We were doing an upgrade on our DCS
> system as well as control valves that control the

steam going to the turbine which we use to turn the generator to generate the power. **It was a major, major upgrade changing the valves out and controls and pulling new wire in, replacing wire.**
Q. So this wasn't just a routine maintenance thing, it was a major repair?
A. Major, yes.

(Richard Wilson Dep. 10:23 to 11:13) (emphasis added).

Q. You've already agreed that this was a major project in the eyes of SCE&G, a major work project?
A. Major work project.
Q. All right. And would you agree that upgrading a control system is specialized work?
A. It is specialized in that, yes, it is specialized.

(Lawrence Purvis Dep. 42:18 to 42:24).

In contrast to specialized repair work, routine maintenance work can sometimes be covered by the statutory employment doctrine. For example, in *Wheeler v. Morrison Machinery Co.*, 313 S.C. 440, 438 S.E2d 264 (1993), the court found the removal of asbestos was part of the defendant's routine "ongoing maintenance program" and therefore part of the defendant's "trade or business." According to the court, "[p]reventive maintenance...has always been and always will be an ongoing process." *Wheeler,* 313 S.C. at 443, 438 S.E.2d at 266.

According to the Plaintiff, the work being performed by the Plaintiff and the other subcontractors was not routine maintenance; instead it was a specialized repair. In support thereof, the Plaintiff cites to documents obtained from S.C. OSHA, which indicate that the demolition/upgrade/repair work being performed by the Plaintiff and other contractors and subcontractors on the date of the subject incident generally only takes place every thirty (30) to forty (40) years. Moreover, Plaintiff points to testimony given by **SCE&G employees** who have

testified that this was not routine maintenance and, in fact, this specific demolition/repair work had never been done before on the subject equipment:

> Q. Okay. Do you have any knowledge as to whether any other SCE&G employees have ever done any type of work on that panel?
> A. I'm sure some of the other electricians have worked on that panel. I know they have as far as the switches.
> **Q. But as far as any sort of demo or pulling out wires or replacing the panel itself.**
> **A. Not that particular one, no.**

(Richard Wilson Dep. 14:10 to 14:18) (emphasis added).

> **Q. The project and the work that was being done on Unit 3, this wouldn't be considered routine maintenance, would it?**
> **A. No.**
> Q. This is, again, a major overhaul or repair?
> A. Yes.

(Richard Wilson Dep. 32:23 to 33:4) (emphasis added).

> Q. Do you know if SCE&G has ever demolished, removed and upgraded that unit or units at Canadys at any time previous?
> A. This particular unit?
> Q. Yes, sir.
> A. I would say no.

(Lawrence Purvis Dep. 12:24 to 13:4).

> Q. All right. Would you agree that this was not routine maintenance that was going on at Canadys?
> A. Yes.

(Lawrence Purvis Dep. 20:3 to 20:6).

> Q. During your 13 years at SCE&G, were you ever assigned to work on this particular panel box?
> A. I was.
> Q. What kind of work would you be asked to

do?
A. It had some limit switches inside the box. There was a shaft that came through the box for valve positioning and those switches occasionally would fail or get a little out of adjustment and then we would go in and make an adjustment.
Q. So would it be fair to call that routine maintenance?
A. Yeah.
Q. But as far as removing, replacing the wires or actually removing, replacing the box itself, you were never asked to do that?
A. No, sir.

(Wendell Polk Dep. 16:24 to 17:16) (emphasis added).

Q All right. All right. And are you aware -- it's our understanding that this is the first time these controls were being updated with state of the art equipment -- controls since the Canadys Plant had come on line 40, 50 years ago. Is that your understanding?
A Yes. As far as the full update, yes.
Q All right. **So there's no doubt that routine maintenance had ever done what Emerson was doing on this project?**
A Correct.

(Joe Foster Dep. 28:15 to 28:24) (emphasis added); *see also* Richard Wilson Dep. 11:11 to 11:13 ("Q. So this wasn't just a routine maintenance thing, it was a major repair? A. Major, yes.")).

Finally, a **SCE&G employee** has testified that this type of specialized work is typically done by independent contractors:

Q. During your time at SCE&G, was there ever a time when a project of this scale was undertaken at the Canadys plant?
A. Yeah. I mean, there was stuff like that -- I'm not exactly clear on what you're asking. Did the the company do it by itself or --
Q. As far as the six-week project that was going on during this time.
A. Oh, yeah. I mean, different -- there's different projects over the years. They'll do

upgrades on different systems at different times.
Q. And is that something usually, again, that -- is it something SCE&G would do themselves or would it be contracted out to --
A. Generally contracted out.

(Wendell Polk Dep. 11:5 to 11:19) (emphasis added).

After hearing oral arguments and reviewing the submissions of counsel, viewing the evidence in the light most favorable to the Plaintiff, the non-moving party, the Court finds that the work being performed by the Plaintiff and the other contractors/subcontractors was not routine maintenance. Instead, the testimony of SCE&G employees establishes that the subject demolition/repair project was major and specialized, and under *Glass*, such testimony precludes any ruling that the Plaintiff was a statutory employee of Defendant SCE&G.

B. The Demolition/Repair Work Performed by the Plaintiff was not an "Important" nor a "Necessary, Essential, and Integral" Part of SCE&G's Business of Providing Electricity to Customers.

SCE&G contends that because the equipment the Plaintiff was demolishing is used to power the generator SCE&G uses to produce the electricity, such work should be considered an important, necessary, essential and integral part of SCE&G's business of providing electricity to customers. In support of this contention, SCE&G cites to the deposition testimony of certain SCE&G employees who "testified that the work was necessary, essential, and integral to SCE&G's business of producing power." However, these self-serving legal conclusions are insufficient to carry SCE&G's burden at this stage. *See Shields v. S.C. Dep't of Highways and Pub. Transp.*, 303 S.C. 439, 443, 401 S.E.2d 185, 188 (Ct.App.), cert. denied, (April 24, 1991) (*citing* 32 C.J.S. Evidence § 453 at 91 (1964) ("As a general rule, a witness will not be permitted to state a conclusion, or opinion, of law....")).

If, as SCE&G contends, demolishing/upgrading this particular equipment was an important part of the producing and providing of electricity, it would be expected to have been done in some form of routine or regular manner. That such work generally takes place every 30-40 years and is done by outside contractors that have no role in the production or providing of electricity shows that the task is not an "important" part of the business of providing electricity to customers. As explained by Chief Judge Sanders in *Raines v. Gould, Inc.*:

> Every manufacturer must have a plant, but this fact alone does not make the work of constructing a plant a part of the trade or business of every manufacturer who engages a contractor to construct a plant. Otherwise, the employees of every contractor so engaged would be the statutory employees of every such manufacturer.

288 S.C. 541, 547, 343 S.E.2d 655, 659 (Ct. App. 1986).

Moreover, in *Dickerson v. Eastman Kodak Company*, 569 F. Supp. 1221 (D.S.C. 1983), the court addressed a situation where the contractor's work was "necessary" and even "absolutely indispensable" for the defendant business to operate, but the court still found the work was still not part of the "trade or business" of the defendant if it is not work the direct employees would regularly perform. Quoting from Larson's Workmen's Compensation Law § 49.12 (1982), the court held:

> From these cases it will be readily seen that the test is not one of whether the subcontractor's activity is useful, necessary, or even absolutely indispensable to the statutory employer's business, since, after all, this could be said of practically any repair, construction, or transportation service. **The test ... is whether this indispensable activity is, in that business, normally carried on through employees rather than independent contractors.**

Id. (Emphasis added). Under Professor Larson's analysis, even assuming, *arguendo*, that SCE&G had to demolish/repair/upgrade the subject electrical panel box located on the valve that controlled Turbine No.3 at Canadys Station to be able to continue to power the generator

SCE&G utilizes to generate electricity, that fact does not transform Plaintiff's demolition work into part of the "trade of business" of "providing electricity to customers in South Carolina".

In *Abbot v. The Limited, Inc.*, 338 S.C. 161, 526 S.E.2d 513 (2000), the South Carolina Supreme Court used this same logical approach to hold that even though the transportation of goods was absolutely "essential" to the defendant's business, the subcontractor's employee was not a statutory employee because "[t]he mere fact that transportation of goods to one's place of business is essential for the conduct of the business does not mean that the transportation of the goods is a part or process of the business." *Abbott*, 338 S.C. at 163, 526 S.E.2d at 514. Chief Justice Toal in *Olmstead v. Shakespeare*, 354 S.C. 421, 426, 581 S.E.2d 483, 486 (2003) reiterated this point in holding:

> [T]ransportation of goods is important to nearly all businesses, and, that transportation of goods by a common carrier alone, without something more, does not qualify as "part of [the owner's] trade, business, or occupation" under any of the three established tests for statutory employment.

Under our Supreme Court precedent, even though it may have been "absolutely essential," for Defendant SCE&G to demolish and replace the subject electrical panel box, that fact does not change SCE&G's entire *persona* as a provider of electricity into a demolition/construction company.

Under the particular facts and circumstances of this case, the Court finds that SCE&G fails to meet the criteria of the first test as the activities of the Plaintiff were not an important part of SCE&G's business or trade. Moreover, SCE&G fails to meet the criteria of the second test as such demolition/repair work was not a necessary, essential, and integral part of SCE&G's business.

C. *The Specific Repair Work Being Performed by the Plaintiff Had Not Been Done by SCE&G Employees Before.*

Defendant SCE&G likewise cannot meet the third test for statutory employment – whether or not the **identical activity** performed by the Plaintiff has been performed by employees of SCE&G. *Voss*, 325 S.C. at 569, 482 S.E.2d at 586. As set forth above, it is uncontroverted that, on the date of the incident which forms the subject of this action, the Plaintiff was performing demolition work on an electrical panel box that was mounted to a control valve. **SCE&G employees** have testified as follows regarding the subject panel box:

> Q. It's my understanding, and I'll represent to you he's -- he will testify that that day he was assigned to remove some wires from a panel pox. Are you familiar with the panel box?
> A. I am.
> Q. Was that panel box being replaced?
> A. Yes, sir. It was completely going away.
> Q. I assume they were upgrading it, putting a new one in?
> A. Yes. It was attached to that large valve that was completely removed.
> **Q. To your knowledge, had that panel box ever been replaced during your tenure?**
> **A. Oh, no, sir. It was definitely 40 years old.**

(Wendell Polk Dep. 11:25 to 12:15) (emphasis added).

> Q. At that time, can you give me a rough estimate of how many SCE&G employees were at the plant on a daily basis, how many people were employed there?
> A. At the plant would've been around 50.
> **Q. Among those 50, did SCE&G employ, at that time, anyone who would be responsible for doing any sort of demolition work?**
> **A. No, sir.**

(Wendell Polk Dep. 16:3 to 16:11) (emphasis added).

Q. Okay. During that time, did you ever have occasion to work on the particular panel box involved in this case?
A. That particular one, maybe once or twice.
Q. What type of work would you have done on that panel box?
A. It might have been checking the switches in it to tell if the valves open and closes.
Q. But nothing as far as demoing it or taking it apart or replacing it?
A. No.

(Richard Wilson Dep. 13:12 to 13:24) (emphasis added).

Q. Okay. Do you have any knowledge as to whether any other SCE&G employees have ever done any type of work on that panel?
A. I'm sure some of the other electricians have worked on that panel. I know they have as far as the switches.
Q. But as far as any sort of demo or pulling out wires or replacing the panel itself.
A. Not that particular one, no.

(Richard Wilson Dep. 14:10 to 14:18) (emphasis added).

Q. Do you know if SCE&G has ever demolished, removed and upgraded that unit or units at Canadys at any time previous?
A. This particular unit?
Q. Yes, sir.
A. I would say no.

(Lawrence Purvis Dep. 12:24 to 13:4).

While the above-referenced testimony of the SCE&G employees establishes that they may have performed routine maintenance on the subject panel box in the past, none of the employees had ever, or knew of any other employees who had ever, performed the specific work that the Plaintiff was doing at the time of his injuries. Moreover, as previously noted, the work being performed by the Plaintiff at the time of his injury was not routine maintenance. (*See*

Richard Wilson Dep. 32:23 to 33:4; Lawrence Purvis Dep. 20:3 to 20:6; Joe Foster Dep. 28:15 to 28:24).

The Court finds that Defendant SCE&G has failed to provide any evidence that the identical activity being performed by the Plaintiff when he was injured had been previously performed by SCE&G employees. Therefore, SCE&G has failed to carry its burden with regard to the third test utilized by South Carolina courts in the statutory employment context.

ORDER

It is therefore ORDERED that Defendant SCE&G's Motion for Summary Judgment is DENIED.

The Honorable J. Ernest Kinard, Jr.

This 28 day of Oct, 2014

Winnsboro, South Carolina