THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No. 2013-001896
WCC File No. 1023143

Opinion No. 5307 (S.C. Ct. App. filed April 1, 2015)

George Ferguson, Claimant, ... Appellant,

v.

New Hampshire Insurance Company, Carrier for AMERCO/U-HAUL International, and Sean P. Unterkoefler d/b/a United Stand Moving, Employer, and S.C. Workers' Compensation Uninsured Employers Fund, Defendants, ... Respondents.

PETITION FOR REHEARING

The Appellant, by and through his undersigned attorney, hereby files this Petition for Rehearing. On April 1, 2015, this Court issued an opinion affirming the Decision and Order of the South Carolina Workers' Compensation Commission. Ferguson v. New Hampshire Ins. Co., Op. No. 5307 (S.C.Ct.App. filed April 1, 2015)(Shearouse Adv.Sh. No. 13 at 31).

As grounds for granting his Petition, Appellant would respectfully show the Court may have overlooked or misapprehended the evidence and arguments raised on the issues of (1) the relationship between Unterkoefler and U-Haul – specifically that U-Haul's subsidiary, eMove, provides labor for moving services which it delivers through subcontractors such as Unterkoefler; (2) that Ferguson is Unterkoeffler's direct employee, thus he is the statutory employee of U-haul; ;

(3) Unterkoefler employed 4 or more employees, such that he is required to carry workers' compensation insurance; and (4) should the Court grant rehearing, a remand is required as Ferguson is entitled to temporary compensation and medical treatment for the injuries to his right hand, right arm, right knee, and right shoulder. Additionally, Appellant would note the Court inadvertently omitted AMERCO/U-HAUL International from the caption of its Opinion.[1]

ARGUMENT

I. George Ferguson is the statutory employee of eMove.

The Court held:

> the Appellate Panel correctly found eMove was not Ferguson's statutory employer. While eMove does rely on movers to receive fifteen percent of the total amount paid by the customer for the local mover's services, *eMove is not a moving company.* eMove's business or trade is to create a marketplace where U-haul renters can meet movers.

Ferguson v. New Hampshire Ins. Co., Op. No. 5307 (S.C.Ct.App. filed April 1, 2015)(Shearouse Adv.Sh. No. 13 at 31, 36)(emphasis added).

The Court asked the right question – what is eMove's business? More specifically, is eMove (and U-Haul) providing moving services or is eMove operating an online marketplace?

Respectfully, the Court's holding misapprehends the key point. The *single* service eMove provides (through its subcontractors) is "services, such as *moving services* and others, to the consuming public." [R. P. 231; paragraph 1]. It is this one service that generates revenue for eMove – specifically "a 15% cut from the total amount paid by the Customer for the Services." [R. P. 232; paragraph 9]. This arrangement is explicitly spelled out in the contract with the subcontractor. eMove makes its money from providing moving services; not advertising. See Glass v. Dow

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[1]The caption has included AMERCO/U-HAUL throughout the case. [R.P. 1, 39].

Chemical Co., 325 S.C. 198, 482 S.E.2d 49 (1997)(owners are statutory employers for injuries related to activities that: (1) are an important part of the trade or business of the employer [or] (2) are a necessary, essential, and integral part of the business of the employer).

If "eMove's business or trade is to create a marketplace where U-Haul renters can meet movers," then eMove would have used a different revenue model. It could have charged movers to advertise. It could have charged renters a membership fee. Instead, the contract between Unterkoefler and eMove provided "We allow You to sign up on the MarketPlace free of charge and allow you to advertise Yourself and Your Services free of charge." [R. P. 231]. If that was all eMove did – without taking a 15% cut of the *moving services* sold by U-Haul on the website – then, and only then, it would be fair to say eMove is was in the advertising business.

eMove is a subsidiary of U-Haul. U-Haul created eMove to compete with conventional moving companies – such as Mayflower or Two Men and a Truck. U-Haul built its core business on renting trucks and moving equipment to do-it-yourself movers. However, U-Haul recognized that requiring their customers to do the lifting and drive a large truck substantially limited their customer base. U-Haul was unwilling to invest in the infrastructure necessary to operate a conventional moving service, nor did they want to move too far away from their core business.

The answer for U-Haul was to create eMove. eMove could have been just as the Court described it – a free online marketplace where U-Haul renters can meet movers. There was just one problem. U-Haul wanted more than just an expanded pool of U-Haul renters; they wanted eMove to make money from the actual *moving services.* So, instead of creating a free marketplace, they created a network of subcontractors – for which they took a 15% cut of the moving services sold.

U-Haul is now able to offer virtually the same services as the conventional moving companies. All the customer has to do is pack. The customer pays U-Haul for complete moving services – for which U-Haul provides the truck, the tools (dollies and pads), and the labor.

The method U-Haul uses to sell moving services may seem a little different than conventional moving companies because the contract is entered into online. That is merely a function of the technology. Even though the customer purchases the moving services from U-Haul on the eMove website, the actual delivery of the moving services is done in the real world by subcontractors at U-Haul's direction. Once the customer places the order on the website, U-Haul tells the subcontractor where to go, when to be there, and how to contact the customer. When the job is complete, U-Haul charges the customer's credit card and pays the mover (less U-Haul's "15% cut from the total amount paid by the Customer for the Services." [R. P. 232; paragraph 9].

All of this is confirmed in the contract and by Unterkoefler's testimony, ". . . I didn't have control financially of anything. I didn't deal directly with a customer. [eMove] dealt with the customer and passed the information on to me. [eMove] had control of releasing the funds based on the work I did . . ." [R. p. 159: Tr. P. 95, lines 1-18]. Unterkoefler confirmed "regarding the payment arrangements . . . the customer paid eMove and then eMove paid [him]. [R. p. 159: Tr. P. 94, lines 8-11]. "[T]he customer made all those arrangements with eMove on their website." [R. p. 159: Tr. P. 94, lines 17-21].

These undisputed facts are conclusive evidence that eMove entered into contracts with customers for moving services. The Appellate Panels findings that "Ferguson presented no evidence eMove contracted with anyone to move" is simply wrong.

The point here is there are limited ways to provide labor services. A company providing labor to move household goods and drive trucks – which eMove plainly does – must deliver those services with people. People working in a trade, business or occupation are either employees or independent contractors. There is no other category. If we assume Unterkoefler is not U-Haul's employee,[2] then he must necessarily be U-Haul's subcontractor. See Voss v. Ramco, Inc., 325 S.C. 560, 566, 482 S.E.2d 582, 585 (Ct.App.1997)(finding a manufacturer of small equipment was the statutory employer of field salespeople because selling the equipment was an essential part of the manufacturer's business without which it could not remain in business). And *ipso facto*, Ferguson must necessarily be U-Haul's employee.

U-Haul deserves credit for innovation in adapting moving services to a website based point of sale system. Yet, the mere fact the moving services are *sold* on-line does not change the ineluctable fact that the moving services are *delivered* by subcontractors and employees. As the sole

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[2]Although not necessary under the facts of this case, it can be argued that Unterkoeffler himself was actually an employee of eMove rather than a subcontractor. See Crim v. Decorator's Supply, 291 S.C. 193, 352 S.E.2d 520 (Ct. App. 1986)(holding worker who worked only for employer was an employee because he "never owned a company himself, never received a federal employer's identification number, and never filed a partnership or proprietor's tax return. He neither maintained a business listing in the telephone book nor advertised his services as a carpet installer in any other way. He did not carry Workers' Compensation Insurance.").

Crim is factually quite similar to the instant case. Crim's employer exercised control over his activities in much the same way eMove exercised control over Unterkoeffler. *"The homeowner or contractor always contacted Lexington Floor Covering and selected the desired interiors.* After measuring a home, *Lexington Floor Covering gave Crim the client's address and sent him to install whatever materials the client ordered.* It also gave Crim specific instructions regarding how the material was to be installed." Id. (Emphasis added). The italicized portions of the quote from Crim are virtually identical to the manner in which eMove contracted with its customers for moving services and then dispatched Unterkoeffler to complete the job as ordered. Moreover, Unterkoeffler was not in the moving business himself until he signed the contract with U-Haul, nor did he stay in the business after he left Myrtle Beach. This confirms that Unterkoeffler's at minimum was as a subcontractor, if not an outright employee.

source of revenue for U-Haul's eMove division, the "15% cut from the total amount paid by the Customer for the Services" could not be a more "necessary, essential, and integral part" of eMove's business. [R. P. 232; paragraph 9]. Creating a "business" for people like Unterkoefler - who lack the capital and ability to start a genuine business – is the very reason the Legislature enacted the statutory employee doctrine. Large companies should not be able to gain an unfair competitive advantage by misclassifying employees and avoiding the costs of providing labor.

Appellant respectfully requests the Court reconsider its decision and find Ferguson is the statutory employee of U-Haul/Amerco.

II. George Ferguson is the Direct Employee of Sean Unterkoefler d/b/a United Stand Moving.

The Court held the Appellate Panel correctly found Unterkoefler was not Ferguson's employer. It appears the Court focused on the jobs Unterkoefler did with a helper without considering the jobs Ferguson did with Unterkoefler. Respectfully, this approach skewed the analysis away from a fair appraisal of the entire employment arrangement. See Lewis v. L.B. Dynasty, LLC, Op. No. 27509 (S.C.Sup.Ct. filed March 18, 2015)(Shearouse Adv.Sh. No. 11 at 27).(Attempting to broadly characterize the nature of [employee's] profession prior to engagement in the analysis foretells a single result.").

All parties agree that whether Ferguson's relationship with Unterkoefler is as an employee or an independent contractor is controlled by the four factors which determine the right of control: 1) direct evidence of the right or exercise of control; 2) furnishing of equipment; 3) right to fire; and 4) method of payment. Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 676 S.E.2d 700 (2009). The Supreme Court recently pointed out that "The question before the Court is

a simple, fact-based consideration—did the [employer] exercise sufficient control over [the worker] to create an employee relationship . . ." Lewis v. L.B. Dynasty, LLC, Op. No. 27509 (S.C.Sup.Ct. filed March 18, 2015)(Shearouse Adv.Sh. No. 11 at 27).

Right or Exercise of Control

The Court began its analysis of the right to control factor with this statement: "Ferguson worked for Unterkoefler part time and helped him load and unload trucks rented by customers of Unterkoefler." Respectfully, the Court overlooked that the customers were customers of U-Haul; not Unterkoefler. The customers contracted with U-Haul and paid U-Haul upon completion of the job; U-Haul paid Unterkoefler. There was neither money nor information exchanged between the customer and Unterkoefler – it was all controlled by U-Haul.

The Court's opening statement – "Ferguson worked for Unterkoefler" -- makes it indelibly clear that Ferguson was subordinate to Unterkoefler. It is simply inaccurate to state that Unterkoefler's sending Ferguson to "the date, time and location of the job" is not evidence of control. If that were the case, then anytime someone ordered a pizza delivered to their home, the pizza delivery driver would become an independent contractor; not an employee of the pizza company. The same is true for any other service job from plumbers to food servers – the mere fact the customer places an order does not make the customer the employer nor turn the person who fulfills the order an independent contractor. See Chavis v. Watkins, 256 S.C. 30, 180 S.E.2d 648 (1971)("Each job was subject to change during its execution according to the customer's wishes which, inferentially, were communicated to Watkins, who thereupon gave appropriate instructions to Chavis, with which the latter was obligated to comply.")

The Court analyzed the *exercise or right* of control prong as follow:

> In the few jobs Ferguson completed for Unterkoefler on his own, like the one when he was injured, Unterkoefler did not exercise control over the work he performed. Unterkoefler merely gave Ferguson the customer's information. The customer dictated the date, time, and location of the job. When the job was completed, Unterkoefler gave Ferguson cash for the entire cost of the job. Unterkoefler testified he did not financially benefit from a job completed by Ferguson unless he performed the job with Ferguson.

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This description overlooks much of the evidence. First, Ferguson did some jobs working directly with Unterkoefler as Unterkoefler's helper. This is undisputed. It would be an absurd result for Ferguson to be considered an employee when working on a job with Unterkoefler, yet be considered an independent contractor when Unterkoefler sends Ferguson and another helper to do the identical work. Holloway v. G. O. Cooley & Sons, 208 S.C. 234, 243, 37 S.E.2d 666, 670 (1946)("Employment, like any other contract, presupposes understanding. The new relation cannot be thrust upon the servant without knowledge or consent."). Only Unterkoefler knew when and where the jobs were – and he only knew that because eMove told him. Unterkoefler told Ferguson where to go and what to do. [R. p. 46, line 23-page 47, line 1]. See Spivey v. D.G. Constr. Co., 321 S.C. 19, 467 S.E.2d 117 (Ct.App.1996)(employment relationship shown when employer instructed worker where to report and "explained to worker exactly what needed to be done").

Ferguson had no knowledge of the cost of each job. Even if we take Unterkoefler's testimony that he gave Ferguson cash for the entire cost of the jobs Ferguson worked with other helpers, this does not destroy the employment relationship. At most, it would make Ferguson "an employee-foreman, authorized to hire and pay the members of his crew, rather than an independent contractor." Chavis v. Watkins, 256 S.C. 30, 180 S.E.2d 648 (1971). See, also Harrell v. Pineland

Plantation, Ltd., 337 S.C. 313, 523 S.E.2d 766(1999) "If [the employer] supplies a product or service, it is immaterial what he does with his profits, or whether he expects or gets any profits at all. " (quoting 4 Arthur Larson, Workers' Compensation Law § 50.44(a) (1998)).

The level of control here favors employment. It is exemplified by the facts that only Unterkoefler communicated with eMove. Only Unterkoefler knew the price of the job; the name of the customer; the number of people and hours required to perform the job; and the date, time and location of the job – information Unterkoefler alone received from eMove. It was entirely in Unterkoefler's control as to whether to send Ferguson on a job either with himself or a helper. It was entirely in Ferguson's control as to how much and when he paid Ferguson.

Furnishing of Equipment

All equipment on the job (truck, dollies, moving pads) was supplied by the upstream employer, eMove. The equipment was owned by U-Haul and rented from U-Haul by the customer - the same customer who contracted with U-Haul's subsidiary, eMove, for the moving services. Ferguson supplied no equipment (nor did Unterkoefler).

The Court treats this factor as supporting an independent contractor arrangement because "Unterkoefler provided a labor service to his customers.[3] He did not have his own moving truck or equipment and he used the truck his customers rented and any equipment that came with their rental

[3]As noted earlier, the customers contracted with eMove/U-Haul; not Unterkoefler. As such, it is a mischaracterization to state that Unterkoefler "provided a labor service to *his* customers." The customers were manifestly U-Haul customers. [R. P. 231; paragraph 1 (contract defines a "Customer" as an "individual who desires to obtain [moving services]."]. "eMove located the customer . . . eMove would handle the order, they would send an e-mail to the customer with [the mover's] contact information, as well as, you know ,eMove would send [Unterkoefler] the details of the job." Unterkoefler himself confirmed he "didn't have a contract with the customer [and his] only contract was with eMove." [R.P. 148, page 52, line 23-page 53, line 14].

truck." Ferguson v. New Hampshire Ins. Co., Op. No. 5307 (S.C.Ct.App. filed April 1, 2015)(Shearouse Adv.Sh. No. 13 at 31, 38).

Respectfully, this analysis overlooks the fact that the upstream employer, eMove/U-Haul, owned and provided the truck and equipment used on the job. The fact the equipment was rented by the customer does not change the analysis. U-Haul provided complete moving services by bundling the rental of the truck and equipment along with supplied the labor via eMove's subcontractors and their employees. Providing a moving truck is a specific example of furnishing equipment, as stated by Professor Larson: "When it is the employer who furnishes the equipment, the inference of the right to control is a matter of common sense and business. The owner of a $100,00 truck who entrusts it to a driver is naturally going to dictate details such as speed, maintenance, and the like in order to protect his investment." Lewis v. L.B. Dynasty, LLC, Op. No. 27509 (S.C.Sup.Ct. filed March 18, 2015)(Shearouse Adv.Sh. No. 11 at 27), *quoting* 3 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 61.01 (2013).

In Lewis the Supreme Court noted that one's body is not equipment. Id. In the instant case, Ferguson provided labor – nothing more. He is "far more closely akin to wage earners toiling for a living than to independent entrepreneurs seeking a return on their risky capital investments." Lewis, *quoting* Terry v. Sapphire Gentlemen's Club, , 336 P.3d 951, 959 (Nev. 2014). Unterkoefler testified he signed on with eMove because he did not have the money to start a business. [R.P. 138, page 10, line 22-page 11, line 6].

In holding the claimant was an employee in Lewis, the Supreme Court stated: "Because the [employer] and not [the employee], bore the risk of the capital investment in the equipment used by [the employee to perform her work, we find this factor weighs in favor of an employee relationship."

Id. Respectfully, this Court should follow Lewis. As the upstream employer provided the equipment used by Ferguson,[4] this factor should weigh in favor of an employee relationship.

Method of Payment

As to the method of payment, the Court overlooked Ferguson's testimony that he was paid $17.50 per hour. [R. p. 47, lines 16-24]. Hourly wages are a strong indicator that the worker is an employee. See South Carolina Industrial Commission v. Progressive Life Ins. Co., 242 S. C. 547, 550, 131 S.E.2d 694, 695 (1963)(insurance agents who were paid guaranteed minimum wage were employees); Spivey v. D.G. Constr. Co., 321 S.C. 19, 467 S.E.2d 117 (Ct.App.1996)(fact worker was paid $8.00 per hour was evidence that he was an employee).

Appellant acknowledges that there is a dispute in the testimony. Ferguson testified he believed he was paid by the hour; Unterkoefler testified he paid his helpers by the job. As the Court is permitted to resolve conflicts in the evidence on jurisdictional facts, Appellant recognizes that the Court found as a fact that "Unterkoefler was paid by the job and split his earnings with the number of helpers he had during the job, paying them in cash." Ferguson v. New Hampshire Ins. Co., Op. No. 5307 (S.C.Ct.App. filed April 1, 2015)(Shearouse Adv.Sh. No. 13 at 31, 38).

The question then is whether payment by the job favors employment or an independent contractor relationship. To make sense of it, one must look beyond the simple fact of splitting earnings to who determined the amount of the payment to the helper. Only Unterkoefler (and U-Haul) knew how much eMove paid Unterkoefler for any particular job. Unterkoefler had complete control of how much and when he paid his helpers.

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[4]Ferguson was injured in the act of using U-Haul's appliance dolly. [R.P. 18, lines15-25].

Ferguson had no negotiating power with U-Haul or the customer – his only relationship was with Unterkoefler. Ferguson was always paid directly by Unterkoefler. Sometimes he got paid the day after a job; sometimes he got paid weekly. He testified: "It just depended on when I saw him. If we were at different sites moving, you know, on different days, I might not see him that day, so it varied." [R. p. 47, lines 7-24].

Ferguson was paid cash, so there are no written records recording how much he was paid. eMove paid Unterkoefler by PayPal after each job was completed. He would not pay Ferguson until he got the cash and saw Ferguson in person– which could be the end of the week or the next job. Ferguson testified when he worked with David Coates, "there were days that we got paid together, I mean, as far as the job that we would do and we'd seen Sean at the same time and *he would pay us together for the job* we did." [R. P. 62, lines 19-24 (emphasis added)].

Professor Larson's analysis was once again quoted in Lewis:

> A moment's reflection will show the realistic connection between payment and control. If an employer in a regular business or industry purchases personal labor by the hour, day, or week, it is almost certain to insist on the right to see that the time is well and efficiently spent. It if pays by the hour, the employer wants to see that it gets a full hours work, and that the hour is applied where it is most needed. . . .
>
> By contrast, if the employer makes an agreement to pay a man one hundred dollars to clean out a well, it has no reason to care whether the worker is slow or fast, clumsy or efficient.

Lewis v. L.B. Dynasty, LLC, Op. No. 27509 (S.C.Sup.Ct. filed March 18, 2015)(Shearouse Adv.Sh. No. 11 at 27), *quoting* 3 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 61.06 (2013).

Accepting that Ferguson was paid by the job, on the surface the method of payment prong seems to favor an independent contractor relationship. However, the jobs were priced assuming a

certain number of man-hours. [R. P. 198-208]. Unterkoefler himself worked on most of these jobs – only sending out a two-man crew when he had more than one job at the same time. As he was doing much of the labor himself, he had an interest in seeing that the time was well and efficiently spent. Moreover, since his ability to obtain more jobs from eMove depended in part on his customer reviews, he had an interest in seeing that the job was done well. As such, while method of payment is not the strongest factor here, given the totality of the circumstances, it only slightly weighs toward independent contractor – not enough to outweigh the other factors showing employment.

Right to Fire

As to the right to fire, the Court reasoned: "Unterkoefler could choose to use someone other than Ferguson for a job. Ferguson could also decline or refuse to perform a job. There was no set schedule, and Ferguson did not work on a consistent basis." Ferguson v. New Hampshire Ins. Co., Op. No. 5307 (S.C.Ct.App. filed April 1, 2015)(Shearouse Adv.Sh. No. 13 at 31, 38).

The Court here seems to have focused more on the informality of the work schedule rather than on the right to fire. Working for Unterkoefler was Ferguson's second part-time job. He could almost be considered "casual" labor – which is where the Court seems to be going with its analysis. However, the mere fact an individual may be employed on a casual basis means nothing so long as the work is done "in the course of the trade, business, profession or occupation of his employer." S.C. Code Ann. § 42-1-130 (2007).

The Supreme Court reversed this Court on a similar analysis in Lewis. There, the Supreme Court stated "We recognize that Lewis had no set schedule, and came when she chose with no other repercussion than the loss of income. Nevertheless, once the Club engaged her for the evening, it exercised significant control over her work. Accordingly, we find this factor weighs in favor of a

finding of an employment relationship. Lewis v. L.B. Dynasty, LLC, Op. No. 27509 (S.C.Sup.Ct. filed March 18, 2015)(Shearouse Adv.Sh. No. 11 at 27).

The right to fire was essentially overlooked by both the Appellate Panel and the Court in the instant case. The right to fire discussed in detail in both Shatto and Lewis. "The absolute right to terminate the relationship without liability is not consistent with the concept of independent contract, under which the contractor should have the legal right to complete the project . . ." Shatto v. McLeod Regional Medical Center, Op. No. 27341 (S.C.Sup.Ct. filed December 18, 2013)(Shearouse Adv.Sh. No. 53 at 16, 25) *quoting* 3 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 61.08[1] (2013).

On the specific evidence on right to fire, both Unterkoefler and Ferguson agreed Unterkoefler had the right to fire Ferguson. Ferguson testified he could have been fired had he committed any misconduct. [R. p. 46, lines 20-22].

Unterkoefler was asked if Ferguson "screwed up and, you know, messed up your rating system . . . breaking something or being late or being drunk or being rude to a customer, you basically had the right to fire him . . ." He responded, "I suppose I wouldn't have him – I wouldn't pass the job . . . I guess I wouldn't pass on jobs to him anymore, no." To clarify, he was then asked, "You could basically say I'm not going to use you again, you're not working for United Stand ever again, correct?" He answered, "Yeah." [R. p. 153: Tr. Page 70, line 17-page 71, line 7].

"The fact remains that [Unterkoefler] had the right to determine whether [Ferguson's] work was satisfactory and the right to terminate that relationship if [he] was not satisfied." Shatto. at 26. Even though because of the nature of the part-time job, Ferguson arguably "had the right not to show up at all because [he] had no set schedule, but once [he] was hired for the [job, Unterkoefler] could

end that relationship prior to [his] shift ending and leave [Ferguson] with no recourse for that firing." Lewis v. L.B. Dynasty, LLC, Op. No. 27509 (S.C.Sup.Ct. filed March 18, 2015)(Shearouse Adv.Sh. No. 11 at 27). This central fact confirms the right to fire existed in the relationship, thus confirming that Ferguson was Unterkoefler's employee.

Public Policy and the Employment Relationship

The Workers' Compensation Act is to be construed liberally in favor of coverage. Id. Respectfully, the Court erred in following the strict construction of the employment relationship used by the Appellate Panel. "Common sense indicates that a compensation law passed to increase workers' rights (because their common law rights were too narrow) should not thereafter be narrowly construed." Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010).

Appellant respectfully asks the Court to reconsider the employment relationship in this case. A close look at the facts and circumstance in total, shows that Ferguson was an employee of Unterkoefler; not an independent contractor. Of the four factors showing an employee-employer relationship, the evidence of control, the furnishing of equipment, and the right to fire all point to employment. Only the method of payment factor arguably leans towards an independent contractor relationship – yet it could also be construed as neutral or even slightly favoring employment. As such, the Court should reverse and find Ferguson is an employee.

III. Sean Unterkoefler d/b/a United Stand Moving is subject to the Workers' Compensation Act because he employed 4 or more employees during the relevant time period.

The Court concluded "Unterkoefler regularly employed less than four workers during the relevant time period." Ferguson v. New Hampshire Ins. Co., Op. No. 5307 (S.C.Ct.App. filed April 1, 2015)(Shearouse Adv.Sh. No. 13 at 31, 38). Appellant asks the Court to reconsider this holding.

The evidence shows Unterkoefler employed 4 or more employees once his business picked up to where he could no longer handle it with himself and one helper. The Court never determined the critical period – which generally covers the time frame when the employee is injured. The relevant time period here was the period during July and August 2010 when Ferguson worked with regularity. See Harding v. Plumley, 329 S.C. 580, 584, 496 S.E.2d 29, 31 (Ct.App.1998)(where worker was injured on first day of employment, relevant time period for determining the number of regularly employed workers corresponded to the period of construction). During July and August, Ferguson worked as many as five jobs a week. [R. p. 49, lines 15-22]. When business picked up for United Stand, so did the number of employees.

Ferguson himself worked with 3 other employees at various times (plus Unterkoefler): David Coates, Arly Barr and Kenneth Hill. [R. p. 48, lines 19-25; R. p. 152: Tr. page 69, lines 19-25]. Unterkoefler testified to one other employee named Josh. [R. p. 152 Tr. page 69, lines 19-25]. The records from customer surveys show Josh working at least two jobs. They also mention various other employees by name including "David", "Mark", "Mike", "CJ", "Tyrone," and "Josh." [R. p. 241-252]. The surveys are particularly telling as they are from customers. Notably CJ and Tyrone did a job on August 19, 2010 – two days before Ferguson was injured. Ferguson, Barr, Coates, Hill, Josh, CJ and Tyrone all worked during that period. In fact, during the week Ferguson was injured, there are four specifically identifiable employees who worked: Ferguson and Hill on one crew; CJ and Tyrone on another.

In August, Unterkoefler was doing more one job every day. United Stand was scheduled to work 38 jobs – yet could only complete 32. A trickle of business was now a flood. Everyone who

worked for United Stand had other full time jobs. There was no way for Unterkoefler to do this much work without multiple crews – each crew included at least two men.

The rule is not that four employees must be working at one particular instant in time. For example, assume the employer is a convenience store open 24-hours per day, seven days a week. Each employee works 40 hours and only one employee works at a time. There are 168 hours in a week. It would require a minimum of 4 full-time employees and one part-time employee (working the extra 8 hours) to cover the store. The payroll for that given week would show all five employees – even though at any given time there would only be one employee actually on the job.

Surely the convenience store would be held subject to the Act. The same logic should apply to Unterkoefler. During the week Ferguson was injured, Unterkoefler's payroll included George Ferguson, Kenneth Hill, CJ and Tyrone. During the entire critical period from July to August 2010, nine different employees were identified in the record.

The Court stated "Ferguson agreed he would defer to Unterkoefler's testimony on whether Unterkoefler had any employees. Unterkoefler testified he did not have any employees." Ferguson v. New Hampshire Ins. Co., Op. No. 5307 (S.C.Ct.App. filed April 1, 2015)(Shearouse Adv.Sh. No. 13 at 31, 39). Respectfully, neither Ferguson nor Unterkoefler can state whether Ferguson and the other workers are employees. Ferguson candidly testified to his relationship with Unterkoefler; how he himself was paid; and the times he saw Unterkoefler pay other workers. [R.P. 60-67].

Any deferral to Unterkoefler's testimony about employment relationships was based on the predicate question asked of Ferguson by U-Haul's attorney: "You weren't an owner or a partner in United Stand Moving. Is that correct?" [R. P. 67, lines 9-10]. Once Ferguson answered "No," he was then asked "So, you would *have to defer* to Mr. Unterkoefler's definition" of what his

relationship was with eMove. Is that correct?" [R. P. 67, lines 11-15]. This line of questioning continued on to include "You would also have to defer to Mr. Unterkoefler in whether or not he had any employees." [R. P. 67, lines 24-25].

The Court overlooked the foundation on which these questions were asked and answered. The fact Ferguson deferred to Unterkoefler is because he *was an employee*. He had to defer to the superior knowledge of his employer. The fact he was neither partner nor owner in United Stand Moving supports an employment relationship. This entire line of questioning demonstrates that Unterkoefler demonstrated the control and superior knowledge that the employees lacked.

Furthermore, while Unterkoefler appeared to be coached by U-Haul's attorney to avoid claiming either that he was a subcontractor himself or that he had any employees, at many unguarded points in his testimony, he specifically referred to his workers as employees or described a working relationship akin to an employment relationship. For example, he was asked by U-Haul's counsel "do you have employees?" He answered: "No, I did not. I mostly just had people that would - were willing to help me do this. I didn't have any full-time employees." However, in the very next question, he was asked "What would *they have to do on the job*?" He responded "It was, you know, generally loading and unloading of a rental truck which the customer rented, you know, and packing and unpacking of boxes." [R. P. 139, page 15, lines 8-23 (emphasis added)]. This testimony describes doing a moving job with part-time employees.

Unterkoefler researched workers' compensation insurance on-line. He testified "it was mostly me running this company and, like I said, no particular employee for a large amount of time. I had less than three employees, and I was under – the interpretation of the law is if I had three or less employees, I didn't have to carry Workman's Compensation." [R.P. 146, page 42, lines 5-15].

Unterkoefler may have testified he had less than three employees – but he certainly testifies here he had some employees.

Ultimately the number of employees comes down to a finding of fact – a point acknowledged by Appellant. However, whether the people working for Unterkoefler are employees or independent contractors is a mixed question of law and fact. Ferguson and Unterkoefler can testify on the many details behind Unterkoefler's business and his relationship with his workers – but that ultimate question must be answered by the Court. Simply naming a worker as an employee, a subcontractor or an independent contractor is not controlling.

Appellant asks the Court to reconsider its Opinion and find Unterkoefler was an uninsured employer subject to the Act.

IV. The Commission has jurisdiction over U-Haul International [in Reply to Respondents' argument at pages 15-17].

Although not ruled on by the Court, eMove argued "Without evidence to establish United Stand Moving regularly employed four or more employees, Appellant cannot reach the question of whether eMove is Appellant's statutory employer." [Brief of Respondents, page 17]. This issue is raised in the Petition for Rehearing to ensure the issue is preserved.

eMove's argument is an incorrect statement of the law. It has never been disputed that U-Haul International itself is subject to South Carolina's Workers' Compensation Act.[5] eMove, through its parent U-Haul International, is insured for South Carolina workers' compensation. See S.C.Code Ann. § 42-5-20 (2007)("every employer who accepts the provisions of this title relative

[5]The screenshots from eMove's computer system all bear the notation "Copyright 20012 [sic] U-Haul International, Inc." [R. p. 187-197].

to the payment of compensation shall insure and keep insured his liability . . ."). Indeed, the Caption lists AMERCO/U-HAUL International as the employer; not eMove.

The legal question being raised by eMove is whether the employees of subcontractors other than Unterkoefler count towards the jurisdictional limit. This suggestion should be rejected. The purpose of statutory employment is to protect employees of small employers who themselves are subcontractors of larger employers. An upstream employer cannot insulate itself from liability by spreading the work around to multiple tiny subcontractors – each of whom employs less than four employees. Nor should statutory employment for any particular employee depend on whether the direct employee was subject to the Act.

V. A remand is required as Ferguson is entitled to temporary compensation and medical treatment for the injuries to his right hand, right arm, right knee, and right shoulder.

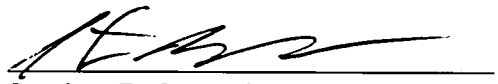
The Appellate Panel did not rule on all the injured body parts nor on the benefits to which Ferguson should be entitled. The evidence showed he injured his right hand, right arm, right knee, and right shoulder. [R. p. 53, line 14-page 55, line 19]. He is not at MMI and requires additional medical treatment, as well as a period of temporary compensation. [R. p.76-114].

No rulings were made on these issues, presumably because the claim was denied on the employment relationship issues. The Court should reverse on the employment issues and remand for a hearing to award benefits. See Pack v. State Dept. of Transp., 673 S.E.2d 461, 381 S.C. 526 (Ct. App. 2009)(remanding for additional findings on issues not addressed or incompletely addressed by Commission). It should be noted that a determination of the average weekly wage and compensation rate was held in abeyance, so the remand should also include that issue as a matter of judicial economy.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests the Court grant the Petition for Rehearing and reverse the Decision and Order of the Appellate Panel. The Court should remand the case to the Commission for a hearing on the extent of injuries, medical treatment required, temporary total disability due, and average weekly wage.

Respectfully Submitted



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Columbia, South Carolina
April 13, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No. 2013-001896
WCC File No. 1023143

George Ferguson, Claimant, ... Appellant,

v.

New Hampshire Insurance Company, Carrier for AMERCO/U-HAUL International, and Sean P. Unterkoefler d/b/a United Stand Moving, Employer, and S.C. Workers' Compensation Uninsured Employers Fund, Defendants, ... Respondents.

PROOF OF SERVICE

I certify that I am paralegal to Stephen B. Samuels and I have caused a copy of the **Petition for Rehearing** to be served upon counsel for the Respondents by mailing a copy of the same in the United States mail, with sufficient postage affixed thereto and return address clearly marked on **April 13, 2015**, addressed as follows:

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April 13, 2015
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SAMUELS LAW FIRM

STEPHEN B. SAMUELS
ATTORNEY AT LAW

RECEIVED
APR 13 2015
SC Court of Appeals

April 13, 2015

Via Hand Delivery
Jenny Abbott Kitchings, Clerk of Court
The South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: George Ferguson v. Amerco/U-Haul
Case Tracking #: 2013-001896
WCC File #: 1023143

Dear Ms. Kitchings:

Enclosed for filing please find the original and seven (7) copies of **Petition for Rehearing** in the above-referenced matter. Also enclosed is a check in the amount of $25.00 for the filing fee. Please date stamp the extra copy of the Petition for our records.

By copy of this letter and enclosure to Kristian C. Bell and Lisa C. Glover, counsel of record for the Respondents, and Sean Unterkoefler (Pro Se Respondent), we are serving a copy of the **Petition for Rehearing** as indicated by the enclosed Proof of Service.

Thank you for your consideration in this matter. Please contact us with any questions or if further information is needed from our office.

With kindest regards, I am

Yours very truly,

Stephen B. Samuels

SBS/krc
Enclosure(s) as stated

cc: Kristian C. Bell, Esquire
Lisa C. Glover, Esquire
Sean Unterkoefler
Natasha M. Hanna, Esquire