

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

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MAY 04 2015

SC Court of Appeals

George Ferguson..... Claimant/Appellant.

v.

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

**RESPONDENTS' RETURN TO
APPELLANT'S PETITION
FOR REHEARING**

TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA COURT
OF APPEALS:

Respondents eMove, Inc. and New Hampshire Insurance respond to
Appellant's Petition for Rehearing regarding the April 1, 2015, opinion of
this Court 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).

Respondents respectfully request the Court deny Appellant's Petition for Rehearing. Appellant's assertion the Court "overlooked or misapprehended" the evidence presented or arguments raised on appeal is erroneous. In contrariety to Appellants' position, Respondents aver, the Court correctly determined:

- Ferguson is not a statutory employee of eMove;
- Ferguson is not an employee of Sean Unterkoefer;
- Unterkoefer does not have four or more employees to be subject to the Act; and
- Ferguson is not entitled to benefits pursuant to the Act.

LAW/ANAYSIS

I. Ferguson Is Not a Statutory Employee of eMove

Moving individuals' belongings is not part of eMove's trade, business, or occupation. Thus, Ferguson is not a statutory employee of eMove. Intrad, eMove serves as a referral source, a clearing house, a marketplace and convenience for individuals looking for local moving help. The creation of a marketplace and serving as a referral source does not satisfy the

requirement of Ferguson's job constituting part of eMove's trade, business or occupation pursuant to S.C. Code Ann. § 42-1-400. See Murray v. Aaron Mizell Trucking Company, 286 S.C. 351, 334 S.E.2d 128 (Ct. App. 1985). There is no evidence in the record eMove's business has anything to do with direct moving services or that any eMove employee has performed any direct moving service for any customer.

Appellant also argues eMove's sole source of revenue is the 15% fee received when a customer uses a local moving company found on the eMove website, making this fee a necessary, essential, and integral part of eMove's business. Appellant also argues eMove would have used a different business model if it wanted to be viewed as an advertising business, arguing only an advertising business can be found to not meet the statutory employer statute. There is no evidence in the record of eMove's business model or the myriad of ways eMove derives income.

Appellant additionally maintains Unterkoefer is a subcontractor of eMove, making eMove the statutory employer of Ferguson. However, eMove does not subcontract out moving work on behalf of a customer to United Stand Moving or any other local moving company. The record before this Court evinces the same. eMove simply provides a marketplace for

interested customers to browse local moving companies that have met minimum guidelines, read reviews from other customers, and choose a local moving company to help with various tasks offered by the individual company.

II. Ferguson is Not a Direct Employee of Sean Unterkoefer d/b/a United Stand Moving

The Court correctly found Unterkoefer did not have the right to control Ferguson's work in order for Ferguson to be an employee of United Stand Moving. Ferguson only worked a few jobs with Unterkoefer/United Stand Moving. Ferguson had the right to reject the jobs offered, and Unterkoefer did not direct Ferguson's performance on the job—if he was even at the job's location.

Unterkoefer's only right to control was to offer Ferguson the job based on the location and times dictated by the customer, the same control any contractor would have over any independent contractor hired to perform any task. In addition, profit was split equally among Unterkoefer and Ferguson for work performed together, and Ferguson did not profit from Unterkoefer's work when they worked together or when Ferguson worked on his own. Unterkoefer provided no equipment to Ferguson and did not require

Ferguson to confirm his employment with United Stand Moving by wearing a uniform or presenting business cards. Finally, Unterkoefer's only right to fire was the same right any contractor would have—asking Ferguson to leave the job for poor work performance or not inviting Ferguson to subsequent job.

Appellant asserts the Supreme Court's decision in Lewis v. L.B. Dynasty, LLC, Op. No. 27509 (S.C. Sup. Ct. filed March 18, 2015), is applicable in the instant case on rehearing and demonstrates Ferguson is an employee of United Stand Moving because payment per hour rather than per job is evidence in favor of an employer-employee relationship. Appellant is in error. In the case at bar, United Stand Moving was paid by customers per hour based on the total number of hours worked for the job. Payment to Ferguson was made by the job based on Ferguson's portion of the work performed at the job. While payment for each job was determined by the customer based on the total number of hours the job took to complete, Ferguson was always paid his actual share of the total job profit.

Appellant also attempts to employ Lewis as evidence Unterkoefer provided equipment for Ferguson because the customer's rented truck came from the alleged upstream employer, U-Haul. Despite Appellant's assertions,

U-Haul has nothing to do with the analysis. Moreover, Unterkoefler, eMove, and U-Haul had no control over the method of transportation chosen by the customer for the moving of items. Unterkoefler admitted in his testimony he was hired by customers from the eMove website to move the belongings in vehicles not owed by U-Haul. Further, a customer of U-Haul was not required to use the eMove website or any local moving company's help with the rental of a truck, including United Stand Moving. Finally, the dollies, pads and other assistive devices provided by the customer to Ferguson varied by job and what each individual customer provided to Ferguson. Thus, Ferguson was not an employee of United Stand Moving to be entitled to benefits under the Act.

III. Sean Unterkoefler d/b/a United Stand Moving Is Not Subject to the Workers' Compensation Act Because It Does Not Regularly Employ Four or More Employees

This Court correctly found Unterkoefler did not regularly employ four or more employees to be subject to the Act. Unterkoefler testified that at any given time, the most people performing jobs were himself and three others. In July and August 2010, Unterkoefler only needed himself and three others to perform the work accepted by United Stand Moving a total of four out of fifty-four times. Of the thirty-two jobs completed in August 2010, United

Stand Moving's schedule shows only three times where a conflict required two jobs to be performed at the same time: the afternoon of August 5 and the mornings of August 21 and 30. Thus, there were only three occasions in August 2010 where Unterkoefer needed himself and three others to perform the moving jobs accepted by United Stand Moving. There is no evidence Unterkoefer ever needed four or more employees in August 2010.

Similarly, of the twenty-two jobs completed in July 2010, United Stand Moving's schedule showed only one time where two jobs were completed at the same time—the morning of July 22. Thus, in July 2010, Unterkoefer needed himself and three others to perform the moving jobs accepted by United Stand Moving only one time, and there is no evidence Unterkoefer ever needed four or more employees in July 2010. Accordingly, this Court correctly determined Unterkoefer did not regularly employ four or more employees to be subject to the Act.

IV. No Remand is Required to Determine Ferguson's Benefits Since He Is Not Entitled to Benefits Under the Act.

Since this Court correctly determined Ferguson was not an employee of Unterkoefer or a statutory employee of eMove, Ferguson is not entitled to

benefits under the Act. There is no need for a remand to determine Ferguson's entitlement to disability or medical benefits.

CONCLUSION

For the foregoing reasons, Respondents respectfully request the Court deny the Appellant's Petition for Rehearing and affirm the Decision and Order of the Appellate Panel.

Respectfully submitted

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**ATTORNEYS FOR RESPONDENTS,
AMERCO/U-HAUL INTERNATIONAL
AND NEW HAMPSHIRE INSURANCE
COMPANY**

Columbia, South Carolina

May 4, 2015

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International, Sean Unterkoefer d/b/a United Stand Moving,
Employer, and the S.C. Workers' Compensation
Uninsured Employers' Fund Defendants/Respondents.

PROOF OF SERVICE

I hereby certify that I served the foregoing Respondents' Return to Appellant's Petition for Rehearing upon all counsel, by placing a copy in the United States mail, postage prepaid, on May 4, 2015, to the following:

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Respectfully submitted

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Columbia, South Carolina
May 4, 2015



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May 4, 2015

VIA HAND DELIVERY

The Honorable Jenny A. Kitchings
South Carolina Court of Appeals
Post Office Box 11629
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MAY 04 2015

SC Court of Appeals

Re: Ferguson v. United Stand Moving/eMove
WCC File No. 1023143
Claim No. 2013-001896
C&L File No. 000511-81700

Dear Ms. Kitchings:

Please find enclosed for filing the original and seven copies of Respondents' Return to Appellant's Petition for Rehearing in connection with the above referenced matter. Please file the original and return the clocked copy to our courier.

By copy of this letter and enclosure, we are serving same on them.

With warmest regards, I remain

Sincerely,

Monica M. McGee
Senior Paralegal

/mmm

Enclosures

cc: Stephen B. Samuels, Esquire
Natasha M. Hanna, Esquire
Sean Unterkoefer
Lisa C. Glover, Esquire