THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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SC SUPREME COURT

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

SCWCC FILE NO. 0719222

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.

PETITION FOR REHEARING

Pursuant to Rules 221(a) and 240, SCACR, Petitioners Seko Charlotte and Nationwide Mutual Insurance Company petition this Court to rehear its Opinion in the above-captioned case, Opinion No. 2015-UP-27519 (Sup. Ct. filed April 29, 2015) ("Opinion"). Petitioners received this Court's Opinion on April 29, 2015.

This Court misapprehends the nature of the logistics/transportation industry and the commercial reality of "hot shipments" like the one involved here. In addition, this Court's Opinion is based in large part on factual findings that are not supported by the preponderance of the evidence in the record. As noted in the Opinion, jurisdictional facts are decided on the basis of the preponderance of the evidence, Fortner v. Thomas

M. Evans Constr. & Dev., LLC, 402 S.C. 421, 429, 741 S.E.2d 538, 543 (Ct. App. 2013), and not under the more lenient substantial evidence standard.[1] In addition, this Court's Opinion imposes a statutory employment relationship on parties whose contract has ended completely and the former statutory employer has no relationship whatsoever with either the subcontractor or the subcontractor's employee – a result reached in no other case identified by the parties or the Court. For these reasons, as explained more fully below, this Court should grant rehearing, reverse Opinion No. 2015-UP-27519 and find that at the time of Claimant Gregory A. Collins' fatal accident, Seko Charlotte was no longer his statutory employer.

1. Key factual findings reached by this Court are not supported by the Record.

Many of the key facts this Court relies on to reach its conclusion that the work for Seko Charlotte did not end until Mr. Collins returned to South Carolina are not supported by substantial evidence, let alone the preponderance of the evidence and, therefore, the Court's conclusion must be reversed. For example, this Court states that "an 'express hot delivery' is understood in the trade to mean an immediate and direct trip." In contrast, Mr. West specifically denied that the shipment had to get to Wisconsin "extremely fast. It had to be there the next day," (Appx. 201, lines 5-9), which, incidentally, allowed him at least 24-hours to try to find a return paying shipment should he have chosen to do so. Mr. Burks testified that an express hot delivery simply meant "something that needs to get just somewhere faster than an LTL [less than a truckload] would." (Appx. 158, lines

[1] Respondents point out below that a number of this Court's key factual findings are not supported by any record evidence at all and, therefore, would not meet even the more lenient substantial evidence standard.

19-25). There is no testimony or evidence describing an "express hot delivery" as "an immediate and direct trip."

More importantly, the Court's finding that, "in the trade" it was "understood that it is unlikely that the driver will have cargo on the return trip," is not supported by any evidence in the record. The only testimony regarding what was normal in the trucking/logistics trade or industry came from Mr. Burks, who testified that, although Seko Charlotte did not know what West Expedited drivers did after making a delivery, "[s]ometimes, [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." (Appx. 161, lines 17-21) (emphasis added). Mr. Burks testified that "**most of the companies we contract with try to find something else up in that area going from that area to another area**, but I am not sure what Mr. Collins did at that time after he finished the job for us." (Appx. 249, lines 12-16) (emphasis added). Thus, Mr. West's statement that he did not usually engage a return paying trip with a third party does not constitute evidence of what is normal in the trade.

This Court focused on isolated testimony by Mr. West in order to reach its conclusion that "when West Expedited did have a [return] load it was for the same primary contractor." In fact, what Mr. West testified to was that, although it was not his general practice to find a return paying load, he did so, "**[m]aybe once or twice a year.** Most of the time, if they have something coming back it would be the same company sent them up there would want them to bring a return back or something like that. That's about the only return trips we get." (Appx. 204, lines 14-23) (emphasis added). Mr. West then qualified his response as follows:

> Q: You said just now that though it may be rare, maybe once a year, sometimes your driver having made such a delivery out of state, could take a return shipment back to South Carolina, or to anywhere else, is that right?
>
> A: Yes.
>
> Q: So, your business was free to send someone such as Mr. Collins somewhere else in and around Wisconsin to pick up another load, correct?
>
> A: That would be correct.
>
> Q: And you could very well, take – at that point you could direct Mr. Collins or any other employee who is out of state to, having dropped off those goods, go somewhere else and pick up another load and bring it home, correct?
>
> A: Yes.

(Appx. 208, line 16 – 209, line 6). The preponderance of the evidence simply does not support this Court's conclusion that Mr. West only engaged return paying trips for the same entity that engaged the outgoing shipment.

In addition, there is no evidence in the record to support this Court's finding that Seko Charlotte "knew ... more than likely, the return trip would be without cargo for another West Expedited customer." First, as noted above, the industry practice was to attempt to find a paying return shipment. Second, when asked whether West Expedited had, in fact, engaged a return paying trip, Mr. Burks testified, "I don't know if he did or didn't. I don't know .... You know, I really didn't know anything about this until we heard something a few months ago about it. So I actually didn't even know that the accident had happened." (Appx. 168, lines 7-17) (*see also* Appx. 169, lines 4-20). Again, there is no evidence to support this Court's inference that Seko Charlotte knew the return trip would not be under contract with a paying third-party customer.

Nor does the record support this Court's finding that "Seko Charlotte had no more control over Collins on the trip to Wisconsin than it did on the return trip to South

Carolina." Instead, Mr. Burks testified consistently that "we needed something from Point A to B. That's what we contracted with [Mr. West] to do, and that's what we expected," (Appx. 161, lines 21-23), and that Seko Charlotte "asked them to pick up a load in Spartanburg and take the load to Wisconsin." (Appx. 239, lines 6-9). Seko Charlotte "instructed [Mr. West] where to pick up and I believe the instructions were on the paperwork on where to deliver it to." (Appx. 240, line 22 – 241, line 2). Thus, contrary to this Court's conclusion, Seko Charlotte instructed West Expedited (and through them, Mr. Collins) where to pick up the bearings, where to deliver them, and approximately when they needed to be there. (*See* Appx. 201, lines 5-9 (Mr. West testifying, "It had to be there the next day")). In contrast, Seko Charlotte had no contractual relationship with or control over either West Expedited or Mr. Collins on the return trip.

Despite this Court's dismissal of the contracting parties' understanding of their contract, both Mr. Burks and Mr. West testified repeatedly and unequivocally that, once the delivery was made in Wisconsin, any contractual relationship between Seko Charlotte and West Expedited ended:

> Q: Would you say that your agreement with Seko ended when Mr. Collins made that delivery in Wisconsin?
>
> A: As far as I know, yes.

(Appx. 208, lines 12-15) (*see also* Appx. 210, lines 11-14) (Appx. 241, line 6 – 242, line 1) (Supp. Appx. 18, lines 4-14).

This Court's Opinion incorrectly states that "West Expedited included the cost of the return trip in the mileage rate charged Seko Charlotte." While Mr. West testified that he included the cost of fuel and "wear and tear," (Appx. 202, lines 14-23), those are not

all of the costs involved in a return trip. Mr. West specifically testified that he paid Mr. Collins on a one way basis only, (Supp. Appx. 28, line 25 – 29, line 13), so payment to Mr. Collins for the return leg of the trip was not included in the contract amount between Seko Charlotte and West Expedited. Instead, the contract price was set on a one-way, loaded mile basis. Mr. Burks testified that the agreement between Seko Charlotte and West Expedited was "very ... clear by both parties and didn't ever seem to have a conflict with it .... He had his fleet of trucks, or his vans, and he would run those for a dollar and twenty cents per mile one way. When he completed the job, he would bill us for that amount. It was a one-way mileage charge. He would charge us, one way, a dollar twenty per loaded mile." (Appx. 159, line 22 – 160, line 6). Mr. Burks also testified that every company Seko Charlotte contracted with had "a one-way, per-mile charge. Every one we've ever dealt with has only charged per mile one way ..." (Appx. 183, lines 18-20) (*see also* Appx. 246, lines 7-17). Mr. West confirmed that "the trucking companies that offer jobs to your company pay you only based upon mileage one way ... so after the delivery is made, **the trip home ... is not paid for by the trucking company**." This applied to the jobs that he did for Seko Charlotte specifically. (Supp. Appx. 17, line 15 – 18, line 3) (emphasis added).

Critically, this Court's Opinion fails to take into account the fact that, if West Expedited had engaged a return paying shipment, Seko Charlotte's price per mile would not have decreased by a single dollar, as it is undisputed that Seko Charlotte did not pay West Expedited any more or less depending on whether there was a paying return shipment. This Court also cannot reconcile its Opinion with the undisputed fact that, had Seko Charlotte wanted Mr. Collins or West Expedited to do anything whatsoever for it on

the return trip, it would have had to have entered into a separate contract with West Expedited for that service.

Finally, this Court's statement that Seko Charlotte frequently used West Expedited's services," is not supported by the record. Instead, when asked how frequently Seko Charlotte used Mr. West's company, Mr. Burks testified, "Oh, I don't think we used them too often, but I would guess – Back during that time ... I think we used them about two or three times a month." (Appx. 162, lines 19-23).

Because all of these factual findings are necessary to this Court's legal conclusion that a statutory employment relationship existed between Seko Charlotte and Mr. Collins at the time of his fatal accident and, at the same time, are unsupported by substantial evidence, let alone the preponderance of the evidence in the Record, this Court should grant rehearing and reverse.

2. This Court incorrectly imposed a contractual relationship between Seko Charlotte, on one hand, and West Expedited and Mr. Collins, on the other, when their contract had been completed and was over.

This Court overlooked and/or misapprehended the fact that there was not and could not be any statutory relationship between Mr. Collins and Seko Charlotte at the time of Mr. Collins's fatal accident because there was no contractual relationship between Seko Charlotte and West Expedited at that time. Under this Court's Opinion, whether a statutory relationship existed at the time of Mr. Collins' accident depends entirely on whether West Expedited made the decision to engage a paying delivery on the return trip (or send Mr. Collins on some errand of its own). Thus, this Court is imposing statutory employer liability on Seko Charlotte based on decisions made by West Expedited as opposed to decisions made by Seko Charlotte. Such a result runs counter to

the principles underlying the South Carolina Workers' Compensation Act ("Act") generally and the statutory employment provisions, S.C. Code Ann. §42-1-400,[2] in particular.

Under this Court's Opinion, if Seko Charlotte hired a Taxi Company to take a person from Point A to Point B for it and, once the person was dropped off at Point B, Seko Charlotte's status as a statutory employer of the taxi driver would be entirely dependent on whether the Taxi Company engaged a return paying trip, or whether it instructed its driver to go somewhere else, or to come straight back. In fact, to the extent West Expedited instructed Mr. Collins, West Expedited's only employee, to return immediately to South Carolina, instructions over which Seko Charlotte had no control and of which Seko Charlotte had no knowledge, that decision likely contributed to Mr. Collins falling asleep at the wheel which caused his fatal accident. (Appx. 200, line 15 – 201, line 13) (Appx. 202, line 24 – 203, line 6) (*see also* Appx. 168, line 11 – 169, line 20) (Appx. 209, line 20 – 210, line 10).

This Court's Opinion cannot be reconciled with the rule that, "Workers' Compensation awards are authorized **only if an employer-employee relationship exists at the time of the injury**." Edens v. Loris Bellini, S.p.a., 359 S.C. 433, 439, 597 S.E.2d 863, 866 (Ct. App. 2004) (emphasis added). In the end, in order to reach the conclusion set forth in the Opinion, this Court had to disregard what the parties to the contract testified their contract actually was and, instead, hypothesize a contract that the Court felt was more just or proper. However, the role of a court is to interpret the contract between parties, not to re-construct the contract the Court thinks the parties should have made.

[2] Respondents note that this Court decided the statutory employment question under S.C. Code Ann. § 42-1-400, whereas the Single Commissioner, whose decision this Court's Opinion reinstates, decided the case under S.C. Code Ann. § 42-1-410. (Appx. 42).

E.g., Auto-Owners Ins. Co. v. Rhodes, 405 S.C. 584, 598, 748 S.E.2d 781, 789 (2013) (admonishing that "[c]ourts must enforce, not write, contracts ...").

By interpreting the contract between Seko Charlotte and West Expedited in a manner that conflicts with the parties' testimony that their contract ended once the deliveries were made in Wisconsin, this Court implicitly recognizes that, where there is no contractual relationship between the subcontractor and the owner, there cannot be a statutory employment relationship between the subcontractor's employee and the owner. This Court circumvents the problem created by the fact that all of the testimony confirms there was no contractual relationship between West Expedited and Seko Charlotte at the time of Mr. Collins' accident by judicially imposing a contractual relationship on Seko Charlotte that simply does not exist. Regardless of whether the work performed by a subcontractor's employee is part of the owner's "trade, business, or occupation," there can be no statutory employment relationship where there is no contract between the owner and the subcontractor at the time of the accident. *See* Moore v. Virginia Int'l Term., Inc., 720 S.E.2d 117, 119 (Va. 2012) (existence of statutory employment relationship depends on contract between owner and subcontractor); *c.f.*, Evans v. B.F. Perkins Co., 166 F.3d 642, 652 (4th Cir. 1999) (looking to whether the subcontractor's obligations under its contract with the owner had been completed in order to determine whether statutory employment relationship existed at the time the injuries were incurred); Walls v. Food Lion, L.L.C., 66 Va. Cir. 26, 2004 Va. Cir. LEXIS 341 (Va. Cir. Ct. 2004) (same).

The result reached by this Court runs counter to the goals of both the Act in general and the statutory employer provisions in particular. The "manifest purpose" of

the statutory employment doctrine, "is to afford the benefits of compensation to men who are exposed to the risks of its business, and to place the burden of paying compensation upon the organizer of the enterprise." Parker v. Williams & Madjanik, Inc., 275 S.C. 65, 73, 267 S.E.2d 524, 528 (1980). In the case presently before this Court, the only "organizer of the enterprise" at the time Mr. Collins was injured was West Expedited, who was free to choose to engage a return-trip delivery, send Mr. Collins on an errand of its own, or send him on vacation, or tell him to come straight back to South Carolina to perform additional work for West Expedited, a decision over which Seko Charlotte had no control and about which Seko Charlotte had no knowledge. (Appx. 161, lines 13-21). (Appx. 168, lines 11-17). (Appx. 169, lines 5-16).

This Court's Opinion is in conflict with other statutory employment cases where the employee was under the direction and control of the upstream owner at the time of his or her injury. *See, e.g.*, Fortner, 402 S.C. at 428-29, 431, 741 S.E.2d at 542, 543-44; *see also* Posey v. Proper Mold & Eng'g, Inc., 378 S.C. 210, 215, 661 S.E.2d 395, 398 (Ct. App. 2008) (holding that the claimant was a statutory employee of PME/Autegra precisely because he was injured during part of the job that PME/Autegra required (unloading) as part of the delivery service). Seko Charlotte neither instructed nor required Mr. Collins to come back to South Carolina.

Contrary to this Court's apparent assumption that, with respect to Seko Charlotte, the return trip was necessary and incidental to the out-going shipment, that assumption is belied by the facts that: 1) West Expedited reserved the right to engage a return paying shipment for a third party; 2) West Expedited had done so in the past; 3) West Expedited reserved the right to send Mr. Collins on an errand for West Expedited; and 4) had Seko

Charlotte wanted Mr. Collins to do anything whatsoever for it on the return trip, it would have had to have entered into a second contract with West Expedited.

This Court's application of the traveling employee doctrine to the facts of this case is also in error. The rationale behind the traveling employee doctrine is that the employee is in the employment of his or her direct employer when traveling on business. Therefore, so long as an employee does not deviate from the course and scope of that employment, injuries incurred while performing tasks incidental to that employment are covered by the Act. *E.g.*, Hall v. Desert Aire, Inc., 376 S.C. 338, 356-57, 656 S.E.2d 753, 762-63 (Ct. App. 2007). Thus, the traveling employee doctrine is utilized in order to determine whether an injury arises out of and in the course and scope of employment, but not to determine whether an employment relationship exists to begin with.

In addition, to the extent Mr. Collins was a traveling employee at the time of his fatal accident, the Commission properly found that he was a traveling employee of West Expedited only. In every recorded South Carolina traveling employee case, the injured employee was employed by the same entity before, during and after the out of town trip. This Court's Opinion suggests that, an employee who travels out of town on business and quits his or her job while out of town and then is injured on the return trip is still the employee of the company for which he or she no longer works. "But for" the business trip, the employee would not be out of town; however, there can be no question that at the time of injury in this scenario, the employee is no longer employed by its former employer and, therefore, the injuries do not arise out of and in the course and scope of employment. The same should be true in the statutory employment context: where there

is no contractual relationship between the owner and the subcontractor, there can be no statutory employment relationship between the owner and the subcontractor's employees.

To have Seko Charlotte's liability hinge, as this Court has done, on whether West Expedited chose to make a return-trip contract with some third company, to send Mr. Collins on some errand of its own, or to return immediately back to South Carolina, is untenable and runs counter to South Carolina workers' compensation goals and policies. Such a result imposes liability on an entity that had absolutely no connection to either West Expedited or Mr. Collins at the time of his accident. This Court completely fails to explain how a statutory employment relationship can continue to exist after the contract between the owner and subcontractor has ended. At that point in time, there is no relationship linking the owner to the subcontractor's employees in any way.

Finally, this Court's Opinion fails to explain why it believes it is logical to impose statutory employer liability on Seko Charlotte in this instance when, clearly, none would have existed had West Expedited engaged a return paying shipment or sent Mr. Collins on an errand of its own.[3] Under the two scenarios, absolutely nothing changes in the contractual relationship between Seko Charlotte and West Expedited, **or between Seko Charlotte and Mr. Collins**, and the decision to engage a return paying shipment or instruct Mr. Collins to perform some other task is exclusively West Expedited's to make – or not. Seko Charlotte had no connection whatsoever with either West Expedited or Mr. Collins at the time of his fatal accident and, as a result, cannot be deemed Mr. Collins statutory employer responsible for workers compensation benefits under a fair reading of the Act.

[3] This problem is highlighted by the two hypotheticals discussed on pages 20-21 of Petitioners' Brief.

Understandably, this is a difficult case involving a fatality and drawing in the UEF to stand in for an employer who did not carry workers' compensation insurance. However, there is a limit to which both the law and the facts can be stretched in order to reach a result that the Court feels is "fair." "While doubts about the reach of the Act are to be resolved in favor of including workers, courts are bound by the Act as written and do not have the power to expand its scope." Meyer v. Piggly Wiggly No. 24, Inc., 331 S.C. 261, 265, 500 S.E.2d 190, 192 (Ct. App. 1998). To the extent this Court is concerned about Mr. Collins' family being without remedy, as is pointed out in Petitioners' Brief and as this Court recognized, the UEF is obligated to pay workers' compensation benefits on behalf of West Expedited. Finding a statutory employment relationship exists where there is no contractual relationship between the owner and the subcontractor constitutes an impermissible expansion of the scope of the Act, an action expressly reserved to the General Assembly.

CONCLUSION

For all the reasons stated herein, this Court should grant rehearing, reverse its Opinion that Seko Charlotte was Mr. Collins' statutory employer at the time of his fatal accident, and hold that West Expedited was Mr. Collins' sole employer at that time.

Respectfully submitted,

McANGUS GOUDELOCK & COURIE LLC

May 6, 2015

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

v.

Uninsured Employers Fund, ... Respondent.

PROOF OF SERVICE

I certify that on the 6th day of May 2015, I served the Petitioners' **Petition for Rehearing** 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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May 6, 2015

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 please find the original and seven (7) copies of Petitioners' Petition for Rehearing, and the original and one copy of the Proof of Service in the above-referenced matter. Please file the originals and return a clocked-in copy in the self-addressed, stamped envelope.

Also enclosed is our firm's check in the amount of $25 for filing the motion. If you have any questions, please do not hesitate to contact me.

Very truly yours,

McAngus Goudelock & Courie, LLC

Helen F. Hiser

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

The Supreme Court of South Carolina

McAngus Goudelock Courie 05/12/2015

RECEIPT #75937

Case No:	2012-213425
Case Short Title:	Gregory Collins v. Seko Charlotte
Event:	
Fee Type:	Motion Fee
Amount:	$25.00
Payment Type:	Check
Reference No:	27221
Check/Money Order Date:	05/06/2015
Comments:	