THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. 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 Insurance Co., ... Petitioners,

v.

West Expedited & Delivery Service, Inc., ...Defendant,

v.

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

v.

Uninsured Employers' Fund, ... Respondent.

RESPONDENT SOUTH CAROLINA WORKERS' COMPENSATION UNINSURED EMPLOYERS' FUND'S RETURN TO PETITION FOR REHEARING

Pursuant to Rules 221 and 240 of the South Carolina Appellate Court Rules, Respondent South Carolina Workers' Compensation Uninsured Employers' Fund hereby files this Return to Petition for Rehearing filed by SEKO CHARLOTTE (SEKO) and NATIONWIDE MUTUAL INSURANCE COMPANY (Collectively Petitioners). Respondent respectfully submits that this Court did not overlook or misapprehend any points in reaching its decision in the above-captioned matter.

Petitioners, in the Petition for Rehearing, allege that this Court misapprehended commercial realities and relied on evidence not supported by the preponderance of the evidence

in the record in reaching its Opinion, Opinion No. 2015-UP-27519 (Sup. Ct. filed April 29, 2015). It should be noted that the majority of Petitioners' arguments are the same arguments that were dismissed by both this Court and the Court of Appeals.

I. This Court correctly applied the tests for the statutory employment relationship where the Claimant suffered fatal injuries on the return leg of a business trip made in furtherance of the statutory employer's business.

The Petitioners argue that certain factual understandings are not supported by either the substantial or the preponderance of the evidence. In particular, Petitioners take issue with this Court's quote that "in this instance, an 'express hot delivery' is understood in the trade to mean an immediate and direct trip." (emphasis added). This position is curious, given that Petitioners quote Mr. Morris West (principal of WEST EXPEDITED & DELIVERY SERVICE, INC. (WEST)) as testifying this particular shipment was required to be moved from Spartanburg to Wisconsin by the very next day. Appx. p. 201, ll. 5 – 9. This Court's characterization of that testimony as an immediate and direct trip is accurate. He specifically testified that this delivery "would have been all night and then into the next day." Appx. P. 201, ll 12 – 13. Mr. Ron Burks, an employee of SEKO CHARLOTTE, testified that WEST was to get the delivery to its destination as soon as possible: "you know, usually what we would tell him is, well, it's a hot one. It needs to be there whenever you can get it – as soon as you can get it there." Appx. p. 88, ll. 8 – 11.

Secondly, Petitioners argue that the Court was not supported by the evidence in the record when it wrote that it was "understood that it is unlikely that the driver will have cargo on the return trip." Petitioners then go on to cite evidence in the record that, in fact, supports this statement. In particular, as the testimony makes clear, Mr. West was in the best position to know what was typical for the business. At the hearing before the Single Commissioner, Mr. West

testified that "it's not the general practice [to pick up a load for the return trip]. Maybe once or twice a year." Appx. p. 204, ll. 18 – 19. The only other evidence about this comes from an employee of SEKO CHARLOTTE, Ron Burks. He testified he was "not sure" about whether WEST would pick up a delivery for the return trip, and only that other companies "try to get a load coming back." Appx. p. 161, ll. 17 – 21 (emphasis added). Contrary to the implications of Petitioner, he did not testify that it was normal in the course of business for his subcontractors to actually get any loads for the return.

Petitioners assert this Court was incorrect when it found that WEST included the return trip in the mileage rate charged to SEKO CHARLOTTE. To the contrary, Mr. West was very clear on this issue:

> Q. However you bill [SEKO CHARLOTTE], whether you say it's for miles one way, you knew your people had to come back, right?
>
> A. Yes.
>
> Q. So I see what you say to your attorney: That's already figured into the way – the amount you charge for billing [SEKO CHARLOTTE]?
>
> A. Yes.

Supp. Appx., p. 38, ll. 8 – 15.

Further, Mr. West testified as follows:

> Q. Now, when you contracted with SEKO CHARLOTTE to figure out the price per mile, did you consider all of your expenses that would be incurred in making such a delivery?
>
> A. Yes.
>
> Q. So, that includes wear and tear?
>
> A. Yeah.
>
> Q. That includes what it would cost you in gasoline to get a truck all the way to Wisconsin and back?

A. Yes.

Appx. p. 202, ll. 14 – 23 (emphasis added).

Though Petitioners acknowledge that Mr. West testified that the cost of fuel and vehicle wear and tear was included in the calculations, they then assert, without any factual or evidentiary basis, that these "are not all of the costs involved in a return trip." Petition for Rehearing, pp. 5 – 6.

Petitioners also seem to assert that control is relevant to the statutory employment issue by taking issue with the Court's characterization that SEKO CHARLOTTE "had no more control over Collins on the trip to Wisconsin than it did on the return trip to South Carolina." Clearly, "control" in this instance is defined by the relationship of the parties. If SEKO CHARLOTTE is now asserting that it had control over Claimant on the outgoing leg, then that would be a factor in a direct employment relationship. If a direct employment relationship existed on the outgoing leg, even Petitioners would then concede it did so on the return (as it concedes the direct employment relationship between WEST and Claimant during the return leg). However, it should be noted that Mr. Burks testified that SEKO CHARLOTTE gave WEST no deadlines, as Mr. West "understood the nature of the urgency of the shipment." Appx. p. 88, ll. 16 – 17. Therefore, SEKO CHARLOTTE had no control over the details of Claimant's work at any time, and the statutory employment relationship was established by the work SEKO CHARLOTTE was paying WEST to perform.

Petitioners assert this Court improperly characterized SEKO CHARLOTTE's use of WEST's services as "frequent." They cite Mr. Burks's testimony, but fail to note Mr. West's testimony on this issue. Mr. Burks testified that SEKO CHARLOTTE used WEST "two or three

times a month." Appx. p. 162, l. 22. The Court acknowledged this testimony in the opinion. Certainly, the Court's characterization of such transactions as frequent is within its discretion.

II. This Court correctly applied the tests for the statutory employment relationship where the Claimant suffered fatal injuries on the return leg of a business trip made in furtherance of the statutory employer's business.

The bulk of Petitioners' argument in the Petition for Rehearing rests on the cost-basis of the agreement between WEST and SEKO. This is the same argument that Petitioners made before this Court and the Court of Appeals.

As is standard practice in the shipping and delivery industry, these parties, both corporations doing business in South Carolina, determined the cost of deliveries per loaded mile. This means the price of deliveries SEKO subcontracted to WEST was determined by calculating the mileage between the points of pick-up and delivery. That number was then multiplied by $1.20, which was the amount SEKO paid WEST to perform these business operations, which SEKO admitted were necessary and integral to its business.

Respondents contend that this method of calculation determines SEKO's legal status as statutory employer, which they contend terminated immediately upon delivery of product. Because Claimant died on the return leg of the trip, Respondents assert that this Court overlooked or misapprehended their allegation that there was no contractual relationship between SEKO and WEST at the time of the Claimant's accident. Essentially, Respondents' position is that a common carrier can subcontract a necessary and essential delivery while taking on no risks or liability with regards to driver's return, even where (1) the common carrier admits to the existence of a statutory employment relationship with the Claimant on the outgoing leg of the trip; (2) where the return leg of the trip is necessarily incidental to the job the Claimant was undertaking in furtherance of the business of the common carrier; (3) where the driver did not

deviate from the most direct route between the point of delivery and his base of operations; and (4) where the driver was not hired by any other party to perform any further duties other than the original assignment.

The Fund's position, now and as it was before when this argument was initially thrust before this Court, is that a shipping company can't send a man eight hundred (800) miles away as part of its business, and then wash its hands of all responsibility when something unfortunate happens to the fellow on the return to the employer's base of operations.

This Court did not overlook or misapprehend Respondents' contentions. In fact, this proposition was central to Respondents' argument, which this Court noted. This Court discussed the method of payment as being paid "one way." In fact, since this issue is the primary position of Petitioners, this issue is addressed head-on by the Court. As the Court wrote, "[o]nce the statutory employee status attaches, the extent of the status is determined by the nature of the work contracted to be performed." The nature of the work, here, is a delivery of goods from the Southeast to the Midwest.

Clearly, the cost-basis of the contract wasn't overlooked by this Court; further, this Court did not misapprehend the impact, if any, of the price terms of the agreement on the statutory employment doctrine. In fact, as was proper, this Court looked through the parties cost calculations "to impose the absolute liability of an immediate employer upon the owner and/or general contractor although it was not in law the immediate employer of the injured workman." Parker v. Williams & Madjanik, Inc., 275 S.C. 65, 72, 267 S.E.2d 524, 527-28 (1980).

Respondent asserts that this Court's application of the statutory employment analysis[1] to the facts herein was proper and appropriate. To find, as Respondents demand, that there was no

[1] As the Court discussed, South Carolina has applied three tests and concludes the statutory requirement is met if the activity (1) is an important part of the owner's business or trade; (2) is a necessary, essential, and integral part of the

longer any relationship between two (2) delivery companies where the driver engaged to perform the work of the contractor was killed on the return leg of the delivery would, on the contrary, be improper and inappropriate. Such a finding would rely solely and exclusively upon the method used to calculate the price of a job between delivery companies, and as the Supreme Court wrote,

> Whatever the parties contract to call their relationship is not controlling in a statutory employment analysis. See S.C. Code Ann. § 42-1-610 (1985) ("No contract or agreement, written or implied, and no rule, regulation or other device shall in any manner operate to relieve any employer, in whole or in part, of any obligation created by this Title except as otherwise expressly provided in this Title."); see also Wilson v. Daniel Intern. Corp., 260 S.C. 548, 197 S.E.2d 686 (1973) (stating that the terminology used by the parties is not controlling of their relationship).

Harrell v. Pineland Plantation, LTD, 337 S.C. 313, 523 S.E.2d 766, 770 (1999).

Contrary to the assertions of Petitioner, the evidence in this case shows an agreement for a shipment of goods across the country, but it does not, in any way, show an agreement only for a "one-way" trip. Before the Single Commissioner, Morris West, WEST's principal, testified as follows:

> Q. Now, when you contracted with Seko Charlotte to figure out the price per mile, did you consider all of your expenses that would be incurred in making such a delivery?
>
> A. Yes.
>
> Q. So, that includes wear and tear?
>
> A. Yeah.
>
> Q. That includes what it would cost you in gasoline to get a truck all the way to Wisconsin and back?
>
> A. Yes.

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owner's business; or (3) has previously been performed by the owner's employees. Olmstead v. Shakespeare, 354 S.C. 421, 424, 581 S.E.2d 483, 485 (2003). If the activity meets any of these three criteria, the injured employee qualifies as a statutory employee. Id.

Appx. p. 202, ll. 14 – 23. Simply put, this is a method used to calculate the cost of a shipment. If the parties were to cut the price in half and then require payment for a round trip, the obligations from employer (including a statutory employer, whose liability is absolute) to an employee remain the same. Those duties, including the obligation to provide workers' compensation coverage to an employee acting in furtherance of one's business, cannot be abrogated because of a number picked by two (2) corporate entities to use as a divisor in as part of contract negotiations.

Additionally, to find that the statutory employment relationship terminates immediately upon delivery where the driver returns to his base of operations without interruption or deviation would ignore the fact that the return trip is necessarily incidental to the job being performed. Clearly, the statutory employment relationship is intact when the duties being performed by that Claimant are

> incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence.

Voss v. Ramco, Inc., 325 S.C. 560, 482 S.E.2d 582 (Ct.App. 1997). It strains credulity to believe that the return leg of a delivery trip is not absolutely and necessarily incidental to the character of the business being performed. Because the return trip flowed naturally from the SEKO delivery and, unless interrupted by another delivery or a substantial deviation from the Claimant's route and/or duties, the return trip "follow[s] as a natural incident of the work . . . ." Douglas v. Spartan Mills, 245 S.C. 265, 269, 140 S.E.2d 173, 175 (1965).

Respondent asserts that this Court did not overlook or misapprehend the facts or the method of payment from SEKO CHARLOTTE to WEST. In this case, the goal of the statutory employment doctrine would be to place the burden of doing business upon the organizer of the

enterprise. SEKO was the organizer of the enterprise that took this Claimant across the country and which directly led to his fatal injuries. Accordingly, Petitioners' Petition for Rehearing should be denied.

CONCLUSION

For all the reasons stated herein, Respondent respectfully submits that this Court should deny Petitioners' Petition for Rehearing, as this Court correctly applied the law to the facts of the case, and there is no point that this Court overlook or misapprehended.

Respectfully Submitted,

WILLSON JONES CARTER & BAXLEY, P.A.

BY: _____

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ATTORNEYS FOR THE RESPONDENT FUND

May 14, 2015
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
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PROOF OF SERVICE

I certify that on the 14th day of May, 2015, I served the **RESPONDENT SOUTH CAROLINA WORKERS' COMPENSATION UNINSURED EMPLOYERS' FUND'S RETURN TO PETITION FOR REHEARING** on the parties of record by depositing a copy in the United States Mail, sufficient postage prepaid, addressed to their respective attorneys as follows:

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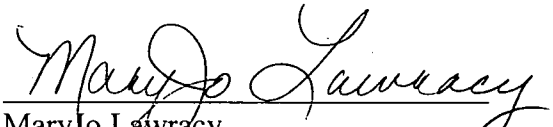

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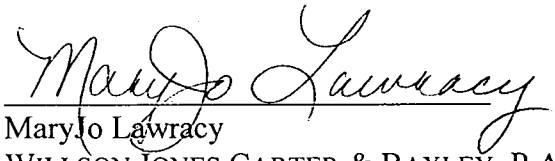

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May 14, 2015

VIA U.S. MAIL
The Honorable Daniel E. Shearouse
Supreme Court of South Carolina
1231 Gervais Street
Columbia, South Carolina 29201

Re: Gregory Collins v. West Expedited & Delivery Service, Inc., et al.
Appeal No.: 2012-213425
WCC File No.: 0719222; DOI: September 8, 2007
WJC&B File No.: 0280.00214

Dear Mr. Shearouse:

Enclosed for filing please find (1) the original and seven (7) copies of Respondent South Carolina Worker' Compensation Uninsured Employers' Fund's Return to Petition for Rehearing; and (2) 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.

Should you have any questions or concerns, please do not hesitate to contact me.

With kindest regards,

WILLSON JONES CARTER & BAXLEY, P.A.

Timothy B. Killen

TBK/mjl
Enclosures

cc: Linda B. McKenzie, Esquire (*via* U.S. Mail)
Helen F. Hiser, Esquire and Weston Adams, III, Esquire (*via* U.S. Mail)