

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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S.C. Supreme Court

APPEAL FROM THE SOUTH CAROLINA

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.

REPLY TO RESPONDENT'S  
RETURN TO PETITION FOR REHEARING

Pursuant to Rules 221(a) and 240, SCACR, Petitioners Seko Charlotte and Nationwide Mutual Insurance Company hereby Reply to Respondent's Return ("Return") to Petition for Rehearing ("Petition") of this Court's Opinion in the above-captioned case, Opinion No. 2015-UP-27519 (Sup. Ct. filed April 29, 2015) ("Opinion").  
Respondent

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

Not only does Respondent fail to effectively counter Petitioners' arguments that key factual findings made by this Court are not supported by the preponderance of the

evidence, but they continue to misconstrue and/or embellish testimony in order to support its argument. In fact, Respondent actually highlights the illogic in this Court's statement that "[i]n this instance, an 'express hot delivery' is understood **in the trade** to mean an immediate and direct trip." (Return p. 2) (bolded emphasis added). By definition, the fact that a phrase is understood "in the trade" in a particular way means that is how it is understood across the trade or industry, and does not vary based on one individual's situation in an isolated instance. Furthermore, Mr. West's testimony specifically denied that the shipment "had to get there extremely fast." Instead, he said, "**Well, not extremely fast.** It had to be there the next day." (Appx. 201, lines 5-9) (emphasis added). Respondent even quotes Mr. Burks' testimony that the instruction was to make the delivery whenever you can get it – as soon as you can get it there." What Respondent fails to note is that Mr. Burks continued to explain that "[w]e didn't give him deadline times, but we told him, you know, the best you can do." (Appx. 178, lines 18-20). In addition, the only testimony in the record as to the definition of "express hot delivery" came from Mr. Burks, who explained that "[i]t's something that needs to get just somewhere faster than an LTL [less than a truckload] truck would. Something that the customer is wanting it to go faster than a normal LTL type truck." (Appx. 158, lines 19-23). Mr. Burks testified that Mr. West "would use vans to run something exclusively to Point B, rather than waiting for it to be consolidated on a truck with all kinds of freight that made several stops and took a few days to get somewhere." (Appx. 159, lines 7-12).

Respondent's suggestion that Mr. West was in the best position to know what was typical for "the business" or "in the trade" is both unsupported and wrong. Mr. West ran a small business, employing only one driver directly, Mr. Collins, and a couple of

“contract drivers” at the time of Mr. Collins’ accident. (Appx. 200, lines 11-22). He never had more than four drivers transporting items for West Expedited. (Appx. 213, lines 17-20). Mr. Burks testified that Seko Charlotte thought “Mr. West was a bigger company than apparently he was ...” (Appx. 171, lines 21-22). Mr. West obtained business from just a few trucking companies that knew about his business. (Appx. 212, lines 8-13). He operated his business out of his home. (Appx. 214, lines 22-24).

In contrast, Mr. Burks testified that Seko Charlotte is a world-wide logistics company. (Appx. 144, lines 20-24). Seko Charlotte employed two or three subcontractors in the Spartanburg area in addition to West Expedited to make deliveries for it. (Appx. 244, line 22 – 245, line 12). Seko Charlotte contracted with West Expedited only about twice a month. (Appx. 247, lines 4-8). Thus, Mr. Burks, who was inherently in a better position to testify as to what was typical in the business of long-distance deliveries, testified that “I know 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). Mr. Burks specifically explained that Mr. West sometimes 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). Thus, contrary to Respondent’s position, not only was Mr. Burks in the best position to testify as to what was normal in the logistics business, but he did, in fact, testify as to what was normal in the course of business which was to engage a return paying shipment if possible. Mr. West did not disagree. (Appx. 208, line 16 – 209, line 6).

As to whether Mr. West calculated all of the cost of the return trip in his one-way per mile rate, Mr. West clearly testified that he did not pay his drivers on the return trip.

Q: Did you pay your drivers anything to return from their destinations?

A: No. It was all included in ...

Q: That was all one set –

A: Yeah.

Q: -- fee you would pay to your drivers?

...

Q: Would you take that into consideration when determining how much you would charge SEKO?

A: No. They paid me a straight amount per mile.

Q: Okay.

A: I pay my drivers a straight amount per mile.

(Supp. Appx. 28, line 25 – 29, line 13); *see also* (Supp. Appx 17, lines 15-25 (Mr. West testifying that the trip home is not paid for by the trucking company that engaged West Expedited to make a delivery)). Thus, although the cost to return the **truck** from Wisconsin to South Carolina may have been calculated in the contract price, the cost to return West Expedited's **driver** was not.

Moreover, Respondent's repeated focus on Mr. West's testimony regarding how he calculated his per mile charge as evidence of the nature of the contract, (Return pp. 3, 7 (twice setting out Mr. West's testimony at Appx. 22, lines 14-23 in full detail)), is in direct conflict with its argument that the parties' testimony as to the terms and nature of their contract has no bearing on the statutory employment analysis. Respondent cannot have it both ways, relying heavily on testimony that purportedly supports its position and then protesting that what the parties say about their contract has no bearing whatsoever on this Court's analysis. Contrary to Respondent's statement otherwise, (Return p. 7),

the evidence in this case demonstrates an agreement for a one-way shipment of goods, after which the contractual relationship between Seko Charlotte and West Expedited, and in turn the statutory employment relationship between Seko Charlotte and Mr. Collins, ended. (Appx. 208, line 12 – 210, line 14) (Appx. 241, line 6 – 242, line 1).

Respondent's argument regarding the degree of "control" on the outgoing trip versus that on the return trip seems to imply, illogically, that Seko Charlotte is advocating that it was in a direct employment relationship with Mr. Collins on the outgoing trip. Seko Charlotte has never taken that position and is not doing so now. Instead, Seko Charlotte takes issue with this Court's unsupported assumption that "Seko Charlotte had **no more control** over Collins on the trip to Wisconsin than it did on the return trip to South Carolina." (Opinion) (emphasis added). This Court's erroneous factual finding implies that the parties' contractual relationship on both the out-going and return trip was identical. Clearly, by designating the pick-up and delivery locations with the instructions that the shipment be made as expeditiously and safely possible, Seko Charlotte had some degree of "control" over both West Expedited and Mr. Collins on the out-going part of the trip.<sup>1</sup> Mr. West did not independently instruct Mr. Collins to make a delivery to Wisconsin in furtherance of West Expedited's business. Instead, both West Expedited and Mr. Collins were engaged by Seko Charlotte to make two deliveries per Seko Charlotte's instructions. In contrast, once those deliveries were made, both West Expedited and Mr. Collins were free to engage a return paying shipment, perform other tasks for West Expedited, send Mr. Collins on vacation, or even cease their direct

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<sup>1</sup> Respondent's reasoning that, because Seko Charlotte did not give West Expedited firm deadlines for delivery, "Seko Charlotte had no control over the details of Claimant's work at any time," (Return p. 4), employs faulty logic and is incorrect. Just because Seko Charlotte may not have controlled **all** of the details of the out-going shipment does not mean it did not control **any** of the details of that leg of the journey.

employment relationship altogether. (*E.g.* Appx. 208, line 12 – 209, line 6) (Appx. 241, line 6 – 242, line 1). Thus, the only conclusion the evidence supports is that Seko Charlotte had some degree of control over Mr. Collins (via its instructions to West Expedited) on the outgoing shipment but absolutely none after the second delivery was made in Wisconsin.

Respondent mistakenly argues that this Court’s statement that “Seko Charlotte frequently used West Expedited’s services” is supported by the record. Although Respondent asserts that Petitioners failed “to note Mr. West’s testimony on this issue,” Respondent simply fails to point to any testimony by Mr. West that supports this Court’s finding. In fact, the closest Mr. West came to testifying about frequency does not support this Court’s statement:

Q: What was your business relationship with SEKO?

A: Just when they called and wanted something done, I’d do it.

(Supp. Appx. 28, lines 14-16). Thus, the only conclusion this record supports is that Seko Charlotte used West Expedited’s services only a few times per month, which does not constitute “frequent” use.

Because these and other factual findings relied on by this Court to reach its ultimate conclusion are not supported by the preponderance of the evidence, this Court should reconsider its Opinion and hold that Seko Charlotte was not Mr. Collins’ statutory employer at the time of his fatal accident.

**2. Respondent mischaracterizes Petitioners’ arguments in order to attempt to refute them.**

Respondent again focuses myopically on only the cost-basis of the contract between Seko Charlotte and West Expedited, apparently as a ploy to avoid the

uncontroverted facts that once the deliveries in Wisconsin were made, there was no contractual relationship between those two entities, and West Expedited was free to engage a paying return shipment or send Mr. Collins on its own errand or direct him to do anything whatsoever. Like this Court, Respondent completely fails to address the problematic result of a ruling that makes Seko Charlotte's status as a statutory employer depend entirely on decisions made by third parties completely unrelated to Seko Charlotte, and over which Seko Charlotte has no control. Because Seko Charlotte had no contract with and no control over any decisions made by West Expedited once the deliveries were made, it cannot have been the "organizer" of the enterprise at that point in time. Parker v. Williams & Madjanik, Inc., 275 S.C. 65, 73, 267 S.E.2d 524, 528 (1980). Both Respondent and this Court fail to acknowledge or grapple with the fact that, while the return trip was necessary and incidental for West Expedited, it was not so for Seko Charlotte.

Furthermore, in applying the traveling employee test to the jurisdictional question here, both this Court and Respondent are mixing the analysis of whether an injury arises out of and in the course of employment with the analysis of whether an employment relationship exists in the first place. Such an approach is as illogical as it is improper: in every case where the traveling employee test is applied to determine whether injuries are compensable, the employer/employee relationship has already been established. Thus, using the traveling employee test to determine whether a statutory employment relationship exists makes no sense, as that is not what the traveling employee test was devised to determine.

Contrary to Respondent's suggestion otherwise, the necessary conclusion that any statutory employment relationship between Seko Charlotte and Mr. Collins ended when the contract between Seko Charlotte and West Expedited ended is supported by more than just the method used to calculate the price of the job. For instance, that conclusion is supported by the uncontested testimony of both Mr. West and Mr. Burk. (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). That conclusion is supported by the uncontested fact that, if Seko Charlotte wanted Mr. Collins or West Expedited to do anything whatsoever for it on the return trip, Seko Charlotte would have had to have entered into a separate contract with West Expedited for that service. That conclusion also is supported by Mr. West's admission that, once the deliveries were made in Wisconsin, he was free to engage a return paying shipment, had done so in the past, and/or he was free to send Mr. Collins on any other business for West Expedited. (Appx. 161, lines 17-21) (Appx. 208, line 16 – 209, line 6). Finally, that conclusion is supported by the uncontested fact that the cost to Seko Charlotte for the delivery from South Carolina to Wisconsin would not have changed one dollar if West Expedited had engaged a return paying shipment.

In fact, this uncontested fact directly refutes Respondent's suggestion that the method of calculating the cost of the shipment is entirely irrelevant to the determination of the relationship of the parties because the parties could have "cut the price in half and then require[d] payment for a round trip." (Return p. 8). If, in fact, the parties had cut the price in half and allocated half to the outgoing trip and half to the return, Seko Charlotte would not have been liable for the return trip payment if West Expedited had engaged a return paying shipment on this particular trip. Instead, under the parties' actual

contract, the cost to Seko Charlotte would not have varied by a single dollar had West Expedited engaged a return paying shipment.

As a statutorily-imposed employment construct, the statutory employment relationship depends on a contractual relationship between the upstream employer and the subcontractor. Where there is no contract between the upstream owner and the subcontractor, there is not and cannot be a statutory employment relationship between the upstream owner and the subcontractor's employees.

**3. Arguments that Respondent failed to address should be deemed conceded.**

Finally, Respondent failed to address Petitioners' arguments: 1) that the preponderance of the evidence does not support this Court's conclusion that Mr. West only engaged return paying trips for the same entity that engaged the outgoing shipment; 2) that Seko Charlotte "knew ... more than likely, the return trip would be without cargo for another West Expedited customer"; 3) that there was no contractual relationship whatsoever between Seko Charlotte and West Expedited at the time of Mr. Collins' accident; 4) that if West Expedited had engaged a return paying shipment, the amount Seko Charlotte paid for the shipment would not have decreased by a single dollar; 5) that, had Seko Charlotte wanted Mr. Collins or West Expedited to do anything whatsoever for it on the return trip, Seko Charlotte would have had to have entered into a separate contract with West Expedited for that service.

Because Respondent did not address or counter those arguments, they can and should be deemed conceded. Turner v. South Carolina Dept. of Health & Envtl. Control, 377 S.C. 540, 547, 661 S.E.2d 118, 121 (Ct. App. 2008) (where a respondent "fails to respond to an issue in his brief, the appellate court may treat the failure to respond as a

[concession] that the appellant's position is correct"), *citing* First Union Nat'l Bank of S.C. v. FCVS Commc'ns, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996), *rev'd on other grounds*, 328 S.C. 290, 494 S.E.2d 429 (1997).

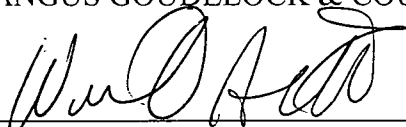
**CONCLUSION**

For all the reasons stated in their Petition and 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 27, 2015

  
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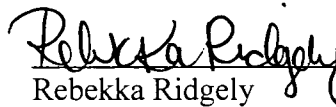
Uninsured Employers Fund, .....Respondent.

**PROOF OF SERVICE**

I certify that on the 27th day of May 2015, I served the Petitioners' **Reply to Respondent's Return to 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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