THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

WCC File No. 1023143

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

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S.C. Supreme Court

George Ferguson, Claimant, ... Petitioner,

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 WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on May 21, 2015.

QUESTIONS PRESENTED

1. Whether U-Haul/Amerco (eMove) is the statutory employer of George Ferguson considering the moving work done by Ferguson's direct employer Sean Unterkoefler is:

   A. an important part of the trade or business of the employer; or
   B. is a necessary, essential, and integral part of the business of the employer?

2. Whether the Court of Appeals erred in finding Ferguson failed to carry his burden of proving that he was an employee of Sean Unterkoefler d/b/a United Stand Moving?

3. Whether the Court of Appeals erred in finding Ferguson failed to carry his burden of proving that Sean Unterkoefler d/b/a United Stand Moving employed four or more employees during the relevant period, thus making Unterkoefler an uninsured employer subject to the Act?

4. Whether the case should be remanded due to the Commission's failure to rule on all of Ferguson's causally related injuries, specifically to his right hand, right arm, right knee, and right shoulder; such issue being raised but not ruled on?

5. Whether the case should be remanded due to the Commission's failure to rule on whether Ferguson would be entitled to temporary total disability benefits from August 21, 2010, through February 1, 2011, and temporary partial disability benefits from February 1, 2011, to the present and continuing until he reaches maximum medical improvement; such issue being raised but not ruled on?

6. Whether the case should be remanded due to the Commission's failure to rule on whether Ferguson is not at maximum medical improvement, and is in need of additional medical treatment to include additional medical treatment to his shoulder and hand; such issue being raised but not ruled on?

7. Whether the Appellate Panel erred as a matter of law in failing to make specific and detailed findings of fact sufficient for appellate review?

STATEMENT OF THE CASE

The Petitioner, by and through his undersigned attorney, hereby files this Petition for Certiorari. On April 1, 2015, the Court of Appeals 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). The Court affirmed the primary three findings of the Commission denying workers compensation benefits to Petitioner: (1) "the Appellate Panel correctly found eMove was not Ferguson's statutory employer;" (2) "the Appellate Panel correctly found Unterkoefler was not Ferguson's employer;" and (3) "The Appellate Panel found Ferguson failed to prove Unterkoefler regularly employed four or more employees, and therefore, he was not subject to the Act." Id.

Certiorari is appropriate in the instant case because this case involves novel questions of law. As the economy evolves with emerging technology, new business models have been created by employers with the express intent of gaining a competitive advantage over existing business models by avoiding the liability, insurance, taxes and costs of employment. In the instant case, Respondent U-Haul/Amerco provides moving services to consumers through subcontractors. Merely because the business is operated on the internet rather than with a traditional brick and mortar building, Respondents should not be able to misclassify their labor in a way that avoids providing workers' compensation to their direct and statutory employees. This is the first case in South Carolina to examine whether an employer can avoid our state's workers' compensation laws merely because the labor services it provides within our state are purchased by the customer on the internet.

As substantiative grounds for granting his Petition, Petitioner would respectfully show the Court of Appeals erred when it 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 Unterkoefler'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.

This workers' compensation case arises out of on the job injuries suffered by Petitioner, George Ferguson, on August 21, 2010. Ferguson and another employee, Kenneth Hill, were carrying a washer and dryer down a stairwell. Hill let go. The washer and dryer pinned Ferguson's "whole right side up against the wall." [R. p. 18, lines 7-25]. Ferguson injured several fingers, his right hand, arm and shoulder. [R. p. 53, line 25-page 55, line 17].

Ferguson's direct employer was Sean Unterkoefler d/b/a United Stand Moving. As Unterkoefler was uninsured, Ferguson sought workers' compensation benefits for his injuries under two theories (1) he was the statutory employee of eMove (a division of Amerco/U-Haul); and (2) the Uninsured Employer's Fund should cover the claim as Unterkoefler regularly employed 4 or more employees.

Respondent eMove is a wholly owned subsidiary of Amerco/U-Haul International. eMove's offices are located in U-Haul's main headquarters in Arizona. [R. p. 231]. U-Haul advertises for

eMove services on its website, on its rental trucks and at its truck rental centers. [R. p. 149: Page 54, line 7-page 55, line 4].

eMove provides moving services to people who rent U-Haul trucks. The actual work is done by subcontractors who sign an on-line contract with eMove. eMove's sole source of revenue is a 15% markup of the moving services performed by its subcontractors. [R. p. 232].

eMove customers schedule a moving date with one of the subcontractors on eMove's website. The customer enters a credit card to secure payment and receive a verification code from eMove. eMove then sends a text message to the subcontractor telling them when to go; where to go; what services to provide; how long the job will take; and how many men are required. Jobs generally require a two man crew.

Upon completion of the job, the customer gives the verification code to the subcontractor – who enters the code into eMove's website. eMove then pays the subcontractor 85% of the price charged to the customer, keeping "a 15% cut from the total amount paid by the Customer for the Services." [R. p. 232].

People interested in becoming subcontractors for eMove sign an on-line contract. [R. p. 231-240]. Although not phrased in those terms, the contract establishes a classic owner-subcontractor relationship. The contract requires the subcontractors (identified as "moving helpers" or "service providers") to comply with all terms of the contract. [R. p. 231]. Most importantly, the contract prohibits the subcontractors from making side agreements or accepting payment directly from eMove's customers – all Customer payments must be made to eMove. [R. p. 232-233]. All transactions are initiated directly with eMove. eMove does not allow the subcontractor and customer to contact each other until the moving services have been scheduled and secured with a credit card.

In March 2009, Sean Unterkoefler executed a contract with eMove to provide "moving services" to eMove's customers. [R. p. 231-240]. Unterkoefler identified his sole proprietorship as United Stand Moving. He operated as an eMove subcontractor until March 2011 – doing a total of 225 jobs for eMove. [R. p. 137: Tr. Page 8, line 21-page 9, line 21; R. p. 141: page 23, lines 9-22].

As required by eMove, Unterkoefler went through a training session. He was told how to be a successful mover, given advice on actual moving activities and "how to keep [eMove's] customers happy." eMove also explained the ground rules of what the subcontractors could and could not do, including "mak[ing] it clear to [Unterkoefler] that [he] couldn't have any side agreements or direct contact with a customer except through eMove." [R. p.152: Tr. Page 66, lines 5-23].

United Stand offered moving services for up to 5 jobs per day, seven days a week. [R. p. 195]. The first moving job was done on March 2, 2009. [R. p. 198]. From there, the work ebbed and flowed reaching a high point of 32 completed jobs in August 2010 – the month in which Ferguson was injured. [R. p. 203-206].

In the spring of 2010, Petitioner George Ferguson took on a part-time job "working for Sean [Unterkoefler] with United Stand Movers to help load and unload U-Haul trucks." [R. p. 46, lines 4-10]. At first, work was slow and Ferguson did not work many jobs – only one or two for the first couple of months. By July and August, Ferguson was doing as many as five jobs a week. [R. p. 49, lines 15-22].

To keep up with the increasing workload, Unterkoefler added people. 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.

This number of employees makes logical sense when you look at how many jobs Unterkoefler did during the critical period. The chart below shows how Unterkoefler's workload substantially increased by August 2010 when Ferguson was injured:

	March	April	May	June	July	August
Days	31	30	31	30	31	31
Scheduled	8	5	9	12	24	38
Completed	2	4	4	10	22	32
% completed	25%	80%	44%	83%	92%	84%

In August, Unterkoefler was doing more than one job every day. He was scheduled to work 38 jobs – yet could only complete 32. His business had gone from a trickle to a flood. Unterkoefler could not handle it with just himself and a helper. 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.

After his August 21, 2010 injury, Ferguson received medical treatment from an orthopaedic surgeon. [R. p. 76-114]. He was unable to return to work as a mover. He also missed work from his full-time job as a sever at Outback Steakhouse. He has not completed his treatment, as he cannot afford further treatment and has been unable to obtain workers' compensation benefits.

ARGUMENT

I. U-Haul is the statutory employer of George Ferguson.

The Court of Appeals 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?

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]. See Glass v. Dow 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 the customers to do the lifting and drive the truck substantially limited their customer base.

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].

This is confirmed by U-Haul's contacts 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]. He testified "regarding the payment arrangements . . . the customer paid eMove and then eMove paid [him]. [R. p. 159: Tr. P. 94, lines 8-11]. "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 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]. 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]."]. The finding 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 people like Unterkoefler and Ferguson did not do the moving jobs, eMove would have no revenue at all. If we assume Unterkoefler is not U-Haul's employee,[1] then he must necessarily be U-Haul's subcontractor. See Voss v. Ramco, Inc.,

[1]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.").

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 statutory 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 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.

Petitioner respectfully requests the Court grant the Petition for Writ of Certiorari and find Ferguson is the statutory employee of U-Haul/Amerco.

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. Unterkoeffler was not in the moving business himself until he signed the contract with U-Haul. This confirms that Unterkoeffler at minimum was as a subcontractor, if not an outright employee.

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

The Court of Appeals began its analysis with this statement: "Ferguson worked for Unterkoefler part time and helped him load and unload trucks rented by customers of Unterkoefler." This entire premise is incorrect – these 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. Neither money nor information was exchanged between the customer and Unterkoefler – all was controlled by U-Haul. This false premise 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.").

Whether Ferguson was an employee or an independent contractor is controlled by four factors analyzing 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 of Appeals 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.

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

It is inaccurate to state that giving an employee"the date, time and location of the job" is not evidence of control. The mere fact the customer places an order does not make the customer the employer nor turn the person who fulfills the order into 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.")

It would be an absurd result for Ferguson to be an employee when working on a job with Unterkoefler, yet be an independent contractor when sent with a 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"). This control favors employment.

Furnishing of Equipment

The Court of Appeals treats this factor as supporting an independent contractor arrangement because "Unterkoefler provided a labor service to his customers. 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 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).

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. 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 this Court noted that one's body is not equipment. Id. 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. As the upstream employer provided the equipment used by Ferguson,[2] this factor should weigh in favor of an employee relationship.

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

Method of Payment

The Court of Appeals found "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). Accepting *arguendo* that Ferguson was paid by the job (he testified he was paid by the hour), he had no negotiating power with U-Haul or the customer – his only relationship was with Unterkoefler. Only Unterkoefler (and U-Haul) knew the price of the job; Ferguson's pay was entirely determined by his employer. The jobs were priced assuming a certain number of man-hours. [R. P. 198-208]. 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

On right to fire, the Court of Appeals 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 right to fire was overlooked in the instant case. In Shattto, the Court stated: "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).

The parties agreed Unterkoefler had the right to fire. Ferguson testified he could have been fired had he committed any misconduct. [R. p. 46, lines 20-22]. When asked if he " . . . basically had the right to fire him . . .," Unterkoefler 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 if 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.

The Workers' Compensation Act is to be construed liberally in favor of coverage. Id. The Court of Appeals erred in applying an unduly strict and formulaic construction of the employment relationship. "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).

Petitioner respectfully asks the Court to grant the Petition and reconsider the employment relationship in this case. A close look at the totality of the facts shows that Ferguson was an employee of Unterkoefler; not an independent contractor.

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 of Appeals 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). Petitioner asks this Court to issue the write, consider the evidence, and reverse.

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 of Appeals 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 of Appeals 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 – this is a legal question for the Court. 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.

Ultimately the number of employees comes down to a finding of fact – a point acknowledged by Petitioner. 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.

Petitioner asks the Court to issue the writ of certiorari, consider the evidence in total, and find Unterkoefler was an uninsured employer subject to the Act.

IV. The Commission has jurisdiction over U-Haul International.

Although not ruled on by the Court of Appeals, eMove argued "Without evidence to establish United Stand Moving regularly employed four or more employees, Petitioner cannot reach the question of whether eMove is Petitioner's statutory employer." [Brief of Respondents, page 17]. This issue is raised in the Petition for Rehearing and the Petition for Writ of Certiorari 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.[3] 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

[3]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.

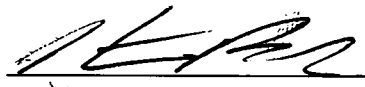
The Appellate Panel did not rule on all the injured body parts nor on the benefits to which Ferguson should be entitled. The evidence showed he injured his right hand, right arm, right knee, and right shoulder. [R. p. 53, line 14-page 55, line 19]. He is not at MMI and requires additional medical treatment, 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, Petitioner respectfully requests the Court grant the Petition for Writ of Certiorari. This case presents novel issues concerning the employee-employer relationship in the internet based economy which should be heard by our highest Court. The Court should grant the Petition; reverse the decisions below and 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
June 22, 2015

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
JUN 22 2015
S.C. Supreme Court

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

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.

PROOF OF SERVICE

I certify that I am paralegal to Stephen B. Samuels and I have caused a copy of the **Petition for a Writ of Certiorari** and **Appendix** to be served by mailing a copy of the same in the United States mail, with sufficient postage affixed thereto and return address clearly marked on **June 22, 2015**, addressed as follows:

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