THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas
J. Ernest Kinard, Jr., Circuit Court Judge

Appellate Case No. 2014-002733

Samuel Washington, Jr., ... Respondent,

v.

South Carolina Electric and Gas Company; and
Emerson Electric Company d/b/a Emerson Network Power,
and/or Emerson Network Power, Defendants,

Of Whom South Carolina Electric and Gas Company . . . . . Appellant.

INITIAL BRIEF OF RESPONDENT

Charles T. Slaughter, Esquire
S. Kirkpatrick Morgan, Jr., , Esquire
WALKER MORGAN, LLC
135 East Main Street 5796
Post Office Box 949 (29071)
Lexington, South Carolina 29072
Telephone: (803) 359-6194
Facsimile: (803) 957-4584

Margie Bright Matthews, Esquire
Sabrina L. Williams, Esquire
BRIGHT MATTHEWS LAW FIRM, LLC
205 East Washington Street
Walterboro, South Carolina 29488
Telephone: (843) 549-6028
Facsimile: (843) 549-6107

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

COUNTER-STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in denying SCE&G's Motion for Summary Judgment on the grounds that the Respondent was, as a matter of law, not a statutory employee of SCE&G, when the preponderance of the evidence shows that: (a) the Respondent was performing major and specialized demolition/repair work, which was outside of the trade or business of SCE&G; (b) the demolition/repair work the Respondent was performing was not an "important" nor a "necessary, essential, and integral" part of SCE&G's business of providing electricity to customers; and (c) the specific demolition/repair work being performed by the Respondent had never been performed by SCE&G employees.

STATEMENT OF THE CASE

Pursuant to Rule 208(b)(2), SCACR, Respondent concurs with the procedural State of the Case set forth by Appellant South Carolina Electric and Gas (hereinafter "SCE&G" or "Appellant") in its Initial Brief, pp. 1-2.

STATEMENT OF FACTS

In September 2008, SCE&G entered into a master agreement with Emerson Electric Company d/b/a Emerson Network Power and/or Emerson Network Power ("Emerson"). Master Agreement. As part of that agreement, SCE&G contracted with Emerson to provide electrical equipment and services relating to the upgrade of Turbine No. 3 at SCE&G's Canadys Station power plant located in Colleton County, South Carolina ("Canadys"). Purchase Order Nos. FH-0100040103 and FH-0100040102. In turn, Emerson subcontracted with Applied Control Technology, Inc. ("ACT") for the provision of, among other things, all labor, supervision, materials and tools necessary to perform the demolition/installation work on Turbine No. 3. Purchase Order Number 4121009192 p. 1; Emerson Subcontract Terms and Conditions For Installation and Construction Services for Purchase Order Number 4121009192 ("Emerson Subcontract"); Attachment A ("Scope of Work") to Emerson Subcontract.

Respondent Samuel Washington, an electrician, was hired by ACT through the local chapter of the International Brotherhood of Electrical Workers and, on September 28, 2011, was assigned to demo/remove old electrical wires from an electrical panel box located on the valve that controlled Turbine No.3. Compl. ¶10; Wendell Polk Dep. 11:25 to 12:15. As Mr. Washington began removing the wires from the panel box, which he had been told were de-energized, he received a high-voltage electric shock. Compl. ¶10. As a result of the contact with SCE&G's energized wire(s) and the severity of the shock he received as the electric current passed through his body, the Plaintiff suffered serious and permanent injuries and damages. Compl. ¶14.

As a result of this incident, the South Carolina Department of Labor, Licensing and Regulation, Office of Occupational Safety and Health ("S.C. OSHA") opened an investigation and, on December 20, 2011, cited SCE&G for two (2) serious violations of the Occupational Safety and Health Regulations of the State of South Carolina. S.C. OSHA Documents.

ARGUMENT

I. The Trial Court Did Not Err in Denying SCE&G's Motion for Summary Judgment on the grounds that the Respondent Was, as a Matter of Law, Not a Statutory Employee of SCE&G.

The sole issue on appeal is whether the trial court correctly found the exclusivity provisions of the South Carolina Workers' Compensation Act inapplicable to this action. South Carolina courts have long recognized that no easily applied formula can be laid down for the determination of whether an individual is a statutory employee in a given case and, as such, "each case must be decided on its own facts." *Ost v. Integrated Prods., Inc.*, 296 S.C. 241, 244, 371 S.E.2d 796, 798 (1988).

To qualify as a statutory employee under the Workers' Compensation Act, an individual must be engaged in an activity that "is a part of [the employer's] trade, business or occupation." S.C.Code Ann. § 42-1-400. "A particular activity is part of the putative employer's 'trade, business or occupation if it (1) is an important part of the employer's business or trade; (2) is a necessary, essential, and integral part of the employer's business; or (3) has previously been performed by the employer's employees." *Cooke v. Palmetto Health Alliance,* 367 S.C. 167, 173, 624 S.E.2d 439, 442 (Ct.App. 2005) (citations omitted); *see also Hopkins v. Darlington Veneer Co.*, 208 S.C. 307, 311, 38 S.E.2d 4, 6 (1946)("[T]he guidepost is whether or not that which is being done is or is not a part of the general trade, business or occupation of the owner.").

As set forth more fully below, the preponderance of the evidence supports the trial court's finding that the demolition/repair work that the Respondent was performing at the time of the subject incident was not a part of SCE&G's business or trade. As such, the Court should affirm Judge Kinard's ruling that the Respondent was not a statutory employee of SCE&G.

A. Major, Specialized Repairs are Not Part of SCE&G's Trade or Business.

While precedent states it is "difficult to lay down any hard and fast rule" in statutory employment cases, one rule the South Carolina Supreme Court has established is that, "where repairs are major, specialized, ***or*** of the sort which the employer is not equipped to handle with its own work force, they are not part of the business." *Glass v. Dow Chemical Co.*, 325 S.C. 198, 201, 482 S.E.2d 49, 50-51 (1997) (emphasis added); *see also Raines v. Gould,* 288 S.C. 541, 543, 343 S.E.2d 655, 657 (Ct. App. 1986)

("Ordinarily construction work, such as building a factory structure or making electrical installations, is considered outside the trade or business of a manufacturer.").

At the time of his injuries, the Respondent was one of several ACT employees performing demolition work as part of a major repair/upgrade project on SCE&G's Canadys Turbine No.3. SCE&G employees have testified that the work the Respondent was performing was "major" and "specialized" repair work:

> Q. Okay. Stepping back a little bit, it's my understanding that during that time, in that September 2011 range, there was a project going on at the Canadys Station plant; is that correct?
> A. Yes.
> Q. What's your understanding as to the reason behind that? Like what was going on?
> A. We were doing an upgrade on our DCS system as well as control valves that control the steam going to the turbine which we use to turn the generator to generate the power. **It was a major, major upgrade changing the valves out and controls and pulling new wire in, replacing wire.**
> Q. So this wasn't just a routine maintenance thing, it was a major repair?
> A. Major, yes.

(Richard Wilson Dep. 10:23 to 11:13) (emphasis added).

> Q. You've already agreed that this was a major project in the eyes of SCE&G, a major work project?
> A. **Major work project.**
> Q. All right. And would you agree that upgrading a control system is specialized work?
> A. **It is specialized in that, yes, it is specialized.**

(Lawrence Purvis Dep. 42:18 to 42:24) (emphasis added).

In contrast to specialized repair work, routine maintenance work can sometimes be covered by the statutory employment doctrine. For example, in *Wheeler v. Morrison*

Machinery Co., 313 S.C. 440, 438 S.E2d 264 (1993), the court found the removal of asbestos was part of the defendant's routine "ongoing maintenance program" and therefore part of the defendant's "trade or business." According to the court, "[p]reventive maintenance...has always been and always will be an ongoing process." *Wheeler,* 313 S.C. at 443, 438 S.E.2d at 266. However, the testimony in this case shows that the work being performed by the Respondent was not routine maintenance; instead it was a specialized repair. For instance, according to documents obtained from S.C. OSHA, the demolition/upgrade/repair work being performed by the Respondent and other contractors and subcontractors on the date of the subject incident generally only takes place every thirty (30) to forty (40) years. S.C. OSHA Documents. Moreover, SCE&G employees have testified that this was not routine maintenance and, in fact, this specific demolition/repair work had never been done before on the subject equipment:

> Q. Okay. Do you have any knowledge as to whether any other SCE&G employees have ever done any type of work on that panel?
> A. I'm sure some of the other electricians have worked on that panel. I know they have as far as the switches.
> **Q. But as far as any sort of demo or pulling out wires or replacing the panel itself.**
> **A. Not that particular one, no.**

(Richard Wilson Dep. 14:10 to 14:18) (emphasis added).

> **Q. The project and the work that was being done on Unit 3, this wouldn't be considered routine maintenance, would it?**
> **A. No.**
> Q. This is, again, a major overhaul or repair?
> A. Yes.

(Richard Wilson Dep. 32:23 to 33:4) (emphasis added).

Q. Do you know if SCE&G has ever demolished, removed and upgraded that unit or units at Canadys at any time previous?
A. This particular unit?
Q. Yes, sir.
A. I would say no.

(Lawrence Purvis Dep. 12:24 to 13:4).

Q. All right. Would you agree that this was not routine maintenance that was going on at Canadys?
A. Yes.

(Lawrence Purvis Dep. 20:3 to 20:6).

Q. During your 13 years at SCE&G, were you ever assigned to work on this particular panel box?
A. I was.
Q. What kind of work would you be asked to do?
A. It had some limit switches inside the box. There was a shaft that came through the box for valve positioning and those switches occasionally would fail or get a little out of adjustment and then we would go in and make an adjustment.
Q. So would it be fair to call that routine maintenance?
A. Yeah.
Q. But as far as removing, replacing the wires or actually removing, replacing the box itself, you were never asked to do that?
A. No, sir.

(Wendell Polk Dep. 16:24 to 17:16) (emphasis added).

Q All right. All right. And are you aware -- it's our understanding that this is the first time these controls were being updated with state of the art equipment -- controls since the Canadys Plant had come on line 40, 50 years ago. Is that your understanding?
A Yes. As far as the full update, yes.
Q All right. **So there's no doubt that routine maintenance had ever done what Emerson was doing on this project?**

A Correct.

(Joe Foster Dep. 28:15 to 28:24) (emphasis added); *see also* Richard Wilson Dep. 11:11 to 11:13 ("Q. So this wasn't just a routine maintenance thing, it was a major repair? A. Major, yes.")).

Finally, a SCE&G employee has testified that this type of specialized work is typically done by independent contractors:

> Q. During your time at SCE&G, was there ever a time when a project of this scale was undertaken at the Canadys plant?
> A. Yeah. I mean, there was stuff like that -- I'm not exactly clear on what you're asking. Did the the company do it by itself or --
> Q. As far as the six-week project that was going on during this time.
> A. Oh, yeah. I mean, different -- there's different projects over the years. They'll do upgrades on different systems at different times.
> **Q. And is that something usually, again, that -- is it something SCE&G would do themselves or would it be contracted out to --**
> **A. Generally contracted out.**

(Wendell Polk Dep. 11:5 to 11:19) (emphasis added).

The above testimony of SCE&G's own employees establishes that the work the Respondent was performing was not routine maintenance, but rather, was a one-time major equipment replacement/upgrade of the kind that SCE&G regularly employs outside contractors to complete. Under *Glass,* such testimony precludes any ruling that the Respondent was a statutory employee of SCE&G.

B. The Demolition/Repair Work Performed by the Plaintiff was not an "Important" nor a "Necessary, Essential, and Integral" Part of SCE&G's Business of Providing Electricity to Customers.

SCE&G contends that because the equipment the Respondent was demolishing is used to power the generator SCE&G uses to produce electricity, such work should be considered an important, necessary, essential and integral part of SCE&G's business of providing electricity to customers.

However, if demolishing/upgrading this particular equipment was an important part of the business of producing and providing electricity, it would be expected to have been done in some form of routine or regular manner. That such work generally takes place every 30-40 years and is done by outside contractors that have no role in the production or providing of electricity shows that the task is not an "important" part of the business of providing electricity to customers. As explained by Chief Judge Sanders in *Raines v. Gould, Inc.*:

> Every manufacturer must have a plant, but this fact alone does not make the work of constructing a plant a part of the trade or business of every manufacturer who engages a contractor to construct a plant. Otherwise, the employees of every contractor so engaged would be the statutory employees of every such manufacturer.

288 S.C. at 547, 343 S.E.2d at 659.

Moreover, in *Dickerson v. Eastman Kodak Company*, 569 F. Supp. 1221 (D.S.C. 1983), the court addressed a situation where the contractor's work was "necessary" and even "absolutely indispensable" for the defendant business to operate, but the court still found the work was still not part of the "trade or business" of the defendant if it is not work the direct employees would regularly perform. Quoting from Larson's Workmen's Compensation Law § 49.12 (1982), the court held:

> From these cases it will be readily seen that the test is not one of whether the subcontractor's activity is useful, necessary, or even absolutely indispensable to the statutory employer's business, since, after all, this could be said of practically any repair, construction, or transportation

> service. **The test ... is whether this indispensable activity is, in that business, normally carried on through employees rather than independent contractors.**

Id. (Emphasis added). Under Professor Larson's analysis, even assuming, *arguendo*, that SCE&G had to demolish/repair/upgrade the subject electrical panel box located on the valve that controlled Turbine No.3 at Canadys Station to be able to continue to power the generator SCE&G utilizes to generate electricity, that fact does not transform Respondent's demolition work into part of the "trade or business" of "providing electricity to customers in South Carolina".

In *Abbot v. The Limited, Inc.*, 338 S.C. 161, 526 S.E.2d 513 (2000), the South Carolina Supreme Court used this same logical approach to hold that even though the transportation of goods was absolutely "essential" to the defendant's business, the subcontractor's employee was not a statutory employee because "[t]he mere fact that transportation of goods to one's place of business is essential for the conduct of the business does not mean that the transportation of the goods is a part or process of the business." *Abbott*, 338 S.C. at 163, 526 S.E.2d at 514. Chief Justice Toal in *Olmstead v. Shakespeare*, 354 S.C. 421, 426, 581 S.E.2d 483, 486 (2003) reiterated this point in holding:

> [T]ransportation of goods is important to nearly all businesses, and, that transportation of goods by a common carrier alone, without something more, does not qualify as "part of [the owner's] trade, business, or occupation" under any of the three established tests for statutory employment.

Under our Supreme Court precedent, even though it may have been "absolutely essential," for SCE&G to demolish and replace the subject electrical panel

box, that fact does not change SCE&G's entire *persona* as a provider of electricity into a demolition/construction company.

As such, the particular work performed by the Respondent in this case was neither an important part of SCE&G's business or trade, nor a necessary, essential, and integral part of SCE&G's business.

C. The Specific Repair Work Being Performed by the Plaintiff Had Not Been Done by SCE&G Employees Before.

The third and final factor considered in determining the statutory employment issue is whether or not "the **identical activity** performed by the subcontractor has been performed by employees of the owner." *Voss v. Ramco, Inc.*, 325 S.C. 560, 569, 482 S.E.2d 582, 586 (1997) (emphasis added). As set forth above, on the date of the incident which forms the subject of this action, the Respondent was performing demolition work on an electrical panel box that mounted to a control valve. SCE&G employees have testified as follows regarding the subject panel box:

> Q. It's my understanding, and I'll represent to you he's -- he will testify that that day he was assigned to remove some wires from a panel pox. Are you familiar with the panel box?
> A. I am.
> Q. Was that panel box being replaced?
> A. Yes, sir. It was completely going away.
> Q. I assume they were upgrading it, putting a new one in?
> A. Yes. It was attached to that large valve that was completely removed.
> **Q. To your knowledge, had that panel box ever been replaced during your tenure?**
> **A. Oh, no, sir. It was definitely 40 years old.**

(Wendell Polk Dep. 11:25 to 12:15) (emphasis added).

Q. At that time, can you give me a rough estimate of how many SCE&G employees were at the plant on a daily basis, how many people were employed there?
A. At the plant would've been around 50.
Q. Among those 50, did SCE&G employ, at that time, anyone who would be responsible for doing any sort of demolition work?
A. No, sir.

(Wendell Polk Dep. 16:3 to 16:11) (emphasis added).

Q. Okay. During that time, did you ever have occasion to work on the particular panel box involved in this case?
A. That particular one, maybe once or twice.
Q. What type of work would you have done on that panel box?
A. It might have been checking the switches in it to tell if the valves open and closes.
Q. But nothing as far as demoing it or taking it apart or replacing it?
A. No.

(Richard Wilson Dep. 13:12 to 13:24) (emphasis added).

Q. Okay. Do you have any knowledge as to whether any other SCE&G employees have ever done any type of work on that panel?
A. I'm sure some of the other electricians have worked on that panel. I know they have as far as the switches.
Q. But as far as any sort of demo or pulling out wires or replacing the panel itself.
A. Not that particular one, no.

(Richard Wilson Dep. 14:10 to 14:18) (emphasis added).

Q. Do you know if SCE&G has ever demolished, removed and upgraded that unit or units at Canadys at any time previous?
A. This particular unit?
Q. Yes, sir.
A. I would say no.

(Lawrence Purvis Dep. 12:24 to 13:4).

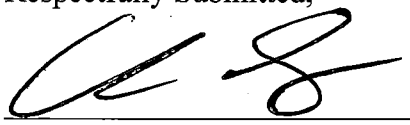
While the above-referenced testimony of the SCE&G employees establishes that they may have performed routine maintenance on the subject panel box in the past, none of the employees had ever, or knew of any other employees who had ever, performed the specific work that the Respondent was doing at the time of his injuries.

Thus, the preponderance of the evidence supports the trial court's determination that the Respondent was not a statutory employee of SCE&G.

CONCLUSION

For these reasons, as well as any other grounds appearing in the record, this Court should affirm the decision of the circuit court denying SCE&G's Motion for Summary Judgment. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

Respectfully Submitted,



Charles T. Slaughter, Esquire
S. Kirkpatrick Morgan, Jr., , Esquire
WALKER MORGAN, LLC
135 East Main Street 5796
Post Office Box 949 (29071)
Lexington, South Carolina 29072
Telephone: (803) 359-6194
Facsimile: (803) 957-4584

Margie Bright Matthews, Esquire
Sabrina L. Williams, Esquire
BRIGHT MATTHEWS LAW FIRM, LLC
205 East Washington Street
Walterboro, South Carolina 29488
Telephone: (843) 549-6028
Facsimile: (843) 549-6107

ATTORNEYS FOR RESPONDENT

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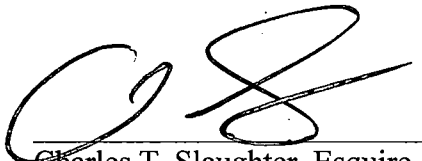
South Carolina Electric and Gas Company; and
Emerson Electric Company d/b/a Emerson Network Power,
and/or Emerson Network Power, Defendants,

Of Whom South Carolina Electric and Gas Company . . . . . Appellant.

PROOF OF SERVICE

I certify that I have served Respondent's Initial Brief on Appellant South Carolina Electric and Gas Company by depositing a copy of it in the United States Mail, postage prepaid, on June 29, 2015, addressed to its attorneys of record, John A. Massalon and I. Ryan Neville, Wills Massalon & Allen, LLC, Post Office Box 859, Charleston, South Carolina 29402, and that the same was served on Defendant Emerson Electric Company d/b/a Emerson Network Power, and/or Emerson Network Power by depositing a copy of it in the United States Mail, postage prepaid, on June 29, 2015, addressed to its attorneys of record, H. Michael Bowers, Smith Moore Leatherwood, LLP, 25 Calhoun Street, Suite 250, Charleston, South Carolina 29401.

June 29, 2015.



Charles T. Slaughter, Esquire
S. Kirkpatrick Morgan, Jr., , Esquire
WALKER MORGAN, LLC
135 East Main Street 5796
Post Office Box 949 (29071)
Lexington, South Carolina 29072
Telephone: (803) 359-6194
Facsimile: (803) 957-4584

Margie Bright Matthews, Esquire
Sabrina L. Williams, Esquire
BRIGHT MATTHEWS LAW FIRM, LLC
205 East Washington Street
Walterboro, South Carolina 29488
Telephone: (843) 549-6028
Facsimile: (843) 549-6107

ATTORNEYS FOR RESPONDENT

Walker Morgan
ATTORNEYS AT LAW
William P. Walker, Jr. ◆ S. Kirkpatrick Morgan, Jr.*
Charles T. Slaughter+ ◆ William P. Walker, III

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SC Court of Appeals

June 29, 2015

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Samuel Washington, Jr. v. South Carolina Electric and Gas Company, Emerson Electric Company d/b/a Emerson Network Power and/or Emerson Network Power
Appellate Case No.: 2014-002733

Dear Ms. Kitchings:

Enclosed herewith please find an original and one (1) copy of the following documents relating to the above-referenced matter:

1. Initial Brief of Respondent;
2. Proof of Service of Respondent's Initial Brief;
3. Respondent's Designation of Matter to be Included in the Record on Appeal;
4. Proof of Service of Respondent's Designation of Matter to be Included in the Record on Appeal; and
5. Certificate of Counsel.

By copy of this letter, I am herewith serving copies of the foregoing upon all counsel of record. Thank you for your assistance with this matter and if you have any questions or need additional information, please do not hesitate to contact me.

With kindest personal regards, I am

Sincerely yours,

WALKER MORGAN, LLC

Charles T. Slaughter

CTS/
Enclosures: As Stated

cc: *(all via first class mail)*
John A. Massalon, Esquire
I. Ryan Neville, Esquire
H. Michael Bowers, Esquire