THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

WCC File No. 1023143
Appellate Case No. 2015-001330

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

George Ferguson ..... Petitioner.

v.

New Hampshire Insurance Company, Carrier for AMERCO/U-HAUL International, Sean Unterkoefler d/b/a United Stand Moving,
Employer, and the S.C. Workers' Compensation
Uninsured Employers' Fund ..... Respondents.

RESPONDENTS' RETURN TO
PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

This appeal arises out of a workers' compensation claim filed by Petitioner George Ferguson on April 5, 2012, naming Respondent United Stand Moving and eMove, Inc. as his employers and New Hampshire Insurance Company and the South Carolina Uninsured Employers' Fund ("SCUEF") as insurance carriers. Petitioner alleges he suffered injuries to his right shoulder, right hand, right arm and right knee on August 21, 2010, while employed by Sean Unterkoefler d/b/a United Stand Moving ("Unterkoefler"). Unterkoefler did not have workers' compensation insurance.

The case was heard before the Single Hearing Commissioner on July 12, 2012. In a November 19, 2012 order, the Single Hearing Commissioner determined, in pertinent part: (1) Petitioner failed to carry his burden of proving he was an employee of Unterkoefler; (2) Petitioner failed to carry his burden of proving Unterkoefler regularly employed four or more employees; and (3) eMove was not the statutory employer of Petitioner. Petitioner never conducted any discovery before the hearing to prove the existence of an employment relationship with Unterkoefler or eMove.

Petitioner filed an appeal with the South Carolina Workers' Compensation Appellate Panel ("the Appellate Panel") on December 30, 2012. The Appellate Panel heard arguments on May 20, 2013. By order dated August 7, 2013, the Appellate Panel affirmed the Single Hearing Commissioner's Order in toto.

Petitioner then appealed to the South Carolina Court of Appeals. The Court of Appeals affirmed the Appellate Panel and held the panel properly found: (1) eMove was not Petitioner's statutory employer; (2) Petitioner failed to prove he was an employee of Unterkoefler; and (3) Petitioner failed to prove Unterkoefler regularly employed four or more employees, and thus, he

was not an uninsured employer subject to the Act. Ferguson v. New Hampshire Ins. Co., 412 S.C. 203, 771 S.E.2d 851 (Ct. App. 2015). Petitioner filed a petition for rehearing, which the Court of Appeals denied. (R. 45). This petition for writ of certiorari followed.

STATEMENT OF THE FACTS

RELATIONSHIP OF THE PARTIES

Sean Unterkoefler d/b/a United Stand Moving is owned by sole proprietor Sean Unterkoefler. Unterkoefler's moving services included loading and unloading, packing and unpacking, cleaning help, and driving help. (R. 188, l. 5 – 89, l. 17). Because Unterkoefler provided only a labor service to its customers, he did not have his own moving truck or equipment. (R. 188, ll. 11-16). He used the rental moving trucks, blankets, dollies, and any other moving materials supplied by his customers. (R. 188).

Unterkoefler did not have any employees. He mostly worked alone, but he found friends, such as Petitioner, "here and there" to help if he had more than one job at a time. (R. 188, ll. 8-17). Petitioner worked full-time as a waiter at Outback Steakhouse. (R. 94, line 22-R. 95, line 3). Petitioner only performed a handful of moving jobs for Unterkoefler by helping with loading and unloading trucks. (R. 194). When Unterkoefler was hired for a moving job that he could not perform, he would pass along the lead for the moving job and the customer's information to Petitioner. (R. 194). Petitioner could hire his own help to complete the job. (R. 194). When Petitioner completed the job, Unterkoefler sent the customer's full payment to Petitioner. (R. 194).

Unterkoefler signed up for an account through eMove to advertise and obtain moving referrals. (R. 186, ll. 21-25; R. 191, ll. 5-25). eMove[1] operates an internet marketplace where customers renting moving trucks can search for and hire local moving companies to assist with loading and unloading rental trucks. (R. 187, l. 18; R. 189 ll. 2-23). eMove merely provides a forum or referral source for individuals or businesses to search for local movers to schedule moving services.

Unterkoefler entered into the "eMove Moving Help - Moving Helper Agreement" ("the Agreement") before he was allowed to advertise on eMove's MarketPlace. (R. 192; R. 280-89). The Agreement provided eMove was a "**neutral venue** for the connection between [Unterkoefler] and the Customer." (R. 281) (emphasis added). The Agreement provided a set of responsibilities for Unterkoefler's conduct on the internet MarketPlace, such as prohibiting him from improperly posting or influencing customer ratings and requiring him to fully disclose his rates, services, and policies in his eMove profile. (R. 280-89).

Petitioner never presented any evidence before the Single Commissioner, the Appellate Panel, or the Court of Appeals that eMove contracted with anyone to move or engaged in any moving itself. As Petitioner conceded at oral argument before the Court of Appeals, the only evidence in the record on this issue is the Agreement. However, there are no provisions in the Agreement where eMove contracted with Unterkoefler to provide moving services. (R. 280-89). Unterkoefler retained complete control and flexibility with providing moving services, determining his coverage area, and contacting customers. (R. 280-89). Unterkoefler set his own availability for days and times he could perform moving services, his own rates, and coverage area. (R. 189).

[1] Respondent eMove, Inc. is a wholly owned subsidiary of U-Haul International, Inc. insured by Respondent New Hampshire Insurance.

Customers created accounts on movinghelp.com in which they were able to view a list of local movers, select Unterkoefler's moving company, the nature of the services needed, and the moving date and time. (R. 187, ll. 18-25). When a customer scheduled a service, Unterkoefler received a text notification with the customer's booking information. (R. 206, ll. 8-21). Unterkoefler called the customer to verify the time of the job, nature of the job, services requested, date, and time. (R. 188, ll. 17-25). Unterkoefler and his friends drove their personal vehicles to each location as the customer provided the moving truck. (R. 188, ll. 24-25; R. 196, ll. 15-25).

The customer controlled payment for the job at all times through direct deposit akin to PayPal. (R. 187, 281-82). Upon booking an appointment, the customer submitted their credit card information and received a payment code. (R. 187). When the moving job was completed to the satisfaction of the customer, the customer provided Unterkoefler with the payment code. (R. 187, ll. 17-25). Unterkoefler could only receive payment for his services if the customer gave him their payment code. (R. 187, ll. 17-25; R. 281-82). Unterkoefler could then log on to his movinghelp.com account and enter the payment code for the funds to be released into his account. (R. 188, ll. 17-25). After the customer paid Unterkoefler, eMove received a "MarketPlace Fee," which allowed Unterkoefler to continue using eMove's website for marketing his company and obtaining referrals. (R. 187, 280-81).

PETITIONER'S ALLEGED INJURIES

Petitioner sustained an injury to his right hand on August 21, 2010, while moving a washing machine down a flight of stairs. Petitioner was admitted to New Hanover Regional Medical Center on August 21, 2010, with a right hand injury. (R. 126). No other injuries were noted. (R. 125-30). Dr. Robert S. Leak, of Carolina Bone and Joint Surgery Center, performed

surgery on his small right finger. (R. 140-41). Dr. Matthew D. Welsch, of Pee Dee Orthopaedics, performed an independent medical examination on March 26, 2012. Dr. Welsch noted the surgical pins placed in Petitioner's hand were removed four to six weeks following his surgery. (R. 161-62). X-rays revealed well-healed fractures and normal MP and IP joints. (R. 162).

At no time did Petitioner mention right shoulder pain. The only medical record referencing injury to the right shoulder is nearly two years post-accident on July 5, 2012. (R. 164).

STANDARD OF REVIEW

The determination of whether a worker is a statutory employee is jurisdictional, and therefore, the question on appeal is one of law. Edens v. Bellini, 359 S.C. 433, 440, 597 S.E.2d 863, 867 (Ct. App. 2004). Similarly, the determination of whether a claimant is an employee or independent contractor is a jurisdictional issue and a question at law. Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 299, 676 S.E.2d 700, 702 (2009). "When deciding questions of law, such as this one, this court has the power and duty to review the entire record and decide the jurisdictional facts in accord with its view of the preponderance of the evidence." Johnson v. Jackson, 401 S.C. 152, 159, 735 S.E.2d 664, 667 (Ct. App. 2012).

LAW/ANALYSIS

I. Petitioner Failed to Present Any Reason for this Court to Grant the Petition for a Writ of Certiorari

Initially, Respondents argue Petitioner failed to prove he met any of the criteria for this Court to grant his Petition for a Writ of Certiorari.[2] Notably, Petitioner has not presented any novel questions of law and the Court of Appeals' decision rests on established South Carolina jurisprudence. The Court of Appeals did not issue a dissent in its decision. Finally, as stated throughout this Return, the Court of Appeals' decision aligns with the prior decisions of this Court. Accordingly, Respondents respectfully requests this Court deny the Petition for a Writ of Certiorari.

II. The Court of Appeals Correctly Found Petitioner was Not a Direct Employee of Sean Unterkoefler d/b/a United Stand Moving

Because Unterkoefler did not make an appearance in this case and the South Carolina Uninsured Employers' Fund did not file a brief before the Court of Appeals, eMove responds to Petitioner's arguments and asserts Petitioner failed to prove an employee and employer relationship with Unterkoefler.

Petitioner bears the burden of proving the existence of an employer and employee relationship, and this proof must be made by the greater weight of the evidence. See Lewis v. L.B. Dynasty, 411 S.C. 637, 641, 770 S.E.2d 393, 395 (2015). Generally, the test to determine the existence of an employer and employee relationship is whether the alleged employer has "the

[2] Rule 242, of the South Carolina Appellate Court Rules, provides a petition for a writ of certiorari should be granted in sound judicial discretion only where: (1) there are novel questions of law; (2) there is a dissent in the decision of the Court of Appeals; (3) the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court; (4) there are substantial constitutional issues directly involved; or (5) there is a federal question included and the Court of Appeal's decision conflicts with a decision of the United States Supreme Court.

right and authority to control and direct the particular work or undertaking, as to the manner or means of its accomplishment." Young v. Warr, 252 S.C. 179, 189, 165 S.E.2d 797, 802 (1969). There are four factors to determine the right of control, including:

(1) direct evidence of the right or exercise of control;

(2) method of payment;

(3) furnishing of equipment; and

(4) right to fire.

Shatto v. McLeod Reg'l Med. Ctr., 406 S.C. 470, 475-76, 753 S.E.2d 416, 419 (2013).

Each factor is weighed evenly and the mere presence of one factor indicating an employee relationship is not dispositive of the inquiry. Id. The analysis of these factors is necessarily driven by the particular facts of the case. Lewis, 411 S.C. at 646, 770 S.E.2d at 398.

RIGHT TO OR EXERCISE OF CONTROL

A business owner does not create an employer and employee relationship with an independent contractor simply because the owner exercises some control. Wilkinson, 382 S.C. at 302, 676 S.E.2d at 703.

It is the right of control, not the actual exercise of control, which is dispositive of this issue. Id. at 299, 676 S.E.2d at 702. "The right to control does not require the dictation of the thinking and manner of performing the work. It is enough if the employer has the *right* to direct the person by whom the services are to be performed, the time, place, degree, and amount of said services." Shatto, 406 S.C. at 477, 753 S.E.2d at 420. In Wilkinson, this Court found a trucking company did not exercise the right of control over a driver by merely supplying the potential driving assignments and providing the pickup location because the driver retained the right to refuse any assignment. 382 S.C. at 301-02, 676 S.E.2d at 703. Further, when the driver agreed

to the assignment and made the pickup, he exercised complete control over the delivery and chose his travel routes without direction from the trucking company. Id. at 302, 676 S.E.2d at 703. This Court concluded these facts leaned in favor of an independent contractor relationship between the trucking company and the driver. Id.

With regard to the first prong of the test, the facts lean in favor of an independent contractor relationship. Petitioner worked full-time as a waiter at Outback Steakhouse. (R. 94, line 22-R. 95, line 3). He only performed a handful of moving jobs for Unterkoefler by helping with loading and unloading trucks, which were rented by customers. Unterkoefler did not exercise control over Petitioner's work. Similar to Wilkinson, where the trucking company merely provided the assignment information to the driver, Unterkoefler merely provided the customer's information to Petitioner. (R. 193-94). 382 S.C. at 301-02, 676 S.E.2d at 703. Additionally, Petitioner retained the right to turn down the moving jobs. See id. (holding a driver was an independent contractor when he retained the right to refuse assignments). The customer dictated the date, time, and location of the job. (R. 194). After Unterkoefler supplied Petitioner the lead to a moving job, Petitioner could hire his own help to complete the job.[3] (R. 194). When Petitioner completed the job, Unterkoefler sent the customer's full payment to Petitioner. (R. 194). Thus, Petitioner exercised the right of control over completing the moving jobs. See Wilkinson, 382 S.C. at 301-02, 676 S.E.2d at 703. Accordingly, the nature of the relationship between Unterkoefler and Petitioner with regard to the right and exercise of control weighs in favor of finding an independent contractor relationship.

[3] Unterkoefler testified, "I gave [Petitioner] the job, gave him the address, basically gave him the lead to the job and told him he could have the funds to the job . . . and if he had someone to help him, he could get someone to help him, and it was his business what he wanted to do with the money and how he wanted to pay his help." (R. 194).

FURNISHING OF EQUIPMENT

"When it is the employer who furnishes the equipment, the inference of right of control is a matter of common sense and business." Shatto, 406 S.C. at 479, 753 S.E.2d at 421. "The genesis of this consideration is that whomever bears the risk of the capital in any investment would logically exert the most control over how that investment is used." Lewis, 411 S.C. at 644, 770 S.E.2d at 396. Citing to Professor Larson, this Court explained:

> 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 $100,000 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 or her investment ....
>
> This being the rationale, the rule should not be applied to items of equipment whose size and value are not so large as to provide this incentive for control and for efficient employment of capital.

Id. at 643-44, 770 S.E.2d at 396 (citing 3 Arthur Larson & Lex. K. Larson, Larson's Workers' Compensation Law § 61.01 (2013)).

In Lewis, this Court found the furnishing of equipment factor weighed in favor of an employee relationship because the strip club bore the risk of the capital investment in the equipment used by the claimant stripper to perform her work. 411 S.C. at 644, 770 S.E.2d at 397. Although the stripper did not bring any other equipment to the strip club other than her costume, the club supplied her necessary performance space, including an area for V.I.P dances, a stage with a pole, tables, and a sound system. Id. Because the strip club bore the risk of the capital investment in the equipment used by the stripper, this Court found in favor of an employee relationship. Id.

Here, the furnishing of equipment factor weighs in favor of an independent contractor relationship. Unterkoefler provided only a labor service to customers. He did not supply a

moving truck, moving equipment, or a company uniform. (R. 188). The customer supplied the rental truck and any equipment necessary to complete the move. (R. 188). Contrary to Petitioner's assertion that an "upstream employer"[4] of Unterkoefler supplied the moving trucks, Unterkoefler testified that customers would sometimes rent trucks from Penske or Budget.[5] (R. 189). Additionally, Petitioner used his own transportation to travel to and from the customer's residence. (R. 190). Thus, unlike the strip club in Lewis, Unterkoefler did not bear the risk of capital investment in any equipment. See id. Accordingly, this factor weighs in favor of an independent contractor relationship.

METHOD OF PAYMENT

Typically, when examining this prong, Courts look to whether the claimant was paid by the job or by the hour and how the claimant filed his taxes. Lewis, 411 S.C. at 645, 770 S.E.2d at 397. Paying by the job and/or sharing profits and expenses with the alleged owner is indicative of an independent contractor relationship, not employee status. McDowell, et al. v. Stilley Plywood Co., et al., 210 S.C. 173, 41 S.E.2d 872 (1947); Tharpe, 254 S.C. at 200, 174 S.E.2d at 399. This factor weighs in favor of finding Petitioner was an independent contractor because Petitioner was paid by the job and split his earnings with the number of men in the moving crew on that particular day. (R. 193). If Unterkoefler provided a moving job lead to Petitioner, he gave Petitioner the customer's entire payment of $174. (R. 194). Petitioner even concedes this factor weighs in favor of an independent contractor relationship. (Pet. 16).

[4] As stated in Argument IV and Argument V of this Return, eMove was not Petitioner's statutory employer.

[5] Arguably, the customer bore the responsibility of the moving trucks and the equipment when the customer rented it from the moving company of their choosing.

RIGHT TO FIRE

This Court has found the right to fire prong of the test the "most problematic" because a putative employer has the ability to fire both employees and independent contractors. Shatto, 406 S.C. at 481, 753 S.E.2d at 422. "The power to fire, it is often said, is the power to control. 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." Id.

In Lewis, this Court found a stripper was an employee of a strip club because (among other factors) the right to fire factor weighed in favor an employee relationship. 411 S.C. at 646, 770 S.E.2d at 398. The strip club could terminate the stripper for violations of the company rules and could be prevented from working at the Club's discretion. Id. There was also no indication the stripper had any right to relief if the strip club terminated her. Id. Based on these particular facts, this Court found the right to fire factor weighed in favor of an employee relationship.

The particular facts of this case do not weigh in favor of an employee relationship. Id. (providing the determination of the existence of an employee relationship is necessarily driven by the particular facts of the case). Unterkoefler and Petitioner had a very loosely organized relationship. Unterkoefler could choose someone other than Petitioner for a job, and Petitioner could decline or refuse to perform a job. (R. 99). Petitioner only performed a handful of moving jobs for Unterkoefler. Thus, Unterkoefler did not have a "right to fire" Petitioner because both Unterkoefler and Petitioner could choose whether they wished to work together on a moving job.

III. The Court of Appeals Properly Held Unterkoefler was Not Subject to the Workers' Compensation Act Because He Did Not Regularly Employ Four or More Employees

The threshold question in determining whether a claim is properly before the South Carolina Workers' Compensation Commission is whether the employer has four or more employees regularly employed in the same business within South Carolina. If not, the employer is exempt. S.C. Code Ann. § 42-1-360. It is also well-settled that subcontractors and statutory employees may be included in fulfilling the requirement. Ost v. Integrated Prods., Inc., 296 S.C. 241, 371 S.E.2d 796 (1988).

Section 42-1-360(2) provides the Workers' Compensation Act does not apply to:

> [A]ny person who has regularly employed in service less than four employees in the same business within the State or who had a total annual payroll during the previous calendar year of less than three thousand dollars regardless of the number of persons employed during that period.

"Regularly employed" means "employment of the same number of persons throughout the period with some constancy." Hernandez-Zuniga v. Tickle, 374 S.C. 235, 257, 647 S.E.2d 691, 702 (Ct. App. 2007). "Where employment cannot be characterized as permanent or periodically regular, but occurs by chance, or with the intention and understanding on the part of both employer and employee that it shall not be continuous, it is casual." Id. at 248, 647 S.E.2d at 697-98. In determining the relevant time period, the Commission should consider "(1) the employer's established mode of operation; (2) whether the employer generally employs the jurisdictional number at any time during his operation; and (3) the period during which employment is definite and recurrent rather than occasional, sporadic, or indefinite." Id. at 257, 647 S.E.2d at 702. The employer's established plan of operation, the relevant time period, and both the duration and regularity of occurrence are important factors in determining whether the employer regularly employed four or more employees. Id. at 249, 647 S.E.2d at 698.

The Court of Appeals correctly found Unterkoefler did not "regularly" employ four or more employees under the definition provided in Hernandez-Zuniga. See id. (defining "regularly employed" as "employment of the same number of persons throughout the period with some constancy"). Contrary to Petitioner's argument, the Court of Appeals did consider the critical time periods of July and August 2010 when determining Unterkoefler did not regularly employ more than four employees. (Pet. 18). See Ferguson, 412 S.C. at 214, 771 S.E.2d at 857. Unterkoefler testified at any given time, the most people performing jobs were himself and three others.[6] (R. 194). During the critical time periods in July and August 2010, Unterkoefler only needed himself and three others a total of four out of fifty-four moving jobs.[7]

Petitioner failed to provide any evidence showing Unterkoefler **regularly** employed four or more employees. (Pet. 18-21). Rather, Petitioner incorrectly claims Unterkoefler was subject to the Workers' Compensation Act because the customer surveys on eMove's website mention a variety of employees by name and Petitioner could name at least three other people who helped Unterkoefler with moving jobs. (Pet. 18; R. 241-52). Regardless of the number of employees Petitioner may name, Petitioner's argument misses the mark because he cannot show Unterkoefler **regularly** employed four or more of these workers.

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[6] Pursuant to section 42-1-130 of the South Carolina Code, Unterkoefler did not count in the calculation of the number of employees.

[7] Of the twenty-two jobs completed in July 2010, United Stand Moving's schedule showed only one time where two jobs were completed at the same time—the morning of July 22. (R. 193). Thus, in July 2010, Unterkoefler needed himself and three others to perform the moving jobs only one time, and there is no evidence Unterkoefler ever needed four or more employees in July 2010. (R. 193). Similarly, of the thirty-two jobs completed in August 2010, United Stand Moving's schedule shows only three times where a conflict required two jobs to be performed at the same time: the afternoon of August 5 and the mornings of August 21 and 30. (R. 193). Thus, there were only three occasions in August 2010 where Unterkoefler needed himself and three others to perform the moving jobs. There is no evidence Unterkoefler ever needed four or more employees in August 2010.

The customer surveys show Unterkoefler sporadically hired help to complete moving jobs. See id. at 248, 647 S.E.2d at 697-98 (stating if employment is by chance or with the understanding that it shall not be continuous, the employment is casual, not regular). Unterkoefler mostly worked alone, but he found friends "here and there" to help if he had more than one job at a time. (R. 188). Thus, the evidence in the record only supports a finding that Unterkoefler did not regularly employ four or more employees. See id. at 249, 647 S.E.2d at 698. Accordingly, the Court of Appeals correctly determined Unterkoefler was not subject to the Act.

IV. The Court of Appeals Correctly Held Petitioner was Not a Statutory Employee of eMove.

A claimant is not entitled to an award under the Workers' Compensation Act unless an employment relationship existed at the time of the alleged injury. Murray v. Aaron Mizell Trucking Co., 286 S.C. 351, 354, 334 S.E.2d 128, 129 (1985). Petitioner conceded he was not a direct employee of eMove. Thus, the initial issue is whether eMove has "owner" liability under section 42-1-400 of the South Carolina Code (2015). Section 42-1-400 provides:

> When any person, in this section and Sections 42-1-420 and 42-1-430 referred to as "owner," undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section and Sections 42-1-420 to 42-1-450 referred to as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this title which he would have been liable to pay if the workman had been immediately employed by him.

If eMove has "owner" liability under section 42-1-400, eMove would be deemed Petitioner's "statutory employer" and liable for workers' compensation. See Parker v. Williams & Madjanik, Inc., 275 S.C. 65, 72, 267 S.E.2d 524, 528 (1980).

The determination of whether "owner" liability under section 42-1-400 will attach to eMove is a two-step analysis. Harrell v. Pineland Plantation, Ltd., 337 S.C. 313, 326, 523 S.E.2d 766, 773 (1999). First, workers' compensation liability does not attach to eMove unless it qualifies as a business under the Act. Id. Second, Petitioner's work must have constituted part of eMove's "trade, business, or occupation." Id. Here, the analysis of whether eMove was Petitioner's statutory employer turns on the second prong of this analysis.

"Owners" are treated as statutory employers for injuries related to activities that:

(1) are an important part of the owner's business or trade;

(2) are a necessary, essential, and integral part of the owner's business; **or**

(3) have previously been performed by the owner's employees.

Glass v. Dow Chemical, 325 S.C. 198, 201, 482 S.E.2d 49, 50 (1997). If the activity at issue meets even **one** of these three criteria, the injured employee qualifies as the statutory employee of "the owner." Id.

In Murray, the Court of Appeals held a referral source was not a statutory employer of an injured worker. 286 S.C. at 356, 334 S.E.2d at 131. There, a lumber manufacturer arranged for a contract logger to cut and haul timber to the lumber manufacturer's plant. Id. at 353, 334 S.E.2d at 129. When the contract logger needed help with transporting timber to the lumber manufacturer's plant, the contract logger would call the lumber manufacturer who would send a hauler to transport the timber. Id. The lumber manufacturer paid the hauler from the contract logger's gross earnings. Id. While transporting lumber, one of the hauler's drivers was injured by a fallen log. Id. The hauler did not have workers' compensation coverage, so the driver filed a claim for workers' compensation with the lumber manufacturer. Id.

The Murray Court determined the lumber manufacturer was not the statutory employer of the injured worker because the lumber manufacturer merely served as a referral source for arranging the hauler to transport lumber for the contract logger. Id. at 356, 334 S.E.2d at 131. Further, the Court held the lumber manufacturer's payment to the hauler on behalf of the contract logger and from the contract logger's gross earnings was merely performed as a convenience for the contract logger and to ensure a hauler did not have to track down different loggers each week for hauling fees. Id. The Court also found the lumber manufacturer had little actual control over the injured worker except to direct him where to go to pick up timber to haul. Id.

The Court of Appeals correctly found eMove was not Petitioner's statutory employer. Ferguson, 412 S.C. at 211, 771 S.E.2d at 856. The Court of Appeals held actual moving was not an important part of eMove's trade of business because eMove's business was to match customers with movers. Id. Further, the Court of Appeals found Petitioner did not meet the "necessary, essential, and integral part of the business" test because he did not present any evidence eMove contracted with anyone to move or engaged in moving itself. Id. Petitioner conceded the third criteria—whether the activity has previously been performed by the owner's employees—does not apply in this case. (Pet. 3).

Respondents assert eMove merely served as a referral source for customers to find movers. (R. 281). Pursuant to Murray, a business that serves merely as a referral source for arranging work cannot be held liable as a statutory employer for an injured worker. 286 S.C. at 356, 334 S.E.2d at 131. There is no evidence in the record to support Petitioner's assertion that eMove was in the business of moving. Petitioner's argument that eMove was Petitioner's statutory employer is based entirely on conjecture and speculation. Petitioner never presented any evidence eMove contracted with anyone to move or engaged in moving itself. As Petitioner

conceded at oral argument before the Court of Appeals, the only evidence in the record on this issue is the Agreement. However, the Agreement did not establish that eMove was in the moving business; rather, the Agreement provided eMove was a "neutral venue" to connect customers with reliable movers. (R. 281). The Agreement proved actual moving was not a part of eMove's trade, business, or occupation because the terms of the Agreement provided eMove's business only involved matching customers with moving help. (R. 281). Because the only evidence in the record—the Agreement—established eMove solely served as a marketplace to connect customers with reliable labor, Petitioner failed to prove he was a statutory employee of eMove.

Further, Unterkoefler never performed any work on behalf of eMove. The evidence shows Unterkoefler entered into contracts with the customers who selected his business and scheduled an appointment for his services. (R. 280-89). Unterkoefler called the customer to verify the date and time of the job, nature of the job, and services requested. (R. 188). Unterkoefler and his friends drove their personal vehicles to each location as the customer provided the moving truck. (R. 188; R. 196). The customers then paid Unterkoefler for his moving services. (R. 280). The only evidence in the record shows the customer arranged all of the details of the moving job with Unterkoefler, and thus, Petitioner failed to present any proof that actual moving was a part of eMove's trade, business, or occupation or that eMove contracted with anyone to move or engaged in moving itself.

Petitioner incorrectly asserts this case is akin to Voss v. Ramco, Inc., 325 S.C. 560, 482 S.E.2d 582 (1997). In Voss, a salesman was hired by a company named NATCO who sold small industrial equipment manufactured by Ramco. Id. at 563, 482 S.E.2d at 583. Because NATCO's activities of selling Ramco's industrial equipment was a part of Ramco's business, the

Court found NATCO's employees, including the salesman, were statutory employees of Ramco. Id. at 568, 482 S.E.2d at 586. However, in Voss, Ramco and NATCO had a deeply involved relationship. For example, Ramco and NATCO had an arrangement for delivering the equipment to the sales force, the standard NATCO sales pitch involved calling a Ramco employee, and Ramco gave bonuses to the NATCO sales force if they made so many offers within a week. Id. at 563-64, 482 S.E.2d at 584.

Voss does not apply here because eMove and Unterkoefler simply did not have a relationship like Ramco and NATCO. Unlike the saleman in Voss who performed work on behalf of Ramco by selling Ramco's equipment, Unterkoefler did not perform any work for eMove. eMove was not involved in arranging Unterkoefler's moving services because the customer had complete control over hiring and retaining Unterkoefler, including determining payment, location, and details of the moving job. (R. 188). Again, Petitioner failed to present any evidence that actual moving was a part of eMove's trade, business, or occupation or eMove engaged in any moving itself.

Petitioner would have the Court believe eMove's 15% MarketPlace fee is indicative of statutory employment because it was "eMove's sole source of revenue." However, Petitioner did not present any evidence regarding eMove's sources of revenue before the Workers' Compensation Commission or the Court of Appeals. There is simply no evidence in the record to support Petitioner's blanket assertion that eMove's marketplace fee is its "sole source of revenue." Edwards v. Lawton, 244 S.C. 276, 278, 136 S.E.2d 708, 709 (1964) ("statements of counsel in oral argument [] should have [a] reasonable foundation in the evidence or in inferences fairly arguable from the evidence.").

Moreover, Petitioner belabors the fact that eMove received the 15% MarketPlace fee after the move was completed to show eMove was in the moving business. (Pet. 9-10). In Murray, the Court held the lumber manufacturer's payment to the haulers from deductions out of the contract logger's gross earnings did not establish the lumber manufacturer was a statutory employer because the payment method was out of convenience to ensure a hauler did not have to track down the loggers to receive payment. 286 S.C. at 356, 334 S.E.2d at 131. Similarly, eMove's MarketPlace fee, which is deducted from the customer's payment to Unterkoefler, is merely a convenience to moving helpers like Unterkoefler who could not afford the MarketPlace fee upfront. (R. 187, 281). Unterkoefler testified he began advertising his moving services on eMove after he discovered he could advertise for free upfront. (R. 187). Contrary to Petitioner's argument, the MarketPlace fee does not establish eMove was his statutory employer.

Petitioner attempts to apply liability under the Workers' Compensation Act where it is not appropriate. It is far-reaching to hold a website that only provided advertising and referral services liable for Petitioner's injuries. Accordingly, Respondents assert the Court of Appeals correctly held eMove was not Petitioner's statutory employer.

V. The Commission Lacked Jurisdiction to Award Benefits

For the first time in this case, Petitioner argues eMove should be held liable as an upstream employer. (Pet. 22). However, an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the Workers' Compensation Commission to be preserved for appellate review. See Stone v. Roadway Express, Employer, 367 S.C. 575, 582, 627 S.E.2d 695, 698 (2006). Because the issue of whether eMove was an upstream employer was not raised to and ruled upon by the Commission, the issue is not preserved for appellate

review. Id. Accordingly, Respondents assert Petitioner should not be permitted to raise this new argument on appeal for the first time.

Moreover, the Commission lacked jurisdiction to award benefits to Petitioner because he failed to prove: (1) he was the statutory employee of eMove; (2) he was an employee of Unterkoefler; or (3) Unterkoefler regularly employed four or more employees. See McCreery v. Covenant Presbyterian Church, 299 S.C. 218, 221, 383 S.E.2d 264, 265 (Ct. App. 1989) ("The Workers' Compensation Commission has subject matter jurisdiction only where the relationship of employer and employee exists at the time of the alleged injury for which the claim is made."), reversed on other grounds by 303 S.C. 271, 400 S.E.2d 130 (1990).

Even if this Court finds Petitioner was an employee of Unterkoefler, Petitioner failed to prove eMove was a statutory employer, which precludes Petitioner from recovering any benefits from eMove. Glass, 325 S.C. at 201, 482 S.E.2d at 50 (holding to be a statutory employee under the Workers' Compensation Act, workers must be engaged in an activity that is a part of the owner's trade, business or occupation). Simply stated, there was no stream of employment between eMove to Unterkoefler or Petitioner for Petitioner to seek benefits from eMove. eMove was nothing more than a referral source and an online marketplace for movers like Unterkoefler to advertise their services. (R. 280-89).

For the first time on appeal, Petitioner also raises the issue of whether Unterkoefler was an employee of eMove in order to seek benefits from eMove. (R. 11-12). Again, this issue is unpreserved because it was not raised to and ruled upon by the Commission. See Stone, 367 S.C. at 582, 627 S.E.2d at 698. When the Commission does not rule on an issue, the appellate court may not address it. See id. Accordingly, Respondents assert it is unnecessary to reach this

issue because Petitioner did not raise it before the Workers' Compensation Commission or even the Court of Appeals.

Further, the issue lacks merit because there was no evidence to show Unterkoefler was an employee of eMove. Petitioner cites to Crim v. Decorator's Supply, 291 S.C. 193, 352 S.E.2d 520 (Ct. App. 1987), to support this argument. In Crim, the Court held a flooring and countertop installer was an employee of a retail interior decorating business because the retailer exercised control over him, including requiring him to arrive at the business at 9:00 a.m. every morning, providing the materials to install, and providing specific instructions for installing the materials. Id. at 195, 352 S.E.2d at 521. Unlike Crim, eMove never exercised the level of control over Unterkoefler because Unterkoefler controlled whether he accepted a moving job, the customer directed Unterkoefler to the location and time for the move, and eMove did not provide any instructions to Unterkoefler with regard to performing a moving job, which is evidenced in the Agreement. (R. 280-89). Thus, Unterkoefler was not an employee of eMove. Accordingly, the Commission lacked jurisdiction to award any benefits because Petitioner failed to prove the existence of an employment relationship.

VI. Petitioner Failed to Preserve the Issue of Whether He Is Entitled to Temporary Compensation and Medical Treatment for his Alleged Injuries

Only the issues raised to and ruled upon by the Commission are cognizable on appeal. See Stone, 367 S.C. at 582, 627 S.E.2d at 698. Petitioner did not preserve the issue of whether he was entitled to temporary compensation and medical treatment for his alleged injuries because the Appellate Panel did not rule on the issue. Petitioner even concedes the Appellate Panel did not rule on these issues. (Pet. 22). Moreover, it is unnecessary for this Court to reach these issues because the finding that Petitioner failed to establish any employment relationship is dispositive. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d

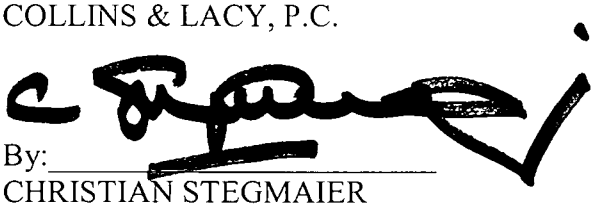
591, 598 (1999). Because Petitioner was not an employee of Unterkoefler or a statutory employee of eMove, the Appellate Panel was without jurisdiction to award benefits under the Act. Accordingly, there is no need to remand to determine whether Petitioner is entitled to temporary compensation and medical treatment.

CONCLUSION

For the foregoing reasons, Respondents respectfully request the Court deny the Petition for a Writ of Certiorari. The Court of Appeals correctly affirmed the Appellate Panel of the Workers' Compensation Commission by holding Petitioner failed to prove (1) he was an employee of Unterkoefler; (2) Unterkoefler regularly employed four or more employees, and thus, he was not an uninsured employer subject to the Act; and (3) he was a statutory employee of eMove.

Respectfully submitted

COLLINS & LACY, P.C.



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RESPONDENTS' RETURN TO PETITION FOR WRIT OF CERTIORARI

Columbia, South Carolina
August 11, 2015

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

WCC File No. 1023143
Appellate Case No. 2015-001330

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

George Ferguson ..... Petitioner.

v.

New Hampshire Insurance Company, Carrier for AMERCO/U-HAUL International, Sean Unterkoefler d/b/a United Stand Moving,
Employer, and the S.C. Workers' Compensation
Uninsured Employers' Fund ..... Respondents.

PROOF OF SERVICE

I hereby certify that I served the foregoing Respondents' Return to Petition for Writ of Certiorari upon all counsel, by placing a copy in the United States mail, postage prepaid, on August 11, 2015, to the following:

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Columbia, South Carolina
August 11, 2015