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IN THE

Supreme Court of Virginia

RECORD NO. 171467

CHARLIE JEFFREYS,

Appellant,

v.

THE UNINSURED EMPLOYER'S FUND, *et al.*,

Appellees.

BRIEF OF APPELLEE
THE UNINSURED EMPLOYER'S FUND

Matthew J. Griffin (VSB No. 74944)
MIDKIFF, MUNCIE & ROSS, P.C.
5115 Bernard Drive, Suite 103
Roanoke, Virginia 24018
Telephone: (540) 904-5777
Facsimile: (540) 904-5868
mgriffin@midkifflaw.com

Counsel for Appellee
The Uninsured Employer's Fund

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

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VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA

CHARLIE JEFFREYS

Appellant,

v.

THE UNINSURED

EMPLOYER'S FUND,

MT. LEBANON MISSIONARY

BAPTIST CHURCH,

and ANNIE L. MOSBY,

Appellees.

Record No.: 171467

BRIEF OF APPELLEES

Pursuant to Rule 5:26(c)(2) of the Rules of the Supreme Court of Virginia, The Uninsured Employers' Fund ("the Fund") submits the following as the Brief of the Appellees (citations to the Joint Appendix are referred to as (J.A. [page])).

NATURE OF THE CASE AND MATERIAL PROCEEDINGS

Mr. Charlie Jeffreys (hereinafter "Claimant") filed multiple Claims for Benefits with the Virginia Workers' Compensation Commission (hereinafter "Commission") alleging a compensable workplace accident occurring on October 31, 2012. Claimant's original Claims for Benefits listed Ms. Stella Fitzgerald and the Harvey School Historical Society of Mount Lebanon Baptist Church ("the Historical Society") as his Employers. In a subsequent amended Claim for Benefits, the claimant added Ms. Anne Mosby and the Mount Lebanon Missionary Baptist Church ("the Church"). The Commission convened a Hearing on the Claims for Benefits on May 7, 2015. At the conclusion of claimant's Hearing, the presiding Deputy Commissioner dismissed Ms. Fitzgerald as a named defendant. None of the remaining defendants—the Historical Society, Ms. Mosby, or the Church—could provide records of Workers' Compensation Insurance. So, the Fund was added as a fourth named defendant.

The parties stipulated that Claimant suffered an injury on October 31, 2012, and remained totally disabled thereafter. The Fund defended the claim on the grounds that Claimant was not an employee of any of the three named alleged employers; Claimant was an independent contractor; the alleged employers did not employ three or more employees; Claimant's injuries were the result of his own

willful misconduct; and none of the defendants are in the trade business, or occupation of construction.

On June 17, 2015, the Deputy Commissioner issued her Opinion awarding benefits. In her Opinion, Deputy Commissioner Slough examined the evidence to determine if Claimant was a direct employee—as opposed to an independent contractor—of the defendants that were actually named in the action. After determining that Claimant was an employee (and therefore covered under the Virginia Workers' Compensation Act) she evaluated who, if anyone, actually employed Claimant. She found that because Johnson gave Claimant direction at the job site, Johnson was Claimant's employer. (J.A. 879). Again, however, because Johnson was not named as a defendant, no Award was entered against him.

The Deputy Commissioner proceeded to find that Mosby was also Claimant's employer. (J.A. 879) The Deputy Commissioner then found that Mosby was acting as an agent of the Historical Society, and thus the Historical Society was also Claimant's employer. (J.A. 879-880) Continuing, since the Historical Society had become an auxiliary of the Church in 2003, the Deputy Commissioner found that the Church was Claimant's employer as well. (J.A. 880-881). Through this reasoning, the Deputy Commissioner concluded that Claimant

was a direct employee of Mosby, the Historical Society, and the Church itself; all three named alleged employers.[1] (J.A. 880-81).

Because the Deputy Commissioner found that Claimant was an employee, and not an independent contractor, she expressly declined to make any findings regarding whether the Church or Historical Society were involved in the trade, business, or occupation of construction. (J.A. 881-82). Yet, the Deputy Commissioner made an express finding that Virginia Code § 65.2-302 was not applicable. *Id*. Specifically, she wrote:

> As an employee of the Church and not an employee of a subcontractor, we do not need to determine if Mount Lebanon Missionary Baptist Church was in the trade, business or occupation of construction as defined under Va. Code § 65.2-302. The claimant was an employee of the Church [. . .] Va. Code § 65.2-302 only applies to cases in which there are at least four persons in interest: (1) an owner or other person who is having work executed for himself; (2) an independent contractor who has undertaken to perform the work; (3) a subcontractor, who has undertaken to perform some or all of the work; and (4) an employee employed in the work. *Bamber v. City of Norfolk*, 138 Va. 26, 121 S.E. 564 (1924). In the present case, we do not have an independent contractor, nor do we have a subcontractor.

[1] At the Hearing, the parties stipulated to the removal of Stella Fitzgerald as a named defendant. (J.A. 872). Johnson was never named as a defendant in the lower proceedings.

Id. at 881-82. Claimant did not contest this finding. In fact, in a letter to the Commission dated August 24, 2015, Claimant affirmatively stated that "there is no substantive error contained in the [Deputy Commissioner's] Opinion and it should be summarily affirmed." (J.A. 902).

The Fund sought review to the Full Commission. In its Written Statement, the Fund argued that Claimant and Johnson were independent contractors, and, in the alternative, that Claimant was Johnson's employee alone. (J.A. 890-901). The Fund specifically asked the Commission to "find . . . that the claimant was not the employee of any of the named defendants." (J.A. 900).

In its September 24, 2015 Review Opinion, the Commission found that Claimant was not Mosby's employee because Mosby "did not direct the means and methods by which the claimant performed his work" and "was not in the trade, business or occupation of construction." (J.A. 957). However, the Full Commission also found that the Fund had waived any challenge to the Deputy Commissioner's finding that the Church was Claimant's employer. (J.A. 958).

On October 8, 2015, the Fund filed a Request for Reconsideration and Motion to Vacate. In his written objection thereto, Claimant again recited with approval the Deputy Commissioner's determination that the facts of the instant matter **did not** implicate the statutory employer inquiry. (J.A. 966). On October

15, 2015, the Commission issued an Order denying the Fund's Motion for Reconsideration and Motion to Vacate. (J.A. 969)

The Fund appealed the Review Opinion to the Court of Appeals of Virginia. In the resulting April 29, 2016 Opinion, a unanimous panel of this Court concluded that the Commission was correct in finding that Mosby was not Claimant's direct employer. (J.A. 978). Additionally, given the Fund's unequivocal assignment of error regarding the alleged employment relationships between Claimant and the Church/Historical Society, the Court reversed the Commission, holding that it was "unreasonable" for the Commission to determine that the Fund had waived the right to contest the alleged employment relationship between Claimant and the Church/Historical Society. (J.A. 980). Accordingly, the Court remanded the matter to the Full Commission to address (1) whether the Claimant was an employee—or alternatively, an independent contractor—of any of the named alleged employers; and (2) whether any of the named alleged employers were engaged in the trade, business, or occupation of construction. (J.A. 982, fn.2).

On January 5, 2017, the parties presented arguments before the Full Commission. The Commission released the resulting Opinion on remand on April 6, 2017 (hereinafter the "Remand Opinion"). During oral argument, the Claimant, by counsel, argued at length that the Historical Society and the Church were the Claimant's employer. In fact, when directly asked, the Claimant, by counsel, said

he was arguing that the Church was the employer. (See Oral Argument Trans 25-26) Not once during oral argument does counsel for the claimant state "statutory employer" or "trade, business or occupation" or "65.2-302." In the Remand Opinion, the Commission found that there was insufficient evidence to find that either of the Historical Society or the Church were the claimant's employer. The Commission also reiterated the Court of Appeal's conclusion that the claimant was not an employee of Ms. Mosby. Accordingly, the Commission found that the claimant was not an employee of any of the alleged employers. Further, given the legal standard applicable to the "independent contractor vs. employer" inquiry, the Commission found there was simply no evidence that the Historical Society or Church exercised any control over the claimant, and thus the claimant was an independent contractor. Finally, the Commission held that there was no evidence that the Historical Society or Church engaged in the trade, occupation or business of construction, so the facts did not implicate any statutory employer situation. *See* Va. Code Ann. § 65.2-302.

On April 14, 2017, the Fund submitted a Request for Modification to the Commission requesting modification of the Remand Opinion requesting the Commission affirmatively state the previous holding that the Church was the claimant's Employer had been reversed, and to state the Claim itself had been denied. The Commission denied the Fund's request.

Both the Claimant and the Fund filed timely appeals to the Virginia Court of Appeals. The Claimant alleged the Commission erred in determining he was not the Statutory Employee of the Historical Society or the Church. The Fund alleged the Commission erred by failing to fully reverse the earlier decision awarding compensation benefits and failing to affirmatively dismiss the Claims for Benefits. Both Claimant and the Fund submitted written briefs supporting their own appeal, and briefs opposing the other respective party's appeal. On October 3, 2017, the Court of Appeals released an unpublished decision affirming the Commission's decision, and remanding the case to the Commission for entry of a more complete order in accordance with the Fund's request.

Claimant filed a timely Notice of Appeal, and ultimately Petition for Appeal to the Virginia Supreme Court alleging six Assignments of Error. The Fund filed a Brief in Opposition to the claimant's Petition for Appeal. On June 14, 2018, the Virginia Supreme Court granted the claimant's Petition for Appeal, and the claimant timely filed the Opening Brief of Appellant.

FACTS

In 2001, Mosby undertook to purchase a building which formerly housed the Harvey Colored School. (J.A. 643). At that time, the schoolhouse was owned and located on the property of one Ewell Barr. *Id.* Mosby had arranged to purchase

the schoolhouse from Mr. Barr, but Mr. Barr passed away before the purchase could be completed. *Id.* In 2003, Mosby's husband purchased the school from Mr. Barr's widow as a gift to Mosby. (J.A. 35). Mosby used her own money to restore the school, and nobody other than Mosby and her husband contributed money towards the purchase of the school. (J.A. 527, 624). Mr. Barr's widow allowed Mosby to leave the school on her property until she was able to move it. (J.A. 35).

Prior to Mosby's acquisition of the school, the Historical Society—a community organization—intended to purchase, restore, and maintain the school. (J.A. 34). In late 2003, the Historical Society became an auxiliary of the Church. (J.A. 744-49). According to the testimony of the Church clerk, Rosalyn Fitz ("Ms. Fitz"), and the minutes from an October 2, 2003 meeting, the Church agreed to take the Historical Society on as an auxiliary. (J.A. 744-49, 800). The pastor of the Church, Dr. George Reynolds ("Dr. Reynolds"), testified that when the Church agreed to take the Historical Society on as an auxiliary, the Church only offered the Historical Society free range and use of the physical Church building. (J.A. 576-77). He also testified that becoming an auxiliary did not involve any exchange of money, and stated that the Church never provided any financial assistance to the Historical Society. (J.A. 549). An August 9, 2003 letter from the Historical

Society to the Church states, "the members of Historical Society will take care of all the business and cost of maintaining Harvey Elementary School." (J.A. 811).

The original goal of the Church and Historical Society was to rebuild the school near the Church for use as a visitor center. (J.A. 800). This did not come to pass. The Historical Society ultimately could not afford to purchase the school, at which point Mosby's husband purchased the school for her as a birthday present in 2003. (J.A. 35-36). At her deposition, Mosby stated that the Historical Society failed at its goal of restoring the school, so she used her own money to restore the school herself. (J.A. 53). Mosby testified that she has never received any money for the restoration from any person or entity other than her husband. (J.A. 624). The Historical Society remained as an auxiliary of the Church for the purpose of community relations, but it had no other involvement with the restoration of the school. (See J.A. 53). The accident in question occurred over 9 years later, during which time the Historical Society had little to no involvement whatsoever with the restoration of the school (J.A. 1).[2]

[2] At the hearing, Dr. Reynolds testified the only document in the Church's files that mentioned the Historical Society was a single page detailing the minutes of the October 2, 2003 church meeting referenced above. (J.A.554). The Church had no records of any other interaction between the Church and the Historical Society in the nearly ten years before Mosby contracted with Wilson to rebuild the school on her private property. *Id*.

In the 12 years preceding the initial Hearing on this Claim, Mosby resided in California, where she had been employed as a mental health aide. (J.A. 623). Mosby testified that she had never been involved in construction or real estate development in any way. (J.A. 621). She had never built a house, she had never remodeled a house, nor had she ever been part of a company or entity involved in the construction, remodeling, or restoring of buildings. (J.A. 622). There is no indication in the record that Mosby was restoring the school with any profit motive.

In 2011, Mosby contracted with Lorenzo Wilson ("Wilson") to dismantle the schoolhouse and reconstruct the building on her family's property. (J.A. 627). The contract between Mosby and Wilson stated that Mosby would pay Wilson $12,500.00 for the relocation of the schoolhouse. (J.A. 850). However, Wilson and his employees merely dismantled the building, and Wilson ultimately left the project before the building was reconstructed on Ms. Mosby's family property. (J.A. 627).

On August 29, 2012, Mosby obtained a building permit for a "historical storage building that is being relocated to property by owner." (J.A. 854). The building was to be relocated to Mosby's family property, which was in the name of her deceased father. (J.A. 620-21, 854). Mosby obtained the building permit on her own. (J.A. 620).

William Jerome Johnson ("Johnson") was one of Wilson's employees at the beginning of the project. (J.A. 630). After Wilson left the project, Johnson asked Mosby if he could take over the project and complete the reconstruction of the house on her family's property. (J.A. 631). Mosby agreed, and she authorized Johnson to undertake the project. *Id.* Johnson testified that Mosby did not give him any instructions regarding how to reconstruct the schoolhouse. (J.A. 675). Johnson stated, "[t]hat's all she did was just ask me to put the building back together and that was it." (J.A. 731). In fact, for the majority of the time over which the project took place, Mosby was at her residence in California. *Id.*

Johnson testified that he was in charge of deciding what materials were needed, and Mosby never gave him any instructions or directions regarding the selection of such materials. (J.A. 676). Once Johnson selected the needed materials, Mosby would use her credit card to make any necessary purchases. (J.A. 675). Johnson testified that Mosby returned to California once the reconstruction began, and she did not have any contact with him regarding any direction in how to proceed with the project. *Id.* Johnson testified that from that point on, she "trusted my judgment." *Id.* In fact, Mosby stated that even if she wanted to, she "could not instruct [Johnson] . . . what to do. . . . I do not build anything." (J.A. 120).

QUESTIONS PRESENTED

The claimant assigns six Assignments of Error. The claimant's brief contains nine sections of argument. Included in these, it appears the Claimant petitions this Court to create a new test for determining statutory employment for private non-profit entities. The Fund maintains that the Court of Appeals committed no error and there is no need for, and the evidence in this case does not warrant, a substantial change to the longstanding law of the Commonwealth of Virginia as it relates to determining the trade, business or occupation of private entities. The Fund believes the claimant's Assignments of Error and the arguments advances fall under the following five groups of issues/arguments:

The Commission, affirmed by the Court of Appeals, correctly found the Church and/or Historical Society were not the statutory employer, and the finding and conclusion is thoroughly and completely supported by the credible evidence; and the Court of Appeals in affirming the decision did not apply some restrictive interpretation of the term restore, and the decision of the Commission, as affirmed by the Court of Appeals, correctly applied longstanding law of the Commonwealth on this issue. (Appellant's Assignments of Error 1, 2, 4 and 6; Appellant's Argument III, IV and V)

The Court of Appeals properly applied the law regarding determination of a statutory employer, and the unique facts of this case do not warrant upending the longstanding law of the Commonwealth to fashion a new test for determining statutory employment for non-profit private entities. (Appellant's Assignment of Error 1; Appellant's Argument III)

The Court of Appeals did Not Rely on an Incorrect "Primary Function Test" in Place of the "Normal Work Test" in Determining the Trade, Business, and Occupation of the Church. (Appellant's Assignment of Error 5; Appellant's Argument V)

Credible Evidence Supports the Facts Articulated by the Court of Appeals. (Appellant's Assignments of Error 2, 3; Appellant's Argument I)

There has been no violation of or infringement upon the claimant's due process rights, and the Court of Appeals has committed no error in affirming the Virginia Workers' Compensation Commission finding that (i) there was no evidence the Historical Society and Church were engaged in the trade, business or occupation of construction, and that (ii) the facts did not implicate a statutory employer situation. (Appellant's Assignment of Error 3; Appellant's Argument VI, VII, VII, IX).

STANDARD OF REVIEW

The issue whether a particular person or entity is the statutory employer of an injured employee is a jurisdictional matter presenting a mixed question of law and fact that must be determined under the facts of each case." *Bosley v. Shepherd*, 262 Va. 641, 648, 554 S.E.2d 77, 81 (2001). Workers' Compensation Commission factual findings are indeed conclusive and binding on the Court of Appeals and the Supreme Court of Virginia, as stated in the claimant's Opening Brief. (See Appellant's Brief at 38, *citing Pruvis v. Porter Cabs*, *Inc.*, 38 Va. App. 760, 763, 568 S.E.2d 272, 274 (1985)).

LAW AND ARGUMENT

I. The Commission, affirmed by the Court of Appeals, correctly found the Church and/or Historical Society were not the statutory employer, and the finding and conclusion is thoroughly and completely supported by the credible evidence; and the Court of Appeals in affirming the decision did not apply some restrictive interpretation of the term restore, and the decision of the Commission, as affirmed by the Court of Appeals, correctly applied longstanding law of the Commonwealth on this issue. (Appellant's Assignments of Error 1, 2, 4 and 6; Appellant's Argument III, IV and V)

A "statutory employer" is an entity that may be held liable to pay workers' compensation benefits to an injured individual who is **not** directly in its employ. *See* Va. Code Ann. § 65.2-302 (2012). By way of example, the Court of Appeals has reiterated that "employees of an uninsured sub-subcontractor may look to the subcontractor, and to the general contractor, for coverage, although recovery is not permitted from both." *States Roofing Corp. v. Bush Constr. Corp.*, 15 Va. App. 613, 616-17, 426 S.E.2d 124, 126 (1993). The statutory employer inquiry usually appears when a direct employee of an uninsured entity is seeking workers' compensation coverage from another entity "up the chain," by operation of law, and not because that injured worker is directly employed by the entity "up the chain."

Virginia Code § 65.2-302 provides a statutory mechanism whereby injured employees of a contractor or subcontractor may seek workers' compensation benefits in this manner. This statute states, in part:

> When any person (referred to in this section 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 (referred to in this section 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 worker employed in the work any compensation under this title which he would have been liable to pay if the worker had been immediately employed by him.

Va. Code Ann. § 65.2-302(A) (2012) (emphasis added in underline). (*See also* J.A. 993 ("[T]here is no statutory employer situation at issue here. Va. Code § 65.2-302.")). The purpose of this provision is to allow actual employees of an uninsured subcontractor to look to the "owner" itself for workers' compensation insurance coverage. *See, e.g.*, *States Roofing Corp. v. Bush Constr. Corp.*, 15 Va. App. 613, 617, 426 S.E.2d 124, 126 (1993). The purpose of this provision is therefore to "bring within the operation of the Workmen's Compensation Act all persons engaged in any work that is a part of the trade, business, or occupation of the 'owner' which is customarily done by the owner's employees." *See, e.g.*, *Southeastern Tidewater Area Manpower Auth. v. Coley*, 221 Va. 863, 275 S.E.2d 589, 591 (1981)(emphasis added).

The "statutory employer" issue generally arises in the following situation: the injured employee's direct employer, a subcontractor, is uninsured, so the injured employee looks "up the chain," to find available workers' compensation coverage from the contractor or contractors for whom the work was performed. *See, e.g.*, *Southeastern Tidewater Area Manpower Auth. v. Coley*, 221 Va. 859, 275 S.E.2d 589 (1981). In this situation, the purported statutory employer generally resists the statutory employer designation, as they do not wish to be held accountable for providing workers' compensation benefits that the subcontractor was obligated to themselves provide. *See* Va. Code Ann. § 65.2-801 (2012)

(stating that every employer under the Act must carry workers' compensation insurance or prove financial ability to pay workers' compensation claims). This is the framework for which Claimant argues in the present iteration of his attempt to obtain benefits.

The burden of proof is on the claimant to prove the existence of a statutory employer from whom he may collect benefits. *See, e.g.*, *Brown v. Waste Mgmt., Inc.*, VWC File No. 198-77-28, at *6 (Aug. 10, 2001) (stating, in the statutory employer context, "[t]he burden of proof is on the claimant to establish every essential element of his case by a preponderance of the evidence"); *accord Thorpe v. Ted Bowling Constr.*, 283 Va. 808, 815, 724 S.E.2d 728, 731-32 (2012).

The Commission and the Court of Appeals properly concluded that there is no statutory employer relationship here. First, the alleged "owner" or "owners" here—the Church and/or the Historical Society—did not engage the Claimant to perform work within their "trade, business, or occupation." Nor did the alleged "owner" or "owners" engage William Jerome Johnson, the man who hired the claimant and directed his day to day activities. The Historical Society and the Church did not engage Claimant or Mr. Johnson to perform anything at all. Rather, it was Mosby who personally engaged Wilson, and later Johnson, regarding relocation and construction of the schoolhouse. There is no evidence to

establish that the Church or the Historical Society engaged with Johnson or Claimant to do anything whatsoever.

Mosby has a relationship with the Historical Society and the Church, but there is no credible evidence she engaged Claimant and/or Johnson on behalf of the Church or the Historical Society. The Historical Society was accepted as an auxiliary of the Church in 2003. The Historical Society did not have regular meetings; they held just two "celebrations." (J.A. 642-643; 647). Moreover, the schoolhouse at issue was reconstructed on Mosby's family property; not property owned by the Church or Historical Society. (J.A. 620-621). Mosby received the money to purchase the schoolhouse from her husband as a gift for her 57th birthday. (J.A. 626). Further, Mosby herself paid for the re-construction of the schoolhouse; the Church and Historical Society did not. (J.A. 631). Mosby's agreement with Wilson, who was initially engaged in the relocation/construction efforts, was entered into by Mosby personally—without the involvement of the Church or Historical Society. (J.A. 644; 850). This engagement took place in 2011. (J.A. 347). Similarly, the agreement with Johnson—under whom Claimant worked directly—was an agreement with Mosby alone. (J.A. 645). Mosby engaged Johnson in her personal capacity, and the credible evidence in the record fails to establish any genuine involvement of the Church or Historical Society in Claimant's employment. The evidence in the record fails to reflect that the Church

or Historical Society subcontracted anything at all, and fails to establish that Mosby was acting on their behalf.

That notwithstanding, determining whether activities fall within or outside an entity's trade, business, or occupation is not a simple, straightforward exercise. Deciding what is the trade, business, or occupation of an entity is a "mixed question of law and fact" and is a question that "does not readily yield to categorical or absolute standards." *Henderson v. Cent. Tel. Co. of Va.*, 233 Va, 377, 381, 355 S.E.2d 596, 599 (1987) (citing *Bassett Furniture v. McReynolds*, 216 Va. 897, 902, 224 S.E.2d 323, 326 (1976)). In conducting this evaluation, the courts commonly look to the "normal work" test.

Established in *Shell Oil Co. v. Leftwich*, the "normal work" test states that in evaluating whether or not the owner is the statutory employer of a subcontractor's injured employee:

> [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 (except in cases where the work is obviously a subcontracted fraction of a main contract) is whether this indispensable activity is, in that business, *normally* carried on through employees rather than independent contractors.

212 Va. 715, 722, 187 S.E.2d 162, 167 (1972) (quoting ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION, Vol. 1A, § 49.12, at 872-73). Therefore, in

Shell Oil, the inquiry was "whether the retailing of gasoline to the general public, admittedly an indispensable activity to the Shell Oil Company, is an activity normally carried on by Shell through its employees rather than through independent contractors." *Id*. at 722, 187 S.E.2d at 167 (emphasis added).

As this test is described, it becomes obvious why the Commission concluded that Claimant was not the statutory employee of Mosby, the Church, or the Historical Society. There is no credible argument to be made that work performed by the claimant on the date of injury is in their "trade, business or occupation, or that these alleged statutory employers normally used their own employees to accomplish work such as that being performed by the claimant on October 31, 2012.

In this evaluation, *Rodriguez v. Leesburg Business Park, LLC* is instructive. 287 Va. 187, 754 S.E.2d 275 (2014). In *Rodriguez*, Leesburg Business Park ("LBP") contracted with a general contractor, E.E. Reed Construction, L.P. ("Reed") to construct warehouses on a parcel of land owned by LBP. 287 Va. at 190, 754 S.E.2d at 276. Ubaldo Rodriguez, an employee of Reed, was fatally injured during the course of this construction, and his estate brought a common law wrongful death action against LBP. *Id*. at 190-91, 754 S.E.2d at 276-77. The focus of the Supreme Court's inquiry was whether LBP was in the "trade, business, or occupation" of Rodriguez's direct employer, Reed.

Through the documents and testimony of LBP's manager and sole member, Lauer, the evidence showed that LBP's business was as follows:

> LBP, Lauer testified, is a "single source" entity, with no employees, which was created to own and develop a parcel of real estate and then lease or sell warehouses constructed on the parcel. LBP's operating agreement states that it was "formed for the purposes of acquiring, holding, improving, managing, leasing and selling real property in Virginia and elsewhere, and engaging in any other business agreed to by the members of the LLC and permitted under the laws of the Commonwealth of Virginia." Lauer described LBP's operation as follows: "[A]s owner and developer, we create the opportunity, we build it, we sell it, we lease it, and we manage it."

Id. at 191, 754 S.E.2d at 277. LBP hired Reed to construct these warehouses.

The Court ultimately held that LBP was <u>not</u> Rodriguez's statutory employer, despite the fact that LBP's foundational documents recite that it exists to acquire, manage, and improve real property. The Court succinctly outlined their ultimate inquiry as follows: "[i]n determining whether [Rodriguez's] construction work was part of LBP's trade, business, or occupation, we therefore do not simply examine whether LBP engaged in construction. Nor is the fact that LBP had no employees determinative. <u>Rather, we must determine whether [Rodriquez's] construction work at the time of his fatal accident was part of LBP's business</u>." *Id*. at 197, 754 S.E.2d at 280 (emphasis added).

Returning to the matter before the Court, the finding of facts below were reviewed upon the credible evidence standard and in the light most favorable to the Fund. *See, e.g.*, *Marshall v. Craft Forklift*, Inc., 41 Va. App. 777, 779, 589 S.E.2d 456, 457 (2003); *States Roofing Corp. v. Bush*, 15 Va. App. 613, 616, 426 S.E.2d 124, 126 (1993). The evidence in this case establishes that the claimant was not performing work at the time of his accident that could credibly be considered part of the trade, business or occupation of the Church or Historical Society.

The claimant was constructing the school house when he suffered his injury. There is simply no evidence in the record the Church and/or the Historical Society are in the "trade, business, or occupation" of construction. (*See* J.A. 540-75, 769-71 (testimony of George Reynolds); 743-50 (testimony of Rosalyn Fitz)). This fact is supported not only by common sense, but the complete absence of evidence in the record that the Church was in the business of construction. None of the relevant documents or testimony imply that the Church was in that business, or that they "normally" used their own employees to engage in the trade, business, or occupation of construction or restoration.

As to the Historical Society, Claimant's reliance on the Historical Society's "Mission Statement" is inflated and misplaced, and cannot function to overcome the mountain of credible evidence that the Historical Society was not in the trade, business, or occupation of construction. In *Rodriguez*, LBP's operating agreement

expressly stated that it was "formed for the purposes of acquiring, holding, improving, managing, leasing and selling real property in Virginia and elsewhere." *Rodriguez,* 287 Va. at 191, 754 S.E.2d at 277. To that end, it hired a contractor to complete that work; it outsourced the entirety of the construction work to another entity. LBP employees themselves never performed any construction tasks, and the fundamental question is whether the injured worker's "construction work at the time of his fatal accident was part of LBP's business." *Id*. at 197, 754 S.E.2d at 280. The Court concluded that LBP was not Rodriguez's statutory employer.

Similarly, despite the Historical Society's "Mission Statement" to "purchase, restore, preserve, and maintain the Harvey Colored School," there is no evidence that any actual employees of the Historical Society performed any work to this effect; let alone any construction work. Moreover, much like LBP, the Historical Society's "Mission Statement" indicates that it is an entity of limited purpose that accomplished its purported goals exclusively through the retention of third-parties. If the operating agreement in *Rodriquez* was insufficient to bring the injured worker's construction tasks within the ambit of LBP's trade, business, or occupation, the Historical Society's "Mission Statement" is similarly deficient as applied to Claimant's work and injury.

The Fund is unaware of any Virginia authority standing for the proposition that the trade, business, or occupation of an entity is determined rigidly by

reference to the entity's foundational documents alone—to the exclusion of all other facts and circumstances presented. The Claimant's dogmatic reliance on the Historical Society's "Mission Statement" cannot establish this essential element of the statutory employer test. Moreover, even though the Claimant repeatedly refers to the founding documents of a non-profit, the claimant did not introduce such evidence in this case. The claimant simply refers to a "Mission Statement" of the Historical Society, and auxiliary of the Church.

Regarding the alleged statutory employers named in these proceedings, Claimant's arguments similarly fail when held up to the light against the "normal work" test described above. The "normal work" aspect of the statutory employer test requires the court to determine whether, in the context of Mosby's, the Church's, and the Historical Society's business, the work at issue is "normally carried on through employees rather than independent contractors." *Shell Oil Co. v. Leftwich*, 212 Va. 715, 722, 187 S.E.2d 162, 167 (1972) (emphasis added). There is no evidence in the record that construction and restoration activities were "normally" carried out by employees of any of the alleged statutory employers.

Virginia Courts have had ample occasion to address the statutory employer inquiry in construction/restoration situations. In fact, this Court stated "[w]e have considered construction or repair of [] a facility not to be the trade, occupation, or

business of an owner for purposes of determining whether a statutory employee or employer relationship exists unless those activities are normally carried out directly by the owner or are part of his normal activities." *Nichols v. VVKR, Inc.*, 241 Va. 516, 522, 403 S.E.2d 698, 702 (1991) (emphasis added). There is no credible evidence in the instant matter that the activities performed by the claimant on the date of his injury are activities "normally carried out" directly by employees of the Historical Society or the Church.

As the Commission properly recognized on Remand, "there is no evidence the Church and Historical Society were in the construction business." (J.A. 990-91, 993). This determination was affirmed by the Court of Appeals, and the Court of Appeals' unpublished opinion setting forth application of the facts to the law was correct and consistent with the longstanding law case law in this Commonwealth regarding application of the statutory employer doctrine.

Claimant's attempt to shift the legal framework governing the statutory employer determination from the well-established tests recited in *Rodriguez* and *Shell Oil*, discussed above, to one that narrowly focuses on the "Mission Statement" of one of three alleged owners/employers is an obfuscation that should be ignored by this Court. Moreover, *Rodriquez* explicitly dispensed with the argument that an entity's "mission statement" controls the statutory employer inquiry. *See Rodriguez v. Leesburg Bus. Park, LLC*, 287 Va. 187, 197, 754 S.E.2d

275, 280 (2014) ("While many activities may be important or even 'indispensable' to the success of a business, those activities do not necessarily constitute the trade, business, or occupation of the owner.").

Stated directly, a statutory employer relationship does not exist unless the owner (1) contracts with another to perform work which is a part of the owner's trade, business or occupation; and (2) that work for which another was hired is work normally carried out by the owner's employees, rather than through independent contractors. *See* Va. Code Ann. § 65.2-302; *Shell Oil Co. v. Leftwich*, 212 Va. 715, 722, 187 S.E.2d 162, 167 (1972). The evidence in the record does not reflect a factual situation which falls within these parameters; particularly when viewed through the lens of the "credible evidence" standard and in the light most favorable to the Fund. The claimant failed to carry his burden of proving the Church and/or Historical Society are his statutory employer pursuant to Virginia Code 65.2-302.

II. The Court of Appeals properly applied the law regarding determination of a statutory employer, and the unique facts of this case do not warrant upending the longstanding law of the Commonwealth to fashion a new test for determining statutory employment for non-profit private entities. (Appellant's Assignment of Error 1; Appellant's Argument III)

While determining the trade, business, or occupation of an entity is not always a straightforward exercise, this Court has held on multiple occasions that "the normal work test" is an appropriate tool for determining the trade, business, or occupation of private entities:

> [i]n a situation in which an employee of an independent contractor sues a private entity that owns a project, we have applied the "normal work test" to determine whether the injured party was engaged in the trade, business, or occupation of the owner at the time of his or her injury. (emphasis added).

Jones v. Commonwealth, 267 Va. 218, 223, 591 S.E.2d 72, 75, 2004 Va. LEXIS 22, *6; *Accord Bassett Furniture Indus., Inc. v. McReynolds*, 216 Va. 897, 902-03, 224 S.E.2d 323, 326-27 (1976); *Johnson v. Jefferson Nat'l Bank*, 244 Va. 482, 485, 422 S.E.2d 778, 780 (1992). Analyzing the activities carried out "on a day-to-day basis provides a reasonably reliable indicator of [an entity's] trade, business, or occupation." *Henderson*, 233 Va. at 383. "Frequency and regularity of performance are factors to be considered in determining whether work is 'normally carried on through employees.'" *Bassett Furniture Industries, Inc. v. McReynolds*, 216 Va. 897, 902, (1976). The purpose of this test is to ensure an owner cannot escape liability under the Workers' Compensation Act simply by contracting out dangerous activities which are a regularly conducted in the normal course of carrying on the business. *Id.* at 381.

The only instances where this Court determined that the application of the "normal work test" did not comport with the purpose the Virginia Workers' Compensation Act is where project's owner is a governmental agency or a public utility. Instead of looking to the day-to-day activities of the employer, if the project's owner is a governmental agency or a public utility, any activity which the owner is authorized or required to do by law or otherwise, is considered the trade, business, or occupation of the owner." *Nichols v. VVKR, Inc.*, 241 Va. 516, 521, 403 S.E.2d 698, 701, 1991 Va. LEXIS 55, *8, 7 Va. Law Rep. 2377 *citing Henderson* 233 Va. at 383. Where statute or regulation requires or authorizes certain activities, this Court will look beyond the "normal work test" and instead apply the "government entity" test because

> [p]ublic utilities and governmental entities are of another class. It is not simply what they do that defines their trade, business, or occupation. What they are supposed to do is also a determinant. Whereas a private business entity is essentially self-defining in terms of its trade, business, or occupation, a public utility has duties, obligations, and responsibilities imposed upon it by statute, regulation, or other means. *Id*.

An entity created and governed by statute and/or regulation, whose fate is directed by public officials, does not enjoy the ability to choose its activities. *Jones v. Commonwealth,* 267 Va. 218, 223, 591 S.E.2d 72, 75, 2004 Va. LEXIS 22, *6. The claimant is presumably asking this Court to determine that the "normal work test" will yield unjust results in cases of private non-profit entities

because a nonprofit is somehow restricted in choosing its own activities by way of its application for and receipt of non profit status from the government. This argument essentially amounts to the application of the "government entity test" to a small, private organization with only a handful of members which is neither created by the General Assembly, governed by public officials, nor restricted by statute (aside from presumably being restricted from generating monetary profits).

The Historical Society and the Church are free to choose their own activities. There is no evidence in the record that either entity was restricted by a "Mission Statement" drafted almost a decade before the claimant's accident. (J.A. 804). In order to find the "normal work test" inappropriate, this Court would essentially need to determine the Historical Society and/or the Church are so restricted by these documents that they are bound to undertake the activities mentioned therein. There is no evidence in the record to support this assumption.

The claimant repeatedly refers to founding documents of the non profit, but simply points to the "Mission Statement" of the Historical Society, an auxiliary of the Church. The claimant did not introduce any founding documents of the Church. The claimant did not introduce any documentation of the Church's application for and receipt of non profit status.

Nevertheless, the claimant asks this Court to look beyond the "normal work test" because analyzing the day-to-day activities of both the Historical Society and the Church clearly show that neither organization regularly or frequently participated in construction activities, as found by the Commission and affirmed by the Court of Appeals. In so arguing, the claimant misconstrues this Court's justification for looking beyond the "normal work test" in cases of public or government entities. Common sense would suggest a private non-profit organization would be restricted from certain profit-earning activities by virtue of its non-profit status (although no such statute, rule or documentation has been cited by the claimant). Beyond this mere assumption, there is no evidence in the record that the Church and/or the Historical Society lack the freedom to determine their own day-to-day activities.

This freedom to change daily activities is of course evidenced by the Historical Society's altering its activities over the course of its existence. Beginning as a group focused on the school restoration project, the group changed its focus instead to fundraising, community outreach, and writing about the school. (J.A. 36, 760, 931). There is no evidence in the record that the Church regularly or frequently engaged in any construction activities. Therefore, it is clear that no statute or regulation required either organization conduct construction activities.

Despite the claimant's characterization of internet print-outs and letter circulated by Mosby as "foundational documents" (Opening Brief at 27), the actual documents under which the Church operates were never entered into the record by the claimant. The burden of proof is on the claimant to establish every essential element of his case. *Thorpe v. Ted Bowling Constr.*, 283 Va. 808, 815, 724 S.E.2d 728, 731-32 (2012). Documents such as the church's charter or constitution, correspondence with the Commonwealth of Virginia regarding non-profit status, or tax filings are notably absent from the record. The claimant thus asks this court to speculate that *some* theoretical, unnamed document restricts the Church from determining its own day-to-day activities. It is not appropriate for the Supreme Court of Virginia to consider altering the longstanding law of the Commonwealth based on speculation as opposed to actual evidence.

III. The Court of Appeals did Not Rely on an Incorrect "Primary Function Test" in Place of the "Normal Work Test" in Determining the Trade, Business, and Occupation of the Church. (Appellant's Assignment of Error 5; Appellant's Argument V)

The claimant mischaracterizes the Court of Appeals' unpublished opinion. The Claimant argues that because the Court of Appeals stated "[t]he <u>primary</u> "trade, business, or occupation" of the Church was to administer to the spiritual needs of its members, and it was not engaged in the construction industry…" that

the wrong legal test was applied. *Jeffreys v. The Uninsured Employer's Fund, et. Al*, 2017 Va. App. Lexis 249, *12; (Appellant's Opening Brief, 29). The Court of Appeals correctly applied "the normal work test" as evidenced by the description of Reynolds's testimony about the Church's reliance on independent contractors for any construction maintenance. Id. The Court of Appeals did not hold that because the Church's primary trade, business, or occupation was attending to the spiritual needs of its members, that the Church cannot be involved in another trade, business or occupation. In actuality, the Court of Appeals walked through the entire statutory employer analysis under longstanding, existing law. The Court of Appeals stated the nature of the primary trade, business or occupation, and also stated that evidence failed to support the Church's being involved in the construction trade. The Court of Appeals' unpublished opinion covered these areas in affirming the Virginia Workers' Compensation Commission's decision that the claimant failed to carry his burden and prove that the Church and/or Historical Society were the claimant's statutory employer pursuant to Virginia Code 65.2-302. As the case was not dispensed of by the Court of Appeals in a summary memorandum order/opinion, the Court was required to articulate in writing its opinion. *See* Virginia Code 17.1-413. The mere incantation of the word "primary" in the Court of Appeals' unpublished opinion does not invalidate the clear application of the correct legal standard. In fact, the thorough and accurate

analysis of the facts and application of the longstanding law in Virginia for determining the trade, business or occupation of the alleged statutory employer confirms the fact the Court of Appeals correctly applied the law and utilized the correct test.

IV. Credible Evidence Supports the Facts Articulated by the Court of Appeals. (Appellant's Assignments of Error 2, 3; Appellant's Argument I)

The decision of the Court of Appeals, including its recitation of the facts and evidence, and its explanation for affirming the Virginia Workers' Compensation Commission, is supported by credible evidence. On remand, the Commission addressed the statutory employment question with a single sentence: "[t]here is no evidence the Church and Historical Society were in the construction business, and we find they were not." *Jeffreys v. Mount Lebanon Missionary Baptist Church*, JCN VA02000016099 (Apr. 6, 2017) at 6. "If there is evidence, or reasonable inferences can be drawn from the evidence, to support the [C]ommission's findings, they will not be disturbed on review [by the Court of Appeals], even though there is evidence in the record to support a contrary finding." *Smith-Adams v. Fairfax Cnty Sch. Bd.*, 67 Va. App. 584, 590, 798 S.E.2d 466, 469, 2017 Va. App. LEXIS 109, *6, 2017 WL 1456990.

The Court of Appeals agreed with the Commission that no evidence in the record supported the Historical Society or the Church being involved in construction, and pointed to the evidence in the record to further explain the decision to affirm the Commission. Claimant's focus on the Court of Appeals explanation for affirming the Commission fails to address the underlying problem with this appeal: there is no evidence in the record to support that the Historical Society or the Church were involved in the trade, business, or occupation of construction; and that there was no evidence to establish that the Church and/or Historical Society were the claimant's statutory employer pursuant to Virginia Code 65.2-302. The claimant's focus on the more detailed explanation by the Court of Appeals affirming the same finding of the Commission fails to address the agreement by both the Court of Appeals and the Virginia Workers' Compensation Commission that the claimant failed to meet his burden in proving the Church and/or Historical Society were the claimant's "statutory employer" pursuant to Virginia Code 65.2-302.

The claimant points to the follow finding in the Court of Appeals as unsubstantiated:

> *We acknowledge that the restoration of the Harvey School necessarily involved certain construction-related activities. The complete reconstruction of the school building, however, fell outside of any routine restoration work. While the Historical Society was formed to*

> *'restore' the school, it's 'trade, business, or occupation' did not include the complete reconstruction of the building… The complete reconstruction of the school was beyond the restoration project envisioned by the Historical Society and its members were not involved in the reconstruction project or other construction activities.* (Appellant's Opening Brief, 10) *citing* Court of Appeals' Opinion of October 3, 2017 at 15.

The claimant also fails to acknowledge several important facts in the record supporting this finding. After being unable to move and restore the school for nearly a decade, it was reasonable to infer that project was beyond the capabilities of the Historical Society. First, the Historical Society completely failed in its initial goal of dismantling and reconstructing the school. The Historical Society never successfully raised sufficient money to complete the dismantling and reconstruction. (J.A. 36) Mosby testified that she was never involved in the construction business, and there is no evidence in the record that any other member of the Historical Society is involved in the construction industry. (J.A. 621-622). Even when Mosby engaged with independent contractors to dismantle, move, and rebuild the school—the project again failed when the first contractor walked off the job. (J.A. 630).

Additionally, this finding is further supported by deposition testimony of Mosby which was filed and made part of the record, pursuant to the Virginia Workers' Compensation Commission Rule 1.8(G). Although not specifically

designated by a party prior to the evidentiary hearing, the following section was included in accordance with Rule 1.8(G):

> Q: Okay. And would you think that it's fair to say that the goal of the Harvey School Historical Society has remained, in terms of its purpose or its mission or its trade or its occupation of the society is to purchase, restore, preserve, renovate and maintain the, what was known as, quote "The Harvey Colored School," close quote, as a historical site?
> A: No.
> Q: Why not?
> A: Because the organization changed. Once—the ability to move the school required a large sum of money, my supporters left me. And so the school remained in the woods from 2003 to 2012.
> Q: I understand that's where the school stayed, but the society that you founded remained, correct?
> A: Remained, but we went – we left the school in the wood from 2003 to 2012. And we did historical writing, and that's all we have done in the historical society since 2003. (J.A. 36-37).

The Court of Appeals has made no error in articulating the basis for affirming the Commission. The claimant contends the Court of Appeals made findings which were not raised or advocated by the parties below. The Claimant alleges he maintained throughout that the Church and/or Historical Society were the claimant's statutory employer. As noted above, the burden of proof is on the claimant to prove the existence of a statutory employer from whom he may collect benefits. *See supra*.

This case had been remanded from the Court of Appeals back to the Virginia Workers' Compensation Commission for an opinion consistent with the Court of Appeals' holding and to address the remaining issues preserved by the defendants. At oral argument before the Virginia Workers' Compensation Commission on January 6, 2017, the claimant, by counsel, did not even state "statutory employer," "trade, business or occupation" or 65.2-302. In its Opinion dated April 6, 2017, the Commission quickly addressed the statutory employer situation in the following sentences:

> Johnson was not named as a party defendant. There is no evidence the Church and Historical Society were in the construction business, and we find they were not. Hence there is no statutory employer situation at issue here. Va. Code § 65.2-302.

The claimant did not file any objection to the ruling or Motion for Reconsideration or other such relief regarding the Commission's basis for determining "there is no statutory employer situation here." The claimant did not make an objection to the decision and the Commission's basis for reaching that decision. Instead, the claimant proceeded with an appeal and now assigns error to the Court of Appeals for articulating the basis for affirming the Virginia Workers' Compensation Commission. As this Court held in *Williams v. Gloucester Sherriff's Department*, "the contemporaneous objection rule prohibits a party from appealing a decision of the Workers' Compensation Commission rendered on grounds neither raised nor previously addressed in the proceedings, if an objection

to that decision was not made the subject of a motion for rehearing or reconsideration before the Commission." 266 Va. 409, 411, 587 S.E.2d 546, 548 (2003).

The evidence presented in this case fully supports the decision of the Court of Appeals in its unpublished Opinion dated October 3, 2017 and its explanation of the evidence which supports its decision. The Court of Appeals committed no error and did not introduce new evidence or make impermissible findings as alleged by the Claimant. Moreover, the Claimant's appeal should be barred pursuant to the contemporaneous objection rule.

V. There has been no violation of or infringement upon the claimant's due process rights, and the Court of Appeals has committed no error in affirming the Virginia Workers' Compensation Commission finding that (i) there was no evidence the Historical Society and Church were engaged in the trade, business or occupation of construction, and that (ii) the facts did not implicate a statutory employer situation. (Appellant's Assignment of Error 3; Appellant's Argument VI, VII, VII, IX).

"Procedural due process has been said to require that before an individual is deprived of any significant property interest he be granted an opportunity, at a meaningful time in a meaningful manner, for a hearing appropriate to the nature of his case." *James v. Arlington County Bd. of Supervisors*, 226 Va. 284, 289, 307

S.E.2d 900, 903, 1983 Va. LEXIS 317, *13 *citing Boddie v. Connecticut*, 401 U.S. 371, 378 (1971). The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in "property" or "liberty." See U.S. Const., Amdt. 14 ("nor shall any State deprive any person of life, liberty, or property, without due process of law"); Va. Const. art. I, § 11 ("[t]hat no person shall be deprived of his life, liberty, or property without due process of law"); *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59, 119 S. Ct. 977, 989, 143 L. Ed. 2d 130, 149, 1999. Only after finding the deprivation of a protected interest does the Court look to see if the State's procedures comport with due process. *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

1. **The claimant cannot prove he is <u>entitled</u> to Workers' Compensation benefits and therefore cannot prove he enjoys a protected property interest; and in the absence of a protected property interest, this Court need not address whether the specific procedures governing several years of litigation amount to adequate due process.**

Non-vested Workers' Compensation benefits are not a protected property interest. The claimant's assertion that the *Am. Mfrs. Mut. Ins. Co. v. Sullivan* Court implied that a claimant enjoys a protected property interest in disputed Workers' Compensation benefits is incorrect. (Opening Brief of the Appellant at 35). In *Sullivan*, the Supreme Court of the United States held that a claimant's property

interest in disputed Workers' Compensation benefits is fundamentally different then the vested property rights of a welfare beneficiary or disability beneficiary. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 60-61. The Court held that if the claimant cannot prove he is entitled to benefits, he does not have a property interest. *Id*. at 61. Here, because the Clamant failed to name an employer subject to the Virginia Workers' Compensation Act, he is not entitled to Workers' Compensation benefits and no property interest is at stake.

2. The claimant has been afforded due process

To establish a claim for violation of due process, [an appellant] must show that the procedure he complains of deprived him of "a liberty or property interest." *Jackson v. W.*, 14 Va. App. 391, 405-406, 419 S.E. 2d 385, 393 (1992) *citing Carey v. Piphus*, 435 U.S. 247, 249 (1978). To make this showing, [the appellant] had to offer "more than undeveloped assertions that the requested [procedure] would be beneficial …." *Motley v. Motley*, 2007 Va. App. LEXIS 133, *7-8, 2007, *citing Caldwell v. Mississippi*, 472 U.S. 320, 323 n. 1, 105 S. Ct. 2633 (1985). As a general rule, when a party claims a due process violation, courts "require a showing of identifiable prejudice" to that party. *Estes v. Texas*, 381 U.S. 532, 542, 85 S. Ct. 1628 (1965).

The claimant has been afforded due process of law. In Virginia Workers' Compensation matters, due process is not the fulfillment of every procedural request of the claimant, but moreover a baseline protection:

> In the context of a workers' compensation proceeding, due process 'is flexible and calls for such procedural protections as the particular situation demands." *Henrico Pub. Utils. v. Taylor*, 34 Va. App. 233, 243, 540 S.E.2d 501, 506-07 (2001) (quoting *Duncan v. ABF Freight Sys., Inc.*, 20 Va. App. 418, 422, 457 S.E.2d 424, 426 (1995)). "In other words, 'the procedure utilized [need only] afford the parties minimal due process safeguards.'" *Nelson Cty. Sch. v. Woodson*, 45 Va. App. 674, 679, 613 S.E.2d 480, 483 (2005) (quoting *Sergio's Pizza v. Soncini*, 1 Va. App. 370, 376, 339 S.E.2d 204, 207 (1986)).

Smith-Adams v. Fairfax Cnty Sch. Bd., 67 Va. App. 584, 595, 798 S.E.2d 466, 471-472 (2017).

There has been no violation of or infringement upon the claimant's due process rights. The case was before the Commission on the claimant's Claims for Benefits. The claimant, who was hired and directed on a day to day basis by William Jerome Johnson, filed Claims for Benefits naming numerous alleged employers / statutory employers, but not Mr. Johnson. A hearing was held on May 7, 2015. The Deputy Commissioner, noting that no claim had been filed against Mr. Johnson, found that Ms. Mosby, the Historical Society and the Church were all the claimant's employers. The Deputy Commissioner found that the case

did not involve a statutory employer situation. The case then proceeded through appeals for years: initial appeal to the Virginia Workers' Compensation Commission (opinion dated June 17, 2015); to the Court of Appeals (opinion September 24, 2015); a Petition for appeal to this Court (denied September 20, 2016); before the Virginia Workers' Compensation Commission on remand from the Court of Appeals (opinion April 6, 2017); and then to the Court of Appeals again (opinion October 3, 2017). Moreover, the current appeal to the Supreme Court of Virginia represents the continuation of the due process afforded the claimant in accordance with the laws of the Commonwealth, Va. Code § 17.1-411, and in fulfillment of his Constitutional rights.

The Claimant has been afforded due process. The Claimant had the opportunity to conduct discovery, depose witnesses, and present evidence at an evidentiary hearing. He has argued his case since the initial hearing. The claimant was afforded a hearing and years of litigation through multiple appeals on his own application. If there is a lack of evidence in the record related to the statutory employer argument, it is due to the claimant's own decisions over the course of litigation. The Court of Appeals committed no error in affirming the Virginia Workers' Compensation Commission finding that (i) there was no evidence the Historical Society and Church were engaged in the trade, business or occupation of construction, and that (ii) the facts did not implicate a statutory employer situation.

The Court of Appeals carried out its statutory obligation of setting forth a written Opinion, albeit an unpublished opinion. The claimant simply disagrees with the findings of the Virginia Workers' Compensation Commission which were affirmed by the Court of Appeals.

CONCLUSION

Based on the foregoing, the Appellees respectfully requests that this Court AFFIRM the Opinion of the Court of Appeals and, consistent with the Court of Appeals' Opinion, allow the case to be remanded back to the Virginia Workers' Compensation Commission for entry of the revised Order consistent with the Court of Appeals' Opinion.

APPELLEE,

By Counsel

/s/ Matthew J. Griffin

Matthew J. Griffin (VSB No. 74944)
MIDKIFF, MUNCIE & ROSS, P.C.
5115 Bernard Dr., Suite 103
Roanoke, Virginia 24018
Phone: (540) 904-5777
Fax: (540) 904-5868
mgriffin@midkifflaw.com
Counsel for the Uninsured Employer's Fund

CERTIFICATE

I hereby certify compliance with Rule 5:6, 5:26 and 5:28 of the Rules of the Supreme Court of Virginia. Counsel does not desire to waive their right to oral argument before the Court. I further certify that on this 16th day of August, 2018 three true copies of the foregoing were caused to be hand delivered to the Clerk's Office of the Supreme Court of Virginia, one copy was electronically filed with same Clerk's Office in accordance with the VACES Guidelines, and one copy was delivered, via U.S. mail and email, to all below-listed counsel in accordance with Virginia Supreme Court Rule 5:26(e):

James B. Feinman, Esq.
Law Offices of James B. Feinman
P.O. Box 697
Lynchburg, VA 24505-0697
jb@jfeinman.com
Counsel for Charlie Jeffreys

Jerry L. Williams, Jr., Esq.
Williams, Luck & Williams
214 N. Ridge St.
Danville, VA 24541-1034
Wlw.law@verizon.net
Counsel for Mount Lebanon Missionary Baptist Church

T. Brent Gammon, Esq.
James A. L. Daniel, Esq.
Daniel, Medley & Kirby, P.C.
P.O. Box 720
Danville, VA 24543-0720
bgammon@dmklawfirm.com
jdaniel@dmklawfirm.com
Counsel for Harvey School Historical Society & Annie L. Mosby

/s/ Matthew J. Griffin
Matthew J. Griffin