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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

WCC File No. 1514359

Appellate Case No. 2021-000633

Rachel J. Turner, Employee, ... Appellant-Respondent,

v.

Medustrial Healthcare Staffing Service and Condustrial, Inc.; Guarantee Insurance Company; Countrywide Staffing Solutions Group, Inc.; South Carolina Department of Corrections; State Accident Fund; and South Carolina Uninsured Employer's Fund, ... Respondents

of which Condustrial, Inc. f/k/a Medustrial Healthcare Staffing Service, Employer, is the . . . . . Respondent-Appellant.

AMENDED INITIAL RESPONDENT'S BRIEF OF APPELLANT-RESPONDENT

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2. Whether Rachel Turner is the direct employee of SCDC under Shatto v. McLeod Reg'l Med. Ctr., 406 S.C. 470, 753 S.E.2d 416 (2013).

STATEMENT OF THE CASE

This appeal from the Workers' Compensation Commission arises out of physical and mental injuries suffered by Rachel Turner when she was held hostage and assaulted by inmates at the South Carolina Department of Corrections (SCDC). Turner is a registered nurse. She was employed by Medustrial Healthcare Staffing Service. Medustrial is a division of Condustrial, Inc. Medustrial placed Turner within the Broad River Correctional Institution pursuant to a contract it had with SCDC. The contract provided that Medustrial "shall provide workers' compensation insurance for [it's] employees who are assigned to SCDC." [Claimant's APA pages 254, 258].

When Turner applied for workers' compensation benefits from Condustrial she learned that Medustrial had failed to secure workers' compensation insurance covering the nurses at SCDC.

On May 31, 2016, Turner filed a Form 50 (Request for Hearing). She served (1) Medustrial/Condustrial as her direct employer; (2) SCDC as her statutory employer or, alternatively, as her direct employer; (3) the State Accident Fund as SCDC's carrier; (4) Countrywide Staffing Solutions Group, Inc. (a staffing company which Condustrial alleges carries workers' compensation coverage for Turner and the other nurses); (5) Guarantee Insurance Company[1] (Countrywide's insurance carrier); and (6) the South Carolina Uninsured Employers' Fund. [Form 50].

Medustrial filed a Form 51 (Employer's Answer to Request for Hearing) on June 9, 2016. Medustrial denied that Turner was an employee, alleging that she was an independent contractor.[Form 51].

SCDC and the State Accident Fund filed a Form 51 on June 9, 2016. [Form 51].

Countrywide and Guarantee filed a Form 51 on June 9, 2016. [Form 51].

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[1] Guarantee entered into liquidation shortly after the case was tried. The South Carolina Guaranty Association has succeeded Guarantee as a party in interest.

The Uninsured Employers Fund filed a Form 51 on July 21, 2016. The Fund denied all allegations. [Form 51].

The case was tried over multiple days commencing on July 24, 2017 and concluding on November 6, 2017. Commissioner James issued a Decision and Order on July 31, 2020, holding in pertinent part that:

1. Turner was the direct employee of Condustrial and the statutory employee of SCDC;

2. The average weekly wage is $1,130.86 resulting in a compensation rate of $753.94 based on payroll records from Condustrial.

3. "Turner sustained injuries to her right arm, right shoulder, back and neck. I further find she developed posttraumatic stress disorder as a direct result of the assault and surrounding injuries." [Order page 47, Finding of Fact E 5],

4. "[T]emporary total disability from September 6, 2015 until September 30, 2015 should be provided to Claimant at the rate of $753.94. Payment of temporary total disability from September 30, 2015 until the date of hearing (July 24, 2017) is denied." [Order, page 71].

5. "[L]iability for this claim shall be the sole responsibility of the South Carolina Department of Corrections and the State Accident Fund as the statutory employer of Claimant." [Order, page 71].

Turner filed a Form 30 (Notice of Appeal) to the Full Commission on August 14, 2020. Condustrial; Guarantee and Countrywide; and SCDC and the State Accident Fund also appealed to the Full Commission.

Oral argument was heard before the Appellate Panel on November 10, 2020. The Appellate Panel issued a Decision and Order on April 6, 2021. [FC Order]. The Panel affirmed the findings as to the employment relationship; the period of temporary total disability; and the assignment of liability to SCDC and the State Accident Fund. The Panel reversed the finding of average weekly wage, holding Turner's average weekly wage is $762.21 based on "Claimant's NET taxable income as reflected on her returns." [FC Order, page 47].

On May 4, 2021, Turner filed a Motion to Submit Additional and Newly Discovered Evidence. [Motion]. The Appellate Panel made no ruling on the Motion within the 30 day appeals period.

Turner appealed to this Court on June 15, 2021. [Notice of Appeal]. Condustrial filed a cross-appeal. [Notice of Appeal].

Turner filed a Motion for Partial Remand for the Commission to address the pending Motion to Submit Additional and Newly Discovered Evidence. [Motion]. The Court granted the motion and remanded to the Commission. [Order].

Turner resubmitted her Motion to the Full Commission. Condustrial filed a Return. The Full Commission issued a Form Order on September 20, 2021 denying the Motion. [order].

This appeal followed.

STATEMENT OF THE FACTS

Employer Condustrial is a staffing company. Under the trade name Condustrial, it places skilled tradespeople (plumbers, carpenters, electricians, etc.) on major construction projects. In 2015, these construction employees were covered for workers' compensation through an agreement Condustrial had with Countrywide Staffing. In the previous year, Condustrial insured the construction employees directly through Guarantee Insurance Company.

Condustrial has a division called Medustrial. Medustrial places nurses in various assignments, most particularly with the South Carolina Department of Corrections. Medustrial's annual nursing payroll is roughly $2.5 million dollars. In 2014, when Condustrial was insured directly with Guarantee, their corporate counsel, Tom Sears, falsely informed Guarantee during a premium audit that the nurses were insured by the State of South Carolina, thus the nursing payroll was not included in the premium. [Audit]. At the time of this incident, Condustrial had no workers' compensation insurance for the nurses.

On September 11, 2008, Medustrial entered into a contract with SCDC to provide nurses to work in correctional institutions. The contract specifically provided that:

- SCDC hereby engages Contractor [Medustrial] to provide qualified nursing professionals to provide services to Patients who are under the custody and control of the SCDC . . .

- RN's, LPN's assigned to SCDC by Contractor are employees of Contractor and not SCDC. . . . Contractor shall be responsible for withholding federal and state income taxes, paying federal Social Security taxes, unemployment insurance and **maintaining workers' compensation insurance** in an amount and under such terms as required by the State of South Carolina.

- **Contractor shall provide workers' compensation insurance for Contractor's employees who are assigned to SCDC**. [Claimant's APA pages 254, 258 (emphasis added).

In violation of the specific terms of this contract, Condustrial obtained no workers' compensation coverage for these nurses. Instead, it attempted to misclassify them as independent contractors to defraud both SCDC and Guarantee Insurance Company.

Claimant Rachel Turner is a 48-year old nurse. Turner has been an LPN since 1993. She has worked in a variety of positions, most of which have been with nursing staffing agencies. The various agencies have always treated her the same as to work assignments and schedules, with the exception being that some paid her on a W2 and some (including Condustrial) paid her on a 1099.

On February 7, 2013, Turner applied for a job as an LPN with Medustrial. She filled out an ***Employment Application*** [Claimant's APA p. 261], as well as a W4, and various other documents describing an employee-employer relationship (including documents specifically stating she was an "at-will-employee" who could be terminated for violating Condustrial's (and SCDC's) policies and procedures). Most of the documents stated she was an employee, although a handful indicated she was an independent contractor (including an ***Independent Contractor Agreement***). She signed a ***Post-Offer-Of-Employment Medical Injury*** form "to assist your employer in meeting the knowledge requirement of the Insurance Industry's Second Injury Fund." [Claimant's APA page 268]. She signed a ***Facility and Client Requirements*** form stating "Failure to comply with any of the above will prevent your from working as an employee of MEDUSTRIAL until such time as the non-compliant issue has been resolved." [Claimant's APA page 271]. She signed a ***Terms of Employment*** form listing various requirements which if violated were "grounds for termination." [Claimant's APA page 272]. She signed an ***Attendance Policy*** stating violations "could/may result in further disciplinary actions up to termination of employment." [Claimant's APA page 275]. Most significantly, she signed a form stating that she was entering into an "employment at will

relationship" providing that "m employment relationship with the Company is terminable at will for any reason by either party." [Claimant's APA page 282].

Turner was hired as an LPN and placed at Broad River Correctional Institute. She was paid $21.00 per hour. She was paid some overtime when she worked over 40 hours. [payroll].

On September 5, 2015, Turner and another nurse were captured and held hostage by two inmates. Turner graphically described her ordeal at trial.[2] [Tr I, pages 178-185]. Turner was tied to a chair; beaten; stabbed; threatened with having her fingers cut off, her throat cut, and her head bashed in; and forced to take drugs. She was held for approximately 5 hours. The inmates flipped a coin to see whether Turner or Nurse Hildebrand would be released. Turner was released first. Nurse Hildebrand was rescued when the SWAT team broke through the wall of the medication room.

Turner developed severe PTSD. She also suffered physical injuries to her arm and back which prevent her from working as a nurse.

As to the PTSD, Turner suffers from nightmares, extreme anxiety, fear of white males (the inmates were white males), and inability to be in confined spaces or areas where there is no escape route. Her psychological and psychiatric records continuously record these conditions noting she

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[2] Turner was unable to attend the entire hearing. She was escorted to the courtroom by her daughter solely to give testimony. She was not present at any other part of the 8-day trial due to her severe PTSD and anxiety. She required a *prn* prescription of ten Klonopin (a sedative used to treat seizures, panic disorder, and anxiety) specially prescribed by her psychiatrist to be able to testify at the hearing. [Tr. I, page 325, line 2-page 327, line 7]. Even with the medication, Turner snapped a rubber band on her wrist throughout her testimony as a coping measure. She could not handle unfamiliar white male attorneys approaching her to review documents, instead accepting documents from a female attorney, Ellen Goodwin. [TR I; page 187, lines 15-25; page 105, lines 5-9; page 208, lines 2-4; page 224, lines 1-8; page 245, line 13-15; page 262, line 2-page 263, line 6; page 285, lines20-22]. She panicked several times during the hearing, notably when the lights went out around 7:00 p.m. [Tr. 1, page 324, line 23-page 325, line 3].

has been out work since the assault due to her psychological injuries. The records show her strong desire to get better and return to work, yet being unable to cope with simple social interaction. The records are replete with the doctors' attempts to treat her with desensitization therapy by taking her into public places to help her cope. These efforts were met with little success. [records].

On September 24, 2015, Condustrial sent one of their managers, Lisette Collachi to Turner's home to deliver a letter purportedly offering her light duty. [Countrywide APA page 330]. The manager forced her way into Turner's home to deliver this letter. At the time, Turner was not sleeping, bathing or eating nor was she leaving her house. After hearing this, the manager called the police to do a wellness check on Turner. [Countrywide APA page 327-329].

At the time, Turner was written completely out of work and could not have accepted any offer of employment (nor has she ever improved enough to work in any capacity). When Turner attempted to call Tom Sears at Condustrial about workers' compensation benefits, she learned there were no such benefits because Condustrial considered her an independent contractor. Thereafter, Condustrial refused to take her calls. The purported offer of employment was never renewed.

Turner continues to receive mental health treatment. Shortly after the assault, she underwent a five-week treatment program with a psychiatrist, Dr. Stephanie Berg. [APA pages 29-85]. Dr. Berg consistently kept her out of work, stating: "Due to incident 9/5/15, patient has not worked since that date." [Claimant's APA pages 57, 69, 75]. After Turner completed the five-week program, began treatment with Community Mental Health. Her treatment centered on desensitization therapy in an attempt to return her to work at some point. [Claimant's APA page 38]. As of the hearing, the treatment had not been successful in improving her to the point she could return to work. [Claimant's APA pages 86 - 202].

Turner continues to remain out of work due to her injuries, primarily the PTSD. No workers' compensation benefits have been paid to her. She receives food stamps and other public or charitable assistance. She did receive approximately $7,000.00 in financial assistance from Victims' Assistance – conditioned on proof she provided that she was unable to work. [Tr. I, page 323, lines 8-19; Claimant's APA pages 289 - 296].

STANDARD OF REVIEW

The Administrative Procedures Act ("APA") provides the standard for judicial review of decisions by the Commission. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010); Lark v. Bi-Lo, Inc., 276 S.C. 130, 133-34, 276 S.E.2d 304, 306 (1981). Under the APA, the appellate court can reverse or modify the decision of the Commission if the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. S.C. Code Ann. § 1-23-380(5)(d), (e) (Supp. 2011).

"[T]he guiding principle undergirding our workers' compensation system [is] that the Act is to be liberally construed in favor of the claimant. The second is the equally compelling evidentiary principle that an award may not rest upon surmise, conjecture, or speculation." Hutson v. S.C. State Ports Authority, 399 S.C. 381, 732 S.E.2d 500 (2012). The Commission's decision "must be founded on evidence of sufficient substance to afford a reasonable basis for it." Wynn v. People's Natural Gas Co. of S.C., 238 S.C. 1, 12, 118 S.E.2d 812, 818 (1961).

The existence of an employment relationship is a factual question that determines the jurisdiction of the Workers' Compensation Commission and is reviewable under the preponderance of the evidence standard. Brayboy v. WorkForce, 383 S.C. 463, 681 S.E.2d 567 (2009). When the issue involves jurisdiction, the appellate court may take its own view of the preponderance of the evidence. It is South Carolina's policy to resolve jurisdictional doubts in favor of inclusion rather than exclusion. White v. J.T. Strahan Co., 244 S.C. 120, 135 S.E.2d 720, 723 (1964).

ARGUMENT

I. Rachel Turner is the direct employee of Medustrial/Condustrial and the statutory employee of SCDC.

The Appellate Panel correctly held Turner satisfied all four factors to be considered an employee rather than an independent contractor. South Carolina uses a four-factor test to determine whether a worker is an employee or an independent contractor. All four factors are weighed equally to determine whether the putative employer possesses the *right of control* – which is the lynchpin of the analysis. The factors are: 1) direct evidence of the right or exercise of control; 2) furnishing of equipment; 3) right to fire; and 4) method of payment. Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 676 S.E.2d 700 (2009). The test is not the actual control exercised, but whether there exists the right and authority to control and direct the undertaking. In the instant case, all four factors preponderate in favor of status as an employee.

As a general rule, public policy favors including injured workers within the ambit of the Workers' Compensation Act. "[T]he undisputed purpose of the Workers' Compensation Act is to protect workers, owners, and businesses by requiring a business covered by the Act to insure its workforce against the cost of industrial accidents." Ramirez v. May River Roofing, Inc., 433 S.C. 519, 860 S.E.2d 680 (Ct.App. 2021).

In Wilkinson, our Supreme Court held Wilkinson was an independent contractor because there was "an unchallenged independent contractor arrangement where the parties' conduct follows the agreement in every material respect." Wilkinson, 676 S.E.2d at 703. The court noted the "policy considerations favoring a finding of compensability are . . . diminished where . . . the independent contractor procures workers' compensation coverage or its functional equivalent." Id, 676 S.E.2d at 703. As part of his contract with

Palmetto State, "Wilkinson also agreed to carry Workers Compensation coverage in the limits statutory [sic] within the State of South Carolina."[3] Id., 676 S.E.2d at 701.

This Court reached a different result in Ramirez v. May River Roofing, Inc., 433 S.C. 519, 860 S.E.2d 680 (Ct. App. 2021). The Court noted that "unlike the trucking company in *Wilkinson*, there was no requirement that Ramirez purchase coverage protecting himself against the risk he would be hurt in a workplace accident." Id., 860 S.E.2d at 686. The Court reasoned: "If the record—as in Wilkinson—contained a detailed independent contractor agreement requiring Ramirez to protect himself against the cost of being hurt at work, we would likely feel differently. As it stands, we lean in favor of coverage based on the facts of this case and in order to serve the Act's beneficent purpose." Id. If not for the lack of a remedy for Ramirez's injury, the Court might well have reached the same result as Wilkinson. Implicitly following the maxim that equity will not suffer a wrong without a remedy, the Court concluded "we lean in favor of coverage based on the facts of this case and in order to serve the Act's beneficent purpose."[4] Id.

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[3] At trial, counsel for Condustrial asked Tommy Burgess if he was "aware that the independent contractor agreement between Medustrial and the nurses it was providing SCDC included a provision where those nurses were required to provide their own workers' compensation agreements." [tr. 10.12.17, page 71, lines 17-21] In reality, the independent contractor agreement *did not* contain such a provision. The document states: "The independent contractor . . . shall provide to the broker a certificate of professional liability and malpractice insurance in the amount of $1,200,000 . . ." [Claimant's APA page 236]. Condustrial never enforced this requirement, instead providing this insurance for the nurses. [Tr. 10-13, page 277-278].

[4] The Ramirez court noted the "structure [of the Workers' Compensation Act" was designed to build the costs of industrial accidents into the cost of goods and services and to ultimately pass those costs to the consumers whose demand for the goods and services brought about the conditions that led to the claimant's injury." Id. In the case *sub judice*, SCDC contracted and paid for "workers' compensation insurance for [Condustrial's] employees who are assigned to SCDC." [Claimant's APA pages 254, 258]. As such, the premiums for workers' compensation insurance were built into the price for labor services negotiated between SCDC and Condustrial. Condustrial should not receive a windfall for its knowing and wilful breach of its contractual obligation to protect the nurses it sent to SCDC.

This public policy consideration applies here with even greater force. Turner did not merely face the ordinary risks of nursing in a hospital or clinic setting. She worked in a maximum security prison. The risk and fear of being kidnaped and held hostage became reality for her. Public policy compels the finding that she is an employee subject to the Act.

A. Condustrial is bound by its contract with SCDC providing that Condustrial "shall provide workers' compensation coverage for [Condustrial's] employees who are assigned to SCDC."

On September 11, 2008, Medustrial entered into a contract with SCDC to provide nurses to work in correctional institutions. The contract specifically provided that:

- SCDC hereby engages Contractor [Medustrial] to provide qualified nursing professionals to provide services to Patients who are under the custody and control of the SCDC . . .

- RN's, LPN's assigned to SCDC by Contractor are **employees of Contractor** and not SCDC. . . . Contractor shall be responsible for withholding federal and state income taxes, paying federal Social Security taxes, unemployment insurance and **maintaining workers' compensation insurance** in an amount and under such terms as required by the State of South Carolina.

- **Contractor shall provide workers' compensation insurance for Contractor's employees who are assigned to SCDC.** [Claimant's APA pages 254, 258 (emphasis added)].

This contract was in effect on September 5, 2015 when Turner was kidnaped and assaulted.

In violation of the specific terms of this contract, Condustrial obtained no workers' compensation coverage for these nurses.[5] Instead, it knowingly attempted to misclassify them as independent

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[5] In Shatto, our Supreme Court noted that "[t]he Staffing Agreement between Staff Care and McLeod Regional 'acknowledge[d] that [Shatto] is not an employee of [Staff Care], [and] the relationship of [Shatto] to [Staff Care] is that of an independent contractor . . .'" Shatto v. McLeod Reg'l Med. Ctr., 406 S.C. 470, 753 S.E.2d 416 (2013). The Court referenced this contract to show that the method of payment factor pointed to an independent contractor relationship – even though the balance of factors showed Shatto to be a direct employee of McLeod. In Shatto, the parties stipulated that Shatto was an independent contractor of Staff Care; the issue was whether she was an employee of McLeod. In the instant case, the contract between Condustrial and SCDC specified that Turner and the other nurses were "employees of [Condustrial]" and [Condustrial] shall provide

contractors to avoid the expense of using employee nurses. SCDC management was unaware that Condustrial was deliberately breaching the contract.

At one point, Condustrial investigated purchasing workers' compensation coverage for the nurses. Condustrial called their insurance agent, Charles Lee, to testify regarding obtaining workers' compensation coverage for the nurses in 2008 when Condustrial purchased the predecessor company to Medustrial. Lee was aware that the nurses were placed at the Department of Corrections. Condustrial never disclosed to him that it had contracted with SCDC to provide employee nurses covered by workers' compensation insurance.

Lee testified that the insurance carriers refused to provide coverage for Condustrial's nurses because

> The insurance carriers did not want to ensure independent contractors who would be on Monday working for Condustrial/Medustrial, Tuesday. Wednesday, Thursday may be working for another one, and they didn't want to have a situation where if that employee was injured at any of those jobs, that they may come back and filed a claim under the policy that was provided by Condustrial. And so they just didn't like that scenario and opted not to offer us a policy.[6]

When asked "How did they solve the problem they had with their contract [to provide workers' compensation for the nurses], he testified "Well, I believe what they did is they went to their legal counsel and they developed – that's why they brought in the independent contractor agreement to address that." [tr. 11.06.17, page 62, line 22-page 67, line 19].

At trial and before the Appellate Panel, Condustrial argued that the contractual requirement to provide employees covered under workers' compensation was altered by a "course of dealing." Tom Sears testified repeatedly that "The parties actually performed the contract in a different way in an

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workers' compensation insurance for Contractor's employees who are assigned to SCDC." [Claimant's APA pages 254, 258].

[6] This concern would not apply to Turner as she worked full-time for Condustrial,.

amended or altered or changed way from the language here everyday for nine years."[7] [10/13/17 tr, page 216, line 6-page 217, line 10]. Sears contended SCDC "accepted 1099s on a daily basis." However there was no evidence that SCDC was ever informed, let alone consented, to allowing uninsured independent contractors to work in its prisons. Even Sears admitted "workers comp never came up" in any discussion with SCDC representatives. [10/13/17 tr, page 219, line 24-page 220, line 11].

Russell Rush is the Division Director for Occupational Safety and Workers' Compensation at SCDC. He testified that he had never been advised by anyone at Medustrial/Condustrial that the nurses they provided were not covered by workers' comp insurance." [tr. 11.06.17, page 76, line 25-page 77, line 4]. He testified had he known Turner and the other Condustrial nurses were not covered, "I would not have allowed any contractors onsite that didn't have workers' compensation coverage. It's something that I watch very closely, that we try to – our contracts, you know state very specifically that they have to provide their own workers' compensation insurance." [tr. 11.06.17, page 77, lines 5-14; page 84, line10-page 85, line 11].

Tommy Burgess, SCDC's Director of Support Services for Medical, testified that the contract between SCDC and Medustrial required the nurses to be employees covered by workers' compensation. He further testified that no one from Medustrial ever informed him that the nurses were not employees and were not covered by workers' comp insurance. [tr. 10.12.17, page 102, lines 3-11]. He added "[t]here would be no reason for me, based on our agreement, for me to ask them if they were independent

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[7] Sears used the same tactic regarding Condustrial's attempt to obtain post-underwriting coverage from Countrywide and Guarantee. When Sears attempted to obtain coverage to defend Turner's claim, Countrywide's representative sent an email stating: "Tom, we have not misunderstood anything. We were presented with a claim related to an entity called Medustrial that had never before been disclosed to us." Sears alleged the email "accused us of running a shadow company and hiding it from them." [10/13/17 tr, page 302, lines 2-12].

contractors, because our agreement said that they were going to be covered with work comp, and they were employees." [tr. 10.12.17, page 117, line 15-page 118, line 8].

Burgess was asked if "the contract could be modified just by words or acts of the parties." He responded, "No. All – any modifications would have to go through the contract system, and it would have to be approved and signed for by the Director of SCDC." Burgess confirmed that the contract itself contained a provision stating "This agreement may be amended only by written agreement between the parties." [tr. 10.12.17, page 68, line 16-page 7, line 8; Claimant's APA page 58].

The Court should reject Condustrial's attempt to unilaterally rewrite its contract with SCDC. Courts do not look to the course of dealing between parties as a tool for inserting new obligations among those made explicit by the terms of a written agreement. Rather, courts draw upon parties' dealings only when necessary to acquire an improved understand of the meaning the parties intended by using particular words or expressions in a subsequent written agreement. Thus, course of dealing evidence is used to aid contract interpretation, not to show contract augmentation. See Columbia Nitrogen Corp. v. Royster Co., 451 F.2d 3, 9 (4th Cir. 1971) ("[E]vidence of usage of trade and course of dealing should be excluded whenever it cannot be reasonably construed as consistent with the terms of the contract.") "Where a contract is unambiguous, clear and explicit, it must be construed according to the terms which the parties have used, to be taken and understood in their plain, ordinary, and popular sense." Warner v. Weader, 280 S.C. 81, 83, 311 S.E.2d 78, 79 (1983).

Even in situations where a course of dealing or course of performance may be used to interpret ambiguities in a contract, the other party must have "knowledge of the nature of that performance and an opportunity to object to it." KN Energy, Inc. v. Great Western Sugar Co., 698 P.2d 769 (Colo. 1985). There is no evidence SCDC knew Turner and the other nurses were uninsured. To the contrary, SCDC's representatives testified they believed Condustrial's nurses were insured. The mere fact SCDC failed to

guard its rights carefully by requiring a valid certificate of insurance for each policy period did not void Condustrial's obligations. See Heins v. Heins, 344 S.C. 146, 543 S.E.2d 224 (Ct.App.2001)("The court must enforce an unambiguous contract according to its terms, regardless of the contract's wisdom or folly, or the parties' failure to guard their rights carefully."). Indeed, the fact Condustrial provided certificates of insurance it knew were invalid shows that Condustrial wilfully mislead SCDC.

Condustrial has the temerity to argue it is bound by the one contract favorable to their case, yet deny they are bound by their contract with SCDC. Condustrial's contract with SCDC provided "Contractor shall provide workers' compensation coverage for Contractor's employees who are assigned to SCDC." [Claimant's Exhibit G]. The fact Condustrial represented to SCDC that the nurses were employees covered by workers' compensation insurance is evidence favoring an employment relationship. See Sellers v. Tech Serv., Inc., 803 S.E.2d 731, 421 S.C. 30 (Ct.App.2017) (commission properly considered fact that "In obtaining permits with the City for the job on which Sellers was injured, Tech Service represented that no subcontractors or independent contractors would be involved."). Condustrial argues this contract is immaterial because it was between Condustrial and SCDC; not Turner. They also argued that a written contract between two businesses to provide employees covered by workers' compensation insurance is somehow "an entirely different matter" than less formal "representations to the upstream employer." [Appellant Condustrial's Full Commission Brief, page 14]. Sellers is controlling here. The contract between SCDC and Condustrial is a "fact[] illustrating [Condustrial] held [Turner] out as its employee." Sellers.

In its Brief to this Court, Condustrial ignores the contract with SCDC. In its Brief to the Commission, Condustrial admitted – albeit reluctantly – that the SCDC contract "provides that Condustrial 'shall provide workers compensation coverage for Contractor's employees who are assigned to SCDC.'" Yet they went on to argue that "this is not a prohibition against assignment of

independent contractor nurses; this provision only means that any employee nurses assigned to SCDC will be covered under the worker's compensation laws." This strained and absurd construction demonstrates the lengths Condustrial is willing to go to defraud SCDC and Turner.[8] See Farr v. Duke Power Co., 265 S.C. 356, 218 S.E.2d 431 (1975)("The contract is simply not reasonably susceptible of the strained, illogical construction which, in this lawsuit, Farr belatedly endeavors to place thereupon."). This is further shown by the even more specious argument that "SCDC's manifest concern is employment and worker's compensation liability, which is obviated by the assignment of an independent contractor nurse." [Appellant Condustrial's Full Commission Brief, page 18]. SCDC's manifest concern was realized when they were deemed liable for this claim despite a contract specifically designed to insure that Condustrial provided workers' compensation for the nurses they sent to the prisons.[9]

Sellers did not specify which Wilkinson factor the contract to provide employees applied to. The Court noted "Nevertheless, the record illustrates—and the Commission recognized—several facts illustrating Tech Service held Sellers out as its employee." Sellers at 45, 803 S.E.2d at 739.

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[8] Condustrial also defrauded Guarantee Insurance Company during the previous policy period when Tom Sears represented to Guarantee during a payroll audit that the nurses were insured by SCDC. [Tr. 8, pages 86-92].

[9] Condustrial also argues "The notion that SCDC thought Condustrial's nurses [were employees] is undercut by the fact SCDC never requested certificates of insurance from Condustrial proving the purported nurses were covered under the Act." [Appellant Condustrial's Full Commission Brief, page 18]. This statement is misleading. SCDC had in the past requested certificates of insurance from Condustrial. Condustrial provided a certificate of insurance dated April 30, 2010. The Single Commissioner held SCDC could not transfer liability to the Uninsured Employer's Fund under § 42-1-415 because this certificate was not current with Turner's accident. Thus, while SCDC may have been too trusting or careless to protect its rights, it is not true that they "never requested certificates of insurance."

One might also note that as a condition of continuing to provide nurses to SCDC after this claim arose, Condustrial ostensibly obtained workers' compensation coverage for the nurses – even though Sears testified that the coverage was illusory, depending on the outcome of this case.

The Court held that this fact, while "not conclusive as to employment[,] status does not alter our determination that the Commission thoroughly analyzed the relevant facts and evaluated the employment test factors in an 'evenhanded manner.'" Id. Thus, even though the contractual requirement for Turner to be a covered employee may not be dispositive in and of itself, it is strong evidence that it was the intent of all parties – save Condustrial – to ensure that Turner and the other nurses were employees protected by workers' compensation insurance. Whether the Court finds the contractual requirement to provide employee nurses is "direct evidence of the right or exercise of control" or whether it finds Turner is a third-party beneficiary of that contract,[10] the fact the contract was in force at the time of her injury should compel a finding that she is Condustrial's employee.

B. Application of the Wilkinson four-factor test.

The factors to be considered by the Court in determining whether there is an employee-employer relationship are: 1) direct evidence of the right or exercise of control; 2) furnishing of equipment; 3) right to fire; and 4) method of payment. Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 676 S.E.2d 700 (2009).

1. Direct Evidence of the Right to Control.

The Appellate Panel correctly found "The Direct evidence of a right of control overwhelmingly indicates an employee/employment relationship between Turner and Condustrial/Medustrial." [FC Order, page 15, Finding of Fact B.3.d]. Turner signed numerous documents describing herself as an employee and showing evidence of control. Indeed, the very first document she filled out was the ***Employment Application.*** [Claimant's APA pages 262-262]. Turner testified that she was told all these documents must be signed as part of her "employee

[10] "[I]f a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person." Fabian v. Lindsay, 410 S.C. 475, 765 S.E.2d 132 (2014).

package." [Tr. 1, page 193, lines 11-17]. She signed a ***Post-Offer-Of-Employment Medical Injury*** form used "to assist your employer in meeting the knowledge requirement of the Insurance Industry's Second Injury Fund." [Claimant's APA page 268]. She signed a ***Facility and Client Requirements*** form stating "Failure to comply with any of the above will prevent you from working as an **employee** of MEDUSTRIAL until such time as the non-compliant issue has been resolved." [Claimant's APA page 271, 276 (emphasis added)]. She signed a ***Terms of Employment*** form listing various requirements which if violated were "grounds for termination." [Claimant's APA page 272]. She signed an ***Attendance Policy*** stating violations "could/may result in further disciplinary actions up to termination of employment." [Claimant's APA page 275].

Most significantly, she signed a form stating that she was entering into an "**employment at will relationship**" providing that "the employment relationship with the Company is terminable at will for any reason by either party." [Claimant's APA page 282 (emphasis added)].

Fundamentally, "Employment, like any other contract, presupposes understanding. The new relation cannot be thrust upon the servant without knowledge or consent. . . . Understanding may be inferred from circumstances, but understanding there must be. . . . Rights and remedies are not lost by stumbling unawares into a new contractual relation. There can be no unwitting transfer from one service to another." Holloway v. G. O. Colley & Sons, 208 S.C. 234, 37 S.E.2d 666 (1946), *quoting* Murray v. Union Railway Co. of New York City, 127 N.E. 907 (N.Y. 1920)(Cardozo, J.).

Turner reasonably believed she was an employee for many reasons, not the least of which was the interview and hiring process. She did not learn otherwise until she filed for workers'

compensation and was denied. Tom Sears told her then that she was not their employee and not eligible for workers' compensation benefits.[11] She testified:

> They haven't contacted me since they told me I was not their employee. I've tried contacting them and they refuse to talk to me. When I applied for food stamps, they refused to say I was ever employed with them. When I applied for different assistance that required employment confirmation, they refused to give it.

[Tr I, page 340, lines 1-9].

Condustrial – indeed all Defendants – focus on the ***Licensed Professional Contractor Agreement*** ("LPCA") executed by Turner on February 8, 2012. [Claimant's APA pages 233-237]. Somewhat histrionically, Condustrial argues "In a stunning double standard, the Panel dismisses the significance of the independent contractor agreement as evidence of an independent contractor arrangement in one breathe yet cites purported *pro forma* employment paperwork excecuded by Turner as evidence favoring an employment relationship in another." [Respondents' Brief of Respondent-Appellant, page 27]. As a matter of law, the LPCA is not binding on Turner and cannot define the employment relationship. See Kilgore Group, Inc. v. S.C. Employment Sec. Comm'n, 313 S.C. 65, 68-69, 437 S.E.2d 48, 50 (1993)(holding workers were employees despite written contract stating otherwise because "language in the contract merely declaring the relationship is that of an employer/independent contractor is not dispositive"); S.C. Code Ann. 42-1-620 (2007)("No agreement by an employee to waive his rights to compensation under this Title shall be valid."). As to the "*pro forma* employment paperwork," if Condustrial did not intend Turner to be an employee, then they should not have made her sign it. Nor, for that matter, should they have made her comply with the requirements set out in the employment paperwork.

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[11] Justin Gudvangen also believed he was covered under workers' compensation when employed by Medustrial. While he knew there was no health insurance or retirement plan, and that he would have to pay his own taxes, "as far as workman's comp insurance is concerned, I was not aware that I didn't have coverage through that." [Tr 1, page 9, lines 9-21]. He added that if he had been set clear on the workers' compensation issue, "I think I would have just worked for an agency that provided it and withheld taxes." [Tr 1, page 86, lines 7-11; page 125, lines 9-17].

There is one specific document which binds Condustrial – and it is not the LPCA. On October 9, 2014, Turner was required to sign an ***Application Form Waiver*** stating:

> I further understand that my employment with the Company shall be probationary for a period of ninety days (90) days and further that at any time during the probationary period or thereafter, my **employment relationship with the Company is terminable at will** for any reason by either party.

[Claimant's APA page 282 (emphasis added)].

The significance here is not merely the written acknowledgment that Turner is an at will employee. The document also states the "employment-at-will relationship . . . cannot be altered except by a written instrument signed by the Owner/Managing Member of the Company." [Claimant's APA page 282]. Tony Durham, Condustrial's president, testified that this document was the "last page of the employee policy manual." Durham admitted "only a document signed by [him] can alter the at will employment relationship described in this exhibit." There is no such document in the record. The LPCA was signed by Holly Seeby; not Tony Durham. The ***Application Form Waiver*** trumps the LPCA.

Not only did the Appellate Panel correctly find that the documents confirmed that Turner was an employee, it also found other evidence of Condustrial's right of control. Indeed, the evidence shows that, in practice, Condustrial treated its nurses as employees in virtually every aspect – other than paying for workers' compensation, unemployment insurance and withholding taxes.

Nurses were required by Condustrial and SCDC to wear a uniform, scrubs, closed in shoes, and socks or stocking. [Tr. 8, pages 35-36]. While there was flexibility as to whether a nurse took a shift or not, once the shift was filled, the nurses were required to work. The shifts were set a full month in advance. [Tr. 8, pages 52-53]. Turner testified,"If they [Condustrial] did not want me to work that shift, I could not work it." [Tr. 1, page 219, lines 17-18]. Tom Sears agreed, testifying "with Ms. Turner where she was trying to stay after and get extra shifts, . . . that can't be allowed .

. ." [Tr. 10.13.17, page 440, lines 1-4]. On questioning from Condustrial's lawyer, Sears confirmed Condustrial's policy "require[s] nurses like Ms. Turner to get prior authorization before taking other shifts that would put them into overtime status." [Tr 10.12.17, p. 179, lines 21-25] And while the LPCA stated nurses were supposed to find their own replacement when they could not work a scheduled shift, in practice the nurses never found their own replacements; Condustrial replaced the absent nurse just like any other employee. [Tr1, page 68, lines 6-24].

Condustrial had a written **ATTENDANCE POLICY** "for all employees of Medustrial Healthcare." Turner signed her name above "Employee Signature" on October 9, 2014. The policy stated:

> Employees are required to call in 4 hours before the scheduled shift; no text message will be accepted for cancellation of your shift. Employees **MUST** speak to a Medustrial Healthcare Staffing advisor. If an employee leaves a text message it will be considered a No Call/No Show, and the No Call/Not Show policy will be enforced this could/may result in further disciplinary actions up to termination of employment.

The No Call/No Show policy stated "The second separate offense may result in termination of employment with no additional disciplinary steps." [APA page 275]. The three current or former Medustrial nurses who testified (Turner, Gudvangen and Sidney) uniformly agreed that Condustrial enforced this policy.

The Single Commissioner and Appellate Panel found:

> On a day to day basis, there was no difference between nurses employed by SCDC directly and those placed at SCDC by Condustrial and MedFirst. SCDC required nurses to wear specific uniforms; carry specific identification badges; and park in employee parking. LPN's were directly under the control of the nursing supervisor (charge nurse or an RN) as to where they worked; what hours they worked; which patients they treated; how they charted the care they provided; and myriad other daily tasks. "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." Nelson v. Yellow Cab Co., 343 S.C. 102, 110, 538 S.E.2d 276, 280 (Ct.App.2000), *overruled on other grounds by* Wilkinson, 382 S.C. at 300 n. 3, 676 S.E.2d at 702 n. 3.

[Order, page 36].

They correctly concluded "The direct evidence of a right to control overwhelmingly indicates an employee/employment relationship between Turner and Condustrial/Medustrial." [Order, page 36].

Condustrial argues that the Appellate Panel erred in relying on Shatto because "unlike the claimant in Shatto, who alleged an employment relationship with the hospital where she was assigned and not the agency who assigned her, Turner does not contend she is SCDC's employee. Rather, she seeks to impute SCDC's requirements and control over its contract nurses to Condustrial." [[Respondents' Brief of Respondent-Appellant, page 10]. Essentially, Condustrial concedes that Turner and the other nurses are subject to the control and direction of SCDC while working in the prisons. Tom Sears testified ". . . She went and did what SCDC told her to do." [10/17/TR, page 345, lines 21-22]. Condustrial makes a legal argument that control by SCDC does not equate to control by Condustrial.

This argument was raised and failed as a matter of law in Kilgore Group, Inc. v. South Carolina Employment Sec. Comm'n, 313 S.C. 65, 437 S.E.2d 48 (1993). Although Kilgore dealt with an appeal from the Employment Security Commission, the legal test for an employee is the same as in workers' compensation cases. In Kilgore, the putative employer was an agency which supplied temporary workers to perform:

> a variety of tasks, including construction work, machine operation, truck driving, cleaning, stocking, and assembly. When clients contacted Kilgore with their specific employment needs, Kilgore negotiated with the client a fee for providing a worker or workers to meet the client's demands. Kilgore then contracted with the individual workers to fill the positions required by the client. According to Kilgore's president, the contract could be based on an hourly wage or a fixed amount for the job. However, all workers were required to turn their hours in to Kilgore. Hourly workers were permitted to take "draws" on the amount they had worked. Kilgore's president testified that the contracts expressly provide that the relationship is one of an independent contractor. Id. at 67.

Kilgore's clients controlled the daily activities of the workers. The clients "felt free to tell Kilgore not to sent a worker back if they were ever dissatisfied with his work."[12] Id. Based on these facts, the South Carolina Supreme Court held "the workers were employees of Kilgore, and not independent contractors." Id. Kilgore should control the result in this case.

As to the argument that SCDC rather than Condustrial had the right to control the nurse, the Kilgore court addressed that issue as well:

> The testimony of these clients indicates the workers' performance and the manner in which it was done were controlled directly by The State and State Printing Company supervisors. However, The State and State Printing Company had no contract with the workers. Their ability to exercise control over the workers' activities was derived solely from their contracts with Kilgore and Kilgore's contract with the workers. Therefore, it can be inferred Kilgore possessed the right to control the workers' performance and the manner in which it was done and delegated that authority to its clients.

Id. at 68, 437 S.E.2d at 50.

The simple fact is that Condustrial had the authority to exercise sufficient control over Turner's activities – and actually exercised that authority – for her to be deemed an employee. The Court should affirm the Panel's finding that "The Direct evidence of a right of control overwhelmingly indicates an employee/employment relationship between Turner and Condustrial/Medustrial." [FC Order, page 15, Finding of Fact B.3.d].

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[12] Justin Gudvangen, Turner's charge nurse at SCDC, testified that he had the same authority. He could "inform her agency that we had an issue, you know, up until – up to the point of me requesting her not to come back or that they not send her back or not allowing her back in the institution." He had "the ability to require [Turner] to leave the premises and not come back." [Tr, 1, page 74, line 9-page 75, line 4].

2. Furnishing of Equipment

The Appellate Panel found the Furnishing of Equipment prong "to be somewhat neutral because Claimant's primary contention is that Condustrial was the direct employer." [Order, page 37]. It is true that Condustrial itself did not supply much of anything other than some unspecified safety equipment.

The Panel's analysis overlooks the fact that Turner could not work as a nurse in a prison without a substantial capital investment in facilities and equipment by SCDC. As the Panel notes, "Also, because of security concerns, the nurses placed at the Department of Corrections could not bring in nursing supplies. The items/equipment were provided by the Department of Corrections. Essentially, the nurses assigned to SCDC provide their skill and labor." [Transcript 1, page 77]. This is critically important. As the South Carolina Supreme Court stated in Lewis: "Because the Club, and not Lewis, bore the risk of the capital investment in the equipment used by Lewis to perform her work, we find this factor weighs in favor of an employee relationship." Lewis v. L.B. Dynasty, 411 S.C. 637, 770 S.E.2d 393 (2015).

Turner could not have worked as a nurse in a prison without the equipment, supplies and facilities provided by her statutory (and, under Shatto, direct) employer (SCDC). Accordingly, the Court should reverse the finding on this factor and find the provision of equipment prong "weighs in favor of an employee relationship." Id.

3. Right to Fire

The Appellate Panel found the right to fire factor "strongly preponderates for a finding that Turner is an employee." [Order, page 38]. Turner herself testified "she could be terminated by Medustrial." [Tr. 1, page 328, lines 6-16].

Nurse Sandra Sidney was called on behalf of Condustrial to "refute [Turner's] portrayal of the relationship between these nurses and Condustrial." [Tr. 11.6.17, page 14, lines 9-12]. Sidney "[work[ed] for" Condustrial in 2015. She started in 2014 and was still there at the time of trial. [Tr. 11.6.17, page 24]. She testified she thought she was an independent contractor nurse based on the LPC she had signed. However, when asked about how the employment relationship actually worked, it became apparent she too was under a significant degree of control. [Tr. 11.6.17, page 35, line 14-page 40, line 5].

Nurse Sidney testified she signed "a lot of paperwork." This included many of the same documents signed by Turner – many of which document the right to fire. "It was about our dress code. It was about how we should conduct ourself professionally while we're on the job and how we should operate within our scope of nursing basically, as well as the dress code, and emergency contact information as well." She specifically confirmed she had signed the facility expectations form, drug policy, and attendance policy. [Tr. 11.6.17, pages 38-40; Claimant's APA pages 271, 272, 275 and 276].

As to whether Condustrial had the right to fire her, Nurse Sidney testified they did. She testified: "If we're caught using drugs, we will be reported to our immediate supervisor, and then we would be drug screened or *we would eventually be terminated.*" She confirmed the policy was the same at both Medustrial and SCDC. [Tr. 11.6.17, page 37, lines 2-13]. She further testified that "for no show, no call, no show, yes sir, you would be [disciplined and even terminated]. [Tr. 11.6.17, page 39, line 6, page 40, line 5].

Turner (and apparently Sidney) signed a ***Terms of Employment*** form listing various requirements which if violated were "grounds for termination." [Claimant's APA page 272]. She signed an ***Attendance Policy*** stating violations "could/may result in further disciplinary actions up

to termination of employment."The *Attendance Policy's* purpose was "To set guidelines regarding No Call/No Show, Tardiness and Absences for **all employees of Medustrial Healthcare**." The policy provided a "second separate offense may result in **termination of employment** with no additional disciplinary steps." [Claimant's APA page 275 (emphasis added)].

Condustrial observes "In Wilkinson, the Court determined that the termination of the parties' relationship was controlled by their agreement." [Respondents' Brief of Respondent-Appellant, page 24]. Turner agrees. The controlling agreement on this issue is set forth in the ***Application Form Waiver*** stating:

> I further understand that my employment with the Company shall be probationary for a period of ninety days (90) days and further that at any time during the probationary period or thereafter, my **employment relationship with the Company is terminable at will** for any reason by either party.

[Claimant's APA page 282 (emphasis added)].

Condustrial gives the termination factor short shrift in their brief. Although they refuse to openly admit that the documents create a terminable at will employment relationship, they deflect by suggesting that *terminate* does not mean *fire*. Tom Sears, as he was wont to do, quibbled over this point. He eventually admitted that when he testified earlier that he had to "terminate" Ms. Rathburn, 'her employment was terminated." [Tr. 10.13.17, page 510, line 9–page 512, line 3].

The fact of the matter is that these documents referring to *termination* prove that Condustrial retained the right to fire the nurses. As such, the finding that the Right to Fire factor strongly preponderates for a finding of employment should be affirmed.

4. Method of Payment

The Single Commissioner and Appellate Panel correctly found the method of payment favors an employment relationship. [Order, page 39]. The primary determiner is whether the putative employee was paid by the hour or by the job. "'Payment on a time basis is a strong indication of the

status of employment,' while '[p]ayment on a completed project basis is indicative of independent contractor status.'" Shatto v. McLeod Reg'l Med. Ctr., 406 S.C. 470, 753 S.E.2d 416 (2013)(*quoting* 3 Larson's Workers' Compensation Law § 61.06); South Carolina Industrial Commission v. Progressive Life Ins. Co., 242 S. C. 547, 550, 131 S.E.2d 694, 695 (1963)(insurance agents who were paid guaranteed minimum wage were employees); Spivey v. D.G. Constr. Co., 321 S.C. 19, 467 S.E.2d 117 (Ct.App.1996)(fact worker was paid $8.00 per hour was evidence that he was an employee). The rationale underlying this consideration was set forth by Professor Larson and approved by our Supreme Court in Lewis:

> A moment's reflection will show the realistic connection between payment and control. If an employer in a regular business or industry purchases personal labor by the hour, day, or week, it is almost certain to insist on the right to see that the time is well and efficiently spent. It if pays by the hour, the employer wants to see that it gets a full hours work, and that the hour is applied where it is most needed . . .
>
> By contrast, if the employer makes an agreement to pay a man one hundred dollars to clean out a well, it has no reason to care whether the worker is slow or fast, clumsy or efficient.

Lewis v. L.B. Dynasty, 411 S.C. 637, 770 S.E.2d 393 (2015)(*quoting* 3 Larson's Workers' Compensation Law § 61.06).

Turner was initially paid $21.00 per hour. Turner testified she was paid "Twenty-two dollars an hour. I started at twenty-one, but they raised me up, saying that I was a good employee, so they gave me a raise to twenty-two dollars an hour." [Tr. 1, page 157, lines 6-11]. She was also paid overtime when she worked more than 40 hours, as was Nurse Sidney. [Trt. 11.6.17, page 37, lines 14-21]. Her timesheet stated: "This time sheet must be personally filled out and signed by the employee and supervisor." It also contained the notation relevant to the notice provisions of the Act that "I certify that I obtained no injury or accident while on the assignment." A summary of hours was appended to each timesheet stating "Total for Employee." [Claimants APA pages 284-287]. These are strong indicators of employment.

Furthermore, not only did Condustrial pay Turner by the hour, but they "required there to be an approval if [she] went over 40 hours." [Tr. 1, page 93, lines 7-8; page 132, lines 12-133, line 8]. Thus, Condustrial controlled the amount of hours she could work in a given week. See Kilgore Group, Inc. v. South Carolina Employment Sec. Comm'n, 313 S.C. 65, 437 S.E.2d 48 (1993) (fact that "all workers were required to turn their hours in to" the employing agency was evidence of the employment relationship). See, also Youngblood v. N. State Ford Truck Sales, 364 S.E.2d 433, 438 (N.C.1988) (recognizing that a requirement that a worker perform his work during a set time is indicative of an employer-employee relationship).

It is true Condustrial chose not to withhold taxes and paid these hourly wages on a 1099. However, when she was hired, Turner did not sign a W9. She signed a W4 to have payroll taxes withheld from her paycheck. The W4 shows she was hired as an employee notwithstanding Condustrial's unilateral decision not to honor the W4.[13]

Condustrial argues that because Turner's tax preparer relied on the 1099 to file her taxes as if she were self-employed means she must have been an independent contractor. Our sister state of Georgia addressed a similar issue, albeit in the contest of determining an employee's average weekly wage. Georgia held that where there is an error in the income reporting form (W2 or 1099) completed by the employer, the error is attributable to the employer; not the employee. See Pizza Hut Delivery v. Blackwell, 204 Ga.App. 112, 418 S.E.2d 639 (Ga. App. 1992)(rejecting employers

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[13] Condustrial argues the Panel misinterpreted Shatto's holding on this issue. Condustrial suggests that "Turner alleges Condustrial was her direct employer, but the overwhelming evidence in the record demonstrates Condustrial did not provide insurance, vacation days, sick days, or a retirement plan . . ." [Respondents' Brief of Respondent-Appellant, page 23]. Condustrial misconstrues the facts in Shatto. Shatto was seeking to be deemed an employee of McLeod; not the agency who paid her. The court held the payment of wages issue pointed to an independent contractor relationship because McLeod did not pay Shatto directly at all; the agency did. Shatto v. McLeod Reg'l Med. Ctr., 406 S.C. 470, 753 S.E.2d 416 (2013). One might also note that insurance, sick and vacation days, and a retirement plan are *not* automatically provided to any employee.

argument that employee's failure to include his tips as income on his tax returns barred him from claiming tips as part of his average weekly wage. "The failure to list [employee]'s tips on his W-2 form is attributable to [employer] and not to [employee]. Any failure to pay income tax on unreported tips is a matter for resolution between appellee and the state and federal governments."). As such, while the tax returns may be evidence in the case, the fact the tax preparer based the return on a 1099 created by Condustrial means that it cannot be used as evidence that *she* believed she was an independent contractor; only that Condustrial misclassified her as one.

As such, the Appellate Panel's finding that the method of payment favors an employment relationship should be affirmed. See Sellers v. Tech Serv., Inc., 803 S.E.2d 731, 421 S.C. 30 (Ct. App. 2017)(even though there was some evidence claimant was paid directly by vendors, the fact he was paid mostly by the employer meant "'method of payment'" evidence further weighs in favor of affirming the Commission's finding of an employment relationship between Sellers and Tech Service.").

C. The North Carolina case cited by Condustrial is inapposite to the case at bar.

Condustrial relies heavily on the North Carolina Court of Appeals case of Rhoney v. Fele, 518 S.E.2d 536 (NC.Ct.App.1999). Rhoney was not a workers' compensation case; it was a civil case.[14] The Rhoneys sued Fele and his putative employer, Nursefinders, for the death of their son in an automobile accident caused by Fele. The issue was whether the trial court properly granted

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[14] In a footnote, Condustrial notes South Carolina courts may rely on North Carolina precedent in Workers' Compensation cases. However, while this is a general principle, our courts are not bound to follow North Carolina appellate decisions. When our law or public policy differs, our courts are free to decide cases on the facts, evidence and existing South Carolina law. See Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 580 S.E.2d 100 (2003)("Our view of the South Carolina Workers' Compensation Act, in terms of public policy considerations and equity principles, is materially different from the North Carolina Supreme Court's view of its own statute."). As Rhoney was not a workers' compensation case, the public policy favoring including injured workers' within the Act was not implicated.

summary judgment for Nursefinders on the issue of whether Fele was Nursefinders' employee. The North Carolina Court of Appeals ultimately affirmed holding "Nursefinders exercised insufficient control to create an employee-employer relationship between Fele and Nursefinders." Id. at 541.

Superficially, Rhoney would, were it a South Carolina case applying South Carolina law, appear to support Condustrial's argument. It is not and does not. South Carolina uses the 4-factor test set forth in Wilkinson to determine the level of control the employer has over the employee. North Carolina uses an 8-factor test which substantially differs from our test.[15]

Of the factors the Rhoney court held *favored* an employment relationship, they encompass three of the four South Carolina factors: (1) "Fele was paid an hourly rate with overtime . . . , rather than a lump sum for a particular assignment;" (2) "Nursefinders received payment for Fele's services from the hospital and, after deducting Nursefinders' share . . ., forwarded the remaining wages to Fele; (3) Nursefinders could terminate its relationship with Fele;" and (4) "Nursefinders provided Fele with a work packet and directions to the assigned place of work." Id.

As to common factors pointing to an independent contractor relationship, Rhoney also held, as did the Appellate Panel in the instant case, that the fact "Nursefinders did not provide Fele with valuable equipment" indicated he was an independent contractor.

Rhoney also held the fact "Fele exercised his duties and responsibilities as a nurse at the hospital, free from supervision by Nursefinders" supported a finding that he was an independent contractor. Id. However, this conclusion differs from South Carolina law as in our state where the "ability to exercise control over the workers' activities was derived solely from [the vendor's]

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[15] The person employed (a) is engaged in an independent business, calling or occupation; (b) is to have the independent use of his special skill, knowledge, or training in the execution of the work; (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he may think proper; (g) has full control over such assistants; and (h) selects his own time. Id.

contracts with [the agency] and [the agency's] contract with the workers[, . . .] it can be inferred [the agency] possessed the right to control the workers' performance and the manner in which it was done and delegated that authority to its clients." Kilgore Group, Inc. v. South Carolina Employment Sec. Comm'n, 313 S.C. 65, 437 S.E.2d 48 (1993).

The most obvious factual difference in Rhoney is that the "Fele's work through Nursefinders was sporadic rather than regular." Id. at 540. Turner was a full-time employee of Condustrial. She worked continually and exclusively for Condustrial from her date of hire on February 7, 2013 until she was assaulted two and a half years later on September 5, 2015. From the payroll records in evidence, she continuously worked full time, frequently working well over 40 hours per work with two occasions where she worked 75.75 and 81.50 hours in a single week. [Claimant's APA page 228-232].

In a more recent case – decided nineteen years after Rhoney – the North Carolina Court of Appeals distinguished Rhoney largely on this same basis. In McKenzie, the court noted

> unlike the nurse in Rhoney whose work with the agency "was sporadic rather than regular, . . . the evidence here shows that Mr. Charlton's work with Mr. Smith was regular. He worked forty (40) hours each week, a typical full week, providing direct caregiving services to Mr. Smith.

McKenzie v. Charlton, 822 S.E.2d 159, 164 (N.C.App. 2018). See, also Youngblood v. N. State Ford Truck Sales, 364 S.E.2d 433, 438 (N.C. 1988) (recognizing that a requirement that a worker perform his work during a set time is indicative of an employer-employee relationship).

The instant case differs significantly from Rhoney legally, factually and procedurally. Had South Carolina's 4-factor test been applied, three of the four factors would have favored employment. Factually, Turner worked full-time for Condustrial and no other employers; whereas in Rhoney, the staffing agency recruited nurses to work at medical facilities short-term. Procedurally, Rhoney was a personal injury case; not a workers' compensation case, thus there was

no public policy interest at issue. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 689 S.E.2d 615 (2010)("Common sense indicates that a compensation law passed to increase workers' rights (because their common law rights were too narrow) should not thereafter be narrowly construed."); Hill v. Eagle Motor Lines, 373 S.C. 422, 429, 645 S.E.2d 424, 427 (2007)("In determining jurisdictional questions, doubts of jurisdiction will be resolved in favor of inclusion of employees within workers' compensation coverage rather than exclusion."). Therefore, the Court should reject Condustrial's arguments and affirm the finding that Turner is the direct employee of Condustrial and statutory employee of SCDC.

D. The Appellate Panel gave appropriate weight to all documents, including the *Licensed Contract Agreement.*

Condustrial argues – inaccurately – that "[t]he Panel erroneously discounted the significance of the independent contractor agreement based on Turner's dubious contention that she never read the document." [Appellant's Brief of Respondent-Appellant, page 26]. It is true that the Panel acknowledged that "Turner repeatedly testified 'I don't remember all the documents. I just signed whatever they gave me to sign.'" [FC Order, page 10, Finding of Fact B.3.d]. However, this was not the reason the Appellate Panel discounted the LPCA.

The Panel noted at the outset that "These arrangements must be carefully scrutinized to ensure that the actual relationship between the [employer] and the purported independent contractor truly reflects the parties' stated agreement. We are sensitive to the unequal bargaining power that may exist between the [employer and putative employee].[16] Wilkinson v. Palmetto State Transp.

[16] The Wilkinson court explained that the need to carefully scrutinize independent contractor arrangments arises over concerns that employers will misclassify employees to avoid the expense of workers' compensation: "In this regard, it naturally follows that a trucking company, with a desire to avoid a workers' compensation claim, may be tempted to have 'its cake and eat it, too.' The result would be an ostensible independent contractor arrangement where the trucking company exercises almost complete control over the method and manner of the transportation services." Wilkinson, 676 S.E.2d at 703 (2009). The instant case is a textbook example of the court's concern.

Co., 382 S.C. 295, 676 S.E.2d 700, 703 (2009). The Panel then explicated a key distinction with Wilkinson: "Condustrial did not strictly enforce the Agreement." [FC Order, page 11, Finding of Fact B.3.d]. The Wilkinson court held the independent contractor agreement was enforceable because the "parties' conduct . . . mirrored the terms of the contract." Id.

The Panel then goes on to discuss the "many documents and practices indicating that Turner was considered an employee." [FC Order, page 11, Finding of Fact B.3.d]. Unlike Wilkinson, there is not a single "unchallenged independent contractor arrangement." Here, there are multiple documents which explicitly state that Turner is an employee. As stated previously in this Brief, those documents do not merely state that she is an employee; they create policies and standards which she must follow or face termination, thus proving that she is an employee. The Commission properly examined the substance of all the documents – along with how the arrangement actually worked in practice – and correctly found the requisite degree of control to create the employee-employer relationship.

At trial, and again on appeal, Condustrial relies almost exclusively on the self-serving testimony[17] of its General Counsel), Tom Sears. Sears attempted to dispute or dismiss the plain meaning of every document other than the LPCA. However, "[o]ne cannot undo by self-serving testimony what he has done by documentation." Barr v. Barr, 336 S.E.2d 481, 485, 287 S.C. 13, 18 (Ct.App. 1985)(Shaw, J., dissenting)

Sears, an attorney, devoted much of his testimony to promoting his theory of the case. He contended, without evidence, that the contract with SCDC to provide employees covered by workers' compensation had been altered by a course of dealing. He contended Condustrial's contract with Countrywide (CSSG) would cover Turner's claim should she be judicially determined to be an

[17] *Self-serving* has been aptly defined as "serving one's own interests, often in disregard of the truth or the interests of others." *Merriam-Webster's Collegiate Dictionary*, page 1062 (10th ed. 1993).

employee – even though Condustrial never disclosed the existence of Medustrial nor its $2.5 million annual payroll for nurses working in a maximum security prison (and testified despite being able to talk about the prison system for "two hours," he had no idea the Kirkland Correctional Institute is a Level 3 facility that "houses the most dangerous and violent offenders in the state . . ."). [page 378, lines 21-24; page 393, line 1-page 395, line 23]. He contended independent contractors negotiate the terms of their contracts, yet on cross-examination testified that the LPCA is non-negotiable. [Tr. 10.13.17, page 146, line 5-page 147, line 5].[18] Sears testified that all the nurses willingly chose to be independent contractors, yet excoriated Turner when she questioned her right to be paid overtime or claim workers' compensation benefits.

Sears did, perhaps inadvertently, make some concessions to the truth. When asked to confirm that "if you don't have to pay workers' compensation premiums for a worker and you are receiving money for staffing them, that's better – you make more money than if you have to pay workers' compensation premiums for them; is that correct?" Sears eventually conceded "Potentially yes . . .," but then went on to obfuscate his answer with nonresponsive comments about welders, renegotiating the contract and the brokerage model. [page 371, line 1-page 375, line 19].

Condustrial argues the nurses were not employees because Medustrial was set up under a "brokerage model." The obvious flaw in this argument is that Condustrial mislead *everyone*. They certainly never informed SCDC that the nurses were uninsured. They made the nurses sign multiple conflicting documents – creating a situation where Condustrial retained control, yet reaped windfall profits from charging SCDC for employees while not paying the costs for employees. See Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 676 S.E.2d 700 (2009)("In this regard, it

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[18] Tony Durham testified to the contrary, stating a nurse could elect whether to be an employee or an independent contractor.

naturally follows that [an employer], with a desire to avoid a workers' compensation claim, may be tempted to have 'its cake and eat it, too.'").

Turner was not the only nurse who believed she was an employee. Tom Sears testified that several nurses (three to five) had applied for unemployment compensation – a benefit only available to employees. [TR 10.13.17, page 177, line 16-page 178, line 4].

Even the two nurses who understood they were being paid as independent contractors were not aware of the implications. Justin Gudvangen thought he was covered under workers' compensation, testifying had he known Condustrial would not cover him, "I think I would have just worked for an agency that provided it and withheld taxes." [Tr 1, page 86, lines 7-11; page 125, lines 9-17]. Both Gudvangen and Sandra Sidney knew Condustrial retained the right to fire the nurses. [Tr, 1, page 74, line 9-page 75, line 4; Tr. 11.6.17, page 37, lines 2-13; page 39, line 6, page 40, line 5].

Sears remained unrepentant even after the kidnaping and assault on Turner. After Turner was deposed, Tommy Burgess sent an email requesting a Certificate of Insurance covering Turner. [SCDC exhibit 2]. Sears promised he would get him one. The COI provided did not list SCDC on the risk. It was facially invalid – a fact Sears knew all along. [Tr. 10.13.17, page 450, line 1-page 451, line 13].

After this claim arose, Condustrial went to SCDC to renegotiate the contract. It changed the sentence reading "RN's, LPN's assigned to SCDC by Contractor are employees of Contractor and not SCDC, to read "employees *and/or agents* of Contractor and not SCDC." [Tr. 10.13.17, page 230, line 8-page 233, line 3]. Sears could not (or would not) explain why he did not simply use the specific term *independent contractor* rather than the ambiguous term *agent*. [Tr. 10.13.17, page 455,

line 24-page 466, line 11]. After several hours of testimony he finally stated "I think it stands for independent contractor."

Sears was pressed on whether the 2008 contract had any significance when it talks about workers' compensation. He was then asked "in 2016, when you changed to contract, it still doesn't apply to a single person who works at the Department of Corrections through the contract with you; is that correct." Sears responded, "At the present time, right. In other words, we are still following the brokerage model." [Tr. 10.13.17, page 26, line 5-11].

Tony Durham, Condustrial's president, was somewhat more realistic in his answers. Durham testified that he thought Condustrial and SCDC should be "held to the terms of that contract" requiring the nurses to be employees covered by workers' compensation. He admitted that Condustrial did not provide workers' compensation insurance to the nurses at the time Turner was injured. Unlike Sears, Durham testified that "as of November 2017 [Condustrial has] in place a workers' comp policy that will insure all the nurses assigned to the Department of Corrections by Condustrial." [Tr. 11.3.17, page 151, line 23-page 154, line 17]. He testified Turner "had the equivalency hours to where she could have certainly been a full-time employee, and I would have been happy for her to have been." [Tr. 11.3.17, page 157, lines 7-17].

Durham even testified "Those people are my employees, it's my responsibility to take care of 'em, you know. So, I want them to be covered for whatever potential hazard that there is out there. I mean, that's just responsible businessman and a responsible human being, you know." However, when push came to shove, Durham toed the company line that he could have made them employees, but the nurses were independent contractors because they chose to be. He testified this was how the dispute arose over nonpayment of overtime, stating "If you're going to get paid by me,

you've got to do it within the terms of what I told you you can work." [Tr. 11.3.17, page 27, lines 15-22]. Inadvertently, Durham proved Condustrial controlled the nurses' schedule.

At trial and to some extent in their Brief, Condustrial argued that because SCDEW had ruled in Condustrial's favor finding "nurses similarly situated to Claimant were independent contractors," the Commission should follow SCDEW's ruling. [Respondents' Brief of Respondent-Appellant, page 15, Ht.T. 32-37]. SCDEW necessarily relied on Condustrial's incomplete submission of documents and self-serving responses to a questionnaire. The Appellate Panel properly rejected this argument. See Shelton v. Oscar Mayer Foods Corp., 325 S.C. 248, 481 S.E.2d 706 (1997)(no preclusive effect given to employment compensation rulings because procedure is informal).

The Court should reject Condustrial's argument and affirm the finding that Turner is the direct employee of Condustrial and statutory employee of SCDC.

II. Rachel Turner is the direct employee of SCDC.

The Appellate Panel held Turner was the direct employee of Condustrial and the statutory employee of SCDC. At trial, Turner argued in the alternative that she was a direct employee of SCDC. Turner raises this issue as the additional sustaining ground pursuant to ION, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000).

As to being the direct employee of SCDC, Shatto is on all-fours with the instant case. Shatto v. McLeod Reg'l Med. Ctr., 406 S.C. 470, 753 S.E.2d 416 (2013)(finding agency health care worker was direct employee of the hospital where she performed her duties). Indeed, the only significant difference is that Shatto and her agency stipulated that she was not the employee of the agency. Here, the parties dispute the employment relationship between Turner and Condustrial, and there is strong evidence that Turner is the direct employee of Condustrial (and statutory employee of SCDC).

Even though the end result may be the same as to Turner, there is a moral component that compels Condustrial to be held ultimately liable for her injuries.

CONCLUSION

For the foregoing reasons, the Court should affirm in part and reverse in part. The Court should affirm the findings of the Appellate Panel that Rachel Turner is an employee rather than an independent contractor. The Court should reverse the Appellate Panel on the issue of average weekly wage by reinstating the Single Commissioner's finding that Turner's average weekly wage must be based on wages paid to her by her employer resulting in an average weekly wage of $1,130.86. The Court should also reverse the Appellate Panel and hold Turner should be paid temporary total disability compensation from September 6, 2015 and continuing on a running award. The Court should also hold the Appellate Panel erred in denying Turner's motion to submit additional evidence.

Respectfully Submitted

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June 18, 2022
Columbia, South Carolina

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Commissioners T. Scott Beck, R. Michael Campbell, II, and Gene McCaskill

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WCC File No. 1514359
Appellate Case No. 2021-000633

Rachel J. Turner, Employee,. . . . . Appellant-Respondent,

v.

Medustrial Healthcare Staffing Service and Condustrial, Inc.; Guarantee Insurance Company; Countrywide Staffing Solutions Group, Inc.; South Carolina Department of Corrections; State Accident Fund; and South Carolina Uninsured Employer's Fund,. . . Respondents

of which Condustrial, Inc. f/k/a Medustrial Healthcare Staffing Service, Employer, is the Respondent-Appellant.

PROOF OF SERVICE

I certify that I, Stephen B. Samuels, Attorney for the Appellant, have caused the **Amended Initial Respondent's Brief of Appellant-Respondent** to be served on the parties below clearly marked on the date indicated below, addressed as follows

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June 20, 2022

Via email: ctappfilings@sccourts.org
The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
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RE: Rachel J. Turner v. Medustrial Healthcare Staffing Service and Condustrial, Inc.
Appellate Case No.: 2021-000633

Dear Ms. Kitchings:

Enclosed for filing please find a copy of our **Amended Initial Respondent's Brief of Appellant-Respondent** and **Proof of Service** in the above case.

Please have your staff file the **Amended Initial Respondent's Brief of Appellant-Respondent** and **Proof of Service** and return to us a clocked copy. Feel free to contact us with any questions or if further information is needed from our office.

Sincerely,

Wanda Powell
Paralegal to Stephen B. Samuels

SBS
Enclosure(s) as stated
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