APPELLATE PANEL DECISION AND ORDER
OF THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
SCWCC FILE NO. 1824344

Zachary Brown,

Claimant/Respondent

v.

Southeastern Services, H.H.I., LLC,

Employer/Appellant

and

Uninsured Employers' Fund,

Defendant/Appellant,

Defendants.

MAJORITY AFFIRMATION

Appellate Panel Review held in Columbia, South Carolina, on May 16, 2022, timely and properly served upon all parties of interest.

Appellate Panel Decision and Order filed on July 20, 2022

APPEARANCES:

ZACHARY BROWN, Claimant/Respondent, represented by Joshua R. Fester, Esquire, of Hardeeville, South Carolina.

SOUTHEASTERN SERVICES, H.H.I., LLC, Employer/Appellant, represented by Michael Bennett, Esquire, of Hilton Head Island, South Carolina.

SOUTH CAROLINA WORKERS' COMPENSATION UNINSURED EMPLOYERS' FUND, Defendant/Appellant, represented by Timohty B. Killen, Esquire, of Mt. Pleasant, South Carolina.

STATEMENT OF THE CASE

A hearing was held in this case before Commissioner R. Michael Campbell, II, on February 18, 2021, in Walterboro, South Carolina. As a result of the hearing, the Single Commissioner issued an Order dated February 18, 2022, from which the Defendants appeal.

The Single Commissioner's Findings of Fact and Conclusions of Law are as follows:

FINDINGS OF FACT
(SINGLE COMISSIONER)

1. Notice of Hearing was timely and properly served on all parties of interest.
2. Venue, set in Beaufort County is proper as agreed by the parties.
3. Claimant was hired as a construction laborer by Defendant Southeastern Services HHI, LLC (the LLC) in mid to late October 2018.
4. On October 29, 2018, Claimant fell 6 ft. from a ladder while replacing a window on a residential remodeling project for Defendant Southeastern Services sustaining a left tibia and fibula fracture.
5. Claimant testified that two other employees of the LLC were working with him on the day of the accident, Daniel Smith and Taylor Smith. No subcontractors were working on the jobsite with him on October 29, 2018.
6. Testimony at the hearing established that Claimant worked for Defendant LLC for approximately 3 weeks prior to the accident.
7. Claimant was treated at the Hilton Head Hospital Emergency Room on the day of the accident.
8. After receiving an orthopedic evaluation at the hospital, he was admitted for an emergency open reduction and internal fixation of the left midshaft tibia fracture with intramedullary nailing.

9. Upon release from the hospital, Claimant was instructed to attend a follow-up visit with his attending surgeon, Dr. Scott, remain non-weightbearing on his left lower extremity, and provided a knee brace for post-operative use.

10. Claimant attended two post-operative follow-up appointments at Orthopedic Associates of the Lowcountry. After the second appointment, on December 13, 2018, he was released to "gradually return to working duties as tolerated."

11. Though the records were not offered into evidence, Claimant attended physical therapy. He testified that the day he was released from physical therapy when he was given a boot and advised that he could perform light duty work at his last appointment in January or February.

12. Approximately a year and a half after his surgery, Claimant presented to Dr. Tobin at Tobin Bone & Joint Surgery for an independent medical evaluation complaining of clicking and popping in his left knee, and pain while kneeling.

13. Dr. Tobin opined, to a reasonable degree of medical certainty, that at the time of the evaluation, Claimant had not reached maximum medical improvement and that Claimant required additional treatment in the form of repeat x-rays, an MRI of the left knee to address the possibility of an untreated meniscal tear, and additional surgical intervention. In his medical opinion, Claimant's current symptoms were caused by the treatment he received for his work-related injury.

14. Claimant did not return to his job with the LLC. By his July 28, 2020, IME with Dr. Tobin, he worked for Pro-Wash Plus pressure washing houses. Prior to his employment with Pro-Wash, Claimant returned to work at full capacity with Crossroads Construction on April

15, 2019 and worked there until leaving their employ on October 12, 2019. He did not work from the date of injury, October 29, 2018, to April 14, 2019.

15. No out of work notes form Claimants physicians were admitted into the evidentiary record.

16. Mr. Jamie Brown, the sole member of Southeastern Services HHI, LLC, testified during his deposition and during the hearing that he wanted Claimant to return to work and offered him a job after the accident, but Claimant did not respond. It was "known to [Claimant] that if he wanted to return his job was there for him."

17. Claimant testified that Mr. Jamie Brown did not offer him light duty work after the accident. Instead, he received $100.00 in financial assistance from Southeastern Services.

18. Though his testimony wasn't initially clear about how much he paid to Claimant as post-accident financial assistance, Jamie Brown eventually testified during the hearing and during his deposition that he paid Claimant about $1,100.00. This is not reflected in the payroll records.

19. Payroll records submitted into evidence show that Claimant worked: 56 hours during pay period ending October 19, 2018 earning gross wages totaling $756.00, 50 hours during pay period ending October 26, 2018 earning gross wages totaling $540.00, earning $200.00 in gross wages during pay period ending November 9, 2018.

20. Payroll records and Federal Tax Forms from 2018 also evince that Daniel Smith and Taylor Smith were working full time and being paid by the LLC.

21. Beginning with pay period ending November 2, 2018, payroll records confirm that an additional employee, Chance Jones consistently worked between 34-40 hours per week and was paid by the LLC. Defendant employer's tax records also indicate that Chance was paid wages by the LLC in 2018, though there are no dates of employment on the W2.

22. There was no dispute that Claimant, Daniel Smith, and Taylor Smith were regular, full-time employees on the day of the accident.

23. There was conflicting evidence presented at the hearing regarding whether Chance Jones was also employed by the LLC on October 29, 2018. Claimant testified during his deposition that Chance Jones would "come [sic] in once per week or so if he could help out" and that he worked with him about 3 times. At the Hearing, Claimant testified that Chance did some work for the LLC right before the accident. Daniel Smith testified during his deposition that Chance Jones worked intermittently prior to the accident but wasn't on the jobsite the day of Claimant's accident. Chance had worked off and on for Defendant Southeastern Services for the past 8 years. Jamie Brown also testified during his deposition that Chance works intermittently and wasn't working for Defendant Southeastern Services during Claimant's tenure. Payroll records submitted into evidence from 2017 indicates that Chance Jones was consistently being paid by the company until September 2017, received wages for two pay periods in October 2017, but was not paid wages again until November 2018.

24. In addition to testimony regarding the LLC's number of direct employees, Jamie Brown offered testimony regarding the business' use of subcontractors. Mr. Brown testified that he is a licensed general contractor and possesses the requisite skill to build a residential home "from the ground up" though his business does not build homes or construct major additions. The LLC mainly performs interior remodels focusing on kitchens, baths, window and door replacement, and occasionally exterior decking.

25. He admitted that the LLC sometimes performs plumbing, flooring, tile, and painting work and that these services are an integral part of his business as a general contractor, but he regularly hires subcontractors for these services.

26. If the project requires electrical work, he will subcontract to Dedicated Electric for those services. Dedicated Electric's owner is its only employee.

27. However, according to his testimony, Jamie Brown did not hire any subcontractors to work on the residential window replacement project the day Claimant was injured. He hadn't hired any subcontractors during the time Claimant worked for the LLC. Claimant observed 1 electrician, purportedly from Dedicated Electric, on a different job site. No financial records or check copies were entered into evidence indicating that any subcontractors were paid during claimant's tenure.

28. Jamie Brown testified during the hearing that he formed Southeastern Services HHI, LLC in January 2018. He is the sole member of the LLC, and the entity is taxed as a sole proprietorship. This is corroborated by the tax records.

29. He admitted that the LLC does not carry workers' compensation coverage.

30. Jamie Brown also testified that he does not consider himself an employee of the LLC because he doesn't draw a paycheck though he admitted during his deposition that the LLC pays for his groceries, family vacations, and bills. He has no personal checking account.

31. In exchange for this remuneration, Jamie Brown performs his own office work. He works alongside his crew as a foreman 3-5 days per week and acts as the customer service, sales, and procurement divisions of the company.

32. Mr. Jamie Brown operated a sole proprietorship under the name Jamie Brown d/b/a Southeastern Services HHI. Since the formation of the LLC, he no longer does business under that name.

33. The Commission File contains no Form 5 filed by Mr. Jamie Brown.

CONCLUSIONS OF LAW
(Single Commissioner)

1. Notice of Hearing was timely and properly served on all parties of interest.

2. Venue, set in Beaufort County, is proper as agreed by the parties.

3. The South Carolina Workers' Compensation Commission has jurisdiction over the claim because the LLC employed 4 or more employees at the time of the accident. Not all employers are subject to the Act and required to obtain workers' compensation insurance. The Act specifically exempts "any person who has regularly employed in service less than 4 employees in the same business within the State. . ." S.C. Code Ann. § 42-1-360 (2021). A company regularly employs the requisite number of employees if it employs "the same number of persons with some consistency throughout a relevant time period." *Hernandez-Zuniga v. Tickle*, 374 S.C. 235, 257 (2007). The relevant time period is determined by "considering (1) the employer's established mode of operation; (2) whether the employer generally employs the jurisdictional number at any time during his operation, and (3) the period during which employment is definite and recurrent rather than occasional, sporadic, or indefinite. *Id* (Holding that employer was not subject to the Act because it did not regularly employ 4 or more employees where 2 employees regularly worked for Tickle, testimony was inconclusive as to whether a 3rd individual was regularly employed, and the homeowner never observed "more than [3] workers painting her house.") "The issue of whether

an employer regularly employs the requisite number of employees to be subject to the [Act] is jurisdictional." *Harding v. Plumley*, 329 S.C. 580 (Ct. App. 1998).

4. The South Carolina Workers' Compensation Act defines employee as "[E]very person engaged in an employment under any appointment, contract of hire, or apprenticeship, expressed or implied, oral or written, including aliens and also including minors, whether lawfully or unlawfully employed, but excludes a person whose employment is both casual and not in the course of trade, business, profession, or occupation of his employer." S.C. Code Ann. § 42-1-130 (2021). This definition includes corporate officers but excludes sole proprietors or partners of a business. See S.C. Code Ann. § 42-1-130 (2021)[1] and S.C. Code Ann. § 42-1-520 (2021). Corporate officers may exclude themselves form coverage under the Act by filing a Corporate Officer Notice to Reject, Form 5 with their insurance carrier. See S.C. Code Regs. 67-402 (1997).

5. The relevant time period to determine whether the LLC consistently employed 4 or more employees begins with the LLC's formation in January 2018 and continues until December 2018. Payroll records and federal tax forms establish that Daniel Smith and Taylor Smith were full-time, regular employees of Defendant LLC since its formation in 2018 and until the time of Claimant's accident. There is also no dispute that Claimant was a regular, full-time employee beginning in mid-October 2018 and on the date of accident. In addition to Claimant, Daniel, and Taylor, the sole member of the LLC, Mr. Jamie Brown is considered an employee under the Act. He was and continues to be consistently and regularly employed by the LLC since its formation. As a member

[1] Chapter 44, section 1205 of the South Carolina Uniform Liability Company Act synonymizes the terms "partnership" or "general partnership" with "limited liability company" when used in any other statute or regulation in the South Carolina Code. Because the legislature specifically set forth the terms that could be interchanged with "limited liability company" and those terms do not include "sole proprietor" or "partner" as used in section 42-1-130, members or owners of an LLC are treated as corporate officers for purposes of the Workers' Compensation Act. See *Nelson v. Ozmint*, 390 S.C. 432, 436-437 (2010)(citing *Hodges v. Rainey*, 341 S.C. 79, 86 (2000)("the cannon of construction 'expressio unius est exclusion alterious' or 'inclusio unius est exclusion alterius' holds that "to express one thing implies the exclusion of another, or the alternative.")

of an LLC his status is not a "sole proprietor," but is akin to that of a corporate officer. "[A] limited liability company is a legal entity distinct from its members." S.C. Code Ann. § 33-44-201 (1976). "Each member is an agent of the limited liability company for the purposes of its business." S.C. Code Ann. § 33-44-301 (1976). He testified that though he did not draw a paycheck form the LLC, he received compensation form the LLC for his services as office staff, foreman, customer services, sales, and procurement and that he used the LLC business checking account to pay his personal expenses such as bills and travel. That Mr. Jamie Brown chose to disregard the corporate formalities and pay his bills directly from the LLC instead of issuing himself a paycheck does not transform his employment status with the LLC. Similarly, his status as a sole proprietor for tax purposes[2] has no bearing on his status as an employee under the Workers' Compensation Act. Mr. Jamie Brown's status as an LLC member in this context required him to file a Form 5 excluding himself from coverage under the Act. The Commission file is devoid of a Form 5 from Mr. Jamie Brown. Defendant LLC became subject to the Act the day it hired Claimant in October 2018 as its 4th full-time employee.[3]

6. Even if Mr. Jamie Brown, as a corporate officer of the LLC could not be counted as an employee of Southeastern Services, the preponderance of evidence in the record indicates that

[2] Pursuant to S.C. Code Ann. § 12-2-25, a single member limited liability company is not regarded as an entity separate from its member for tax purposes. S.C. Code § 12-2-25 (2021).

[3] Defense counsel cites *Hartzell v. Palmetto Collision* as standing for the proposition that sole members of limited liability companies are excluded from the jurisdictional number of employees. See *Hartzell v. Palmetto Collision*, 406 S.C. 233 (Ct. App. 2013) reversed by *Hartzell v. Palmetto Collision, LLC*, 415 S.C. 617 (2016). In *Hartzell*, the Court of Appeals held that a single-member LLC employed 4 or more employees during the relevant time period notwithstanding Stallings, the LLC's sole member. *Hartzell, 406 S.C. at 245.* It notes as dicta in footnote 7, that Stallings never indicated his desire to be subject to the Act. *Id., fn. 7.* Regardless of the Court of Appeals' disposition of the jurisdictional issue, the Supreme Court's reversal of the claim renders the entire Court of Appeals opinion null and void. See *Moore v. North American Van Lines*, 319 S.C. 446, 448 (1995)("Generally, reversal of a judgment on appeal has the effect of vacating the judgment and leaving the case standing as if no judgment had been rendered.") Similarly, North Carolina authority on this issue is unpersuasive. The North Carolina Legislature has specifically codified the status of LLC members as sole proprietors and partners. The South Carolian Code language, as cited above, effects a different result in this jurisdiction. If the legislature desires to carve out an exception for single member LLCs, it must act.

Chance Jones consistently and regularly worked for Defendant LLC during the aforementioned time period. The Act excludes "casual" employment form the definition of employee. S.C. Code Ann. § 42-1-130 (2021). An individual will not be considered an "employee" where the employment is causal, impermanent, occasional, by chance, or "with the intention and understanding on both the part of the employer and employee that it shall not be continuous." *Hernandez-Zuniga*, 374 S.C. at 248 (internal citations omitted). In *Harding v. Plumley*, the Court of Appeals affirmed the Commission's determination that Plumley Construction only regularly employed two employees as evidenced by weekly payroll records. *Harding v. Plumley*, 329 S.C. 580, 586-587 (Ct. App. 1998). The other three employees received 1 or 2 payroll checks at a maximum during the relevant period between July - November 1991 and therefore were not "regularly employed" by Plumley Construction. *Id.* "Workers' compensation statutes are construed liberally in favor of coverage, and South Carolina's policy to resolve jurisdictional doubts in favor of the inclusion of employees within workers' compensation coverage." *Hernandez-Zuniga v. Tickle*, 374 S.C. 235, 243 (Ct. App. 2007) (internal citations omitted); see also *Poch v. Bayshore Concrete Prod. South Carolina, Inc.*, 405 S.C. 359, 367 (2013) (internal citations omitted). "If an employer has once regularly employed enough [employees] to come under the act, it remains there even when the number employed temporarily falls below the minimum." *Hernandez-Zuniga v. Tickle*, 374 at 246 (citing 4 Larson, Workers' Compensation §§74.01-02).

7. Payroll records indicate that Chance consistently worked between 30-40 hours per week as of pay period ending November 2, 2018. Defendant's tax records indicate that Chance received wages during 2018, though neither the payroll records nor the W2 includes his date of hire. Claimant testified at the hearing that Chance "would come in once per week or so if he could help

out" and that he worked with him about 3 times. Additional testimony at the hearing established that Chance worked intermittently prior to the accident but wasn't on the jobsite the day Claimant was injured. Mr. Jamie Brown's testimony, that Chance didn't work for Defendant LLC during Claimant's tenure, is inconsistent with the payroll records. Chance was paid for 34 hours of his services for the week ending November 2, 2018. It would be physically impossible to work 34 hours in 1 day. Furthermore, the testimony supports the conclusion that Chance regularly "filled in" when needed and worked intermittently prior to the accident including during Claimant's tenure. Unlike the employees in *Harding* who received 1 or 2 paychecks in a 4-month period, Chance was paid by the LLC beginning in November and worked consistent 40-hour work weeks until December 2018. His employment, though perhaps irregular, remained consistent. His employment was not causal. Therefore, he is counted as an additional employee for purposes of the Jurisdictional requirement subjecting Defendant LLC to the provisions of the Act requiring it to maintain workers' compensation insurance.

8. Though Subcontractors, as statutory employees, may be counted towards the jurisdictional number of employees, the evidence submitted into the record inconclusively determines whether and with what frequency the LLC employed subcontractors. See *Ost v. Integrated Products, Inc.*, 296 S.C. 241, 248-249 (1988) (Statutory employees may be included to satisfy the jurisdictional requirement of Section 42-1-360). In *Keene v. CAN Holdings*, the Court refocused the test to determine whether a subcontractor's employee could be considered an employer's statutory employee.[4] In determining 'whether the work contracted out is part of [the owner's] trade,

[4] Testimony at the hearing established that Defendant LLC did not control the right to hire or fire the putative subcontractor's employees, the subcontractors were paid upon completion, and the LLC did not direct the subcontractor's methods used to complete the work. (Hr. Tr. p. 70, ln. 13-25, p. 71, ln. 1-15). This line of questioning confuses the test used for determining whether a subcontractor's employees can be considered statutory employees. See *Ramirez v. May River Roofing*, 433 S.C. 519 (Ct. App. 2021) cf. *Keene v. CAN Holdings*,

business or occupation' – the court should focus initially on what the owner decided is part of its business." S.C. Code Ann. § 42-1-400 (2021); *Keene v. CNA Holdings*, 2021 WL 3521085 (S.C. Sup. Ct. 2021). An owner's business decision to subcontract work will not be disturbed unless it was made for the purposes of avoiding the costs of properly insuring its workers. *Id.* Testimony at the hearing established that Defendant LLC utilized subcontractors to perform services integral to a general contracting business. However, Mr. Jamie Brown did not hire any subcontractors to work on the residential window project the day Claimant was injured and stated that he hadn't hired any subcontractors while Claimant was working for him. Claimant's testimony partially corroborated this assertion as he admitted that there were no subcontractors working with him at the jobsite on the day of the accident, but contradicted Mr. Jamie Brown's testimony asserting that Claimant worked with an electrician thought to be an employee of Dedicated Electric on an alternate jobsite. There are no check copies or financial records indicating that any subcontractors were paid during the relevant time period in 2018. In *Keene*, the predecessor corporate entity to CAN Holdings (Hystron Fibers) subcontracted with Daniel Construction to provide plant maintenance and repair. *Id.* The claimant performed various maintenance and repair jobs onsite at Hystron Fibers. *Id.* The difference between *Keene* and this claim is that the purported statutory employee was onsite at the time of the accident. Counting statutory employees hired unreasonably expands the boundaries of the Act beyond the policy it intends to serve: To protect small businesses form incurring additional coverage expenses. Therefore, no statutory employees can be included as employees to satisfy the jurisdictional minimum.

9. As additional support for the conclusion that the LLC employed 4 or more employees, Claimant alleged that the LLC is the alter ego of Mr. Jamie Brown's former sole proprietorship,

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2021 WL 3521085 (S.C. Sup. Ct. 2021). Subcontracting company employees are not direct employees but could be considered statutory employees in certain circumstances.

Jamie Brown d/b/a Southeastern Services HHI. According to Claimant's theory, the sole proprietorship's failure to file a Form 38 withdrawing from the Act after having procured workers' compensation insurance is imputed to the LLC bringing the LLC within the purview of the Act. This argument is unpersuasive. Both *Poch v. Bayshore* and *Monroe v. Monsanto* address the relationship of a parent company and its active subsidiary but address this relationship in the context of tort immunity under the Act. See *Poch v. Bayshore*, 405 S.C. 359 (2013) and *Monroe v. Monsanto*, 531 F. Supp. 426 (D.S.C. 1982). Aside from the issue litigated in that line of cases, the main difference between *Poch* and *Monsanto* and the claimant bar is that Mr. Jamie Brown's sole proprietorship no longer exists. He ceased operating as a sole proprietorship after the formation of the LLC in January 2018. While Mr. Jamie Brown may be personally liable for the sole proprietorship's failure to file a Form 38, a finding that the LLC is liable for the obligations of a separate and non-existent sole proprietorship, turns the South Carolina Liability Company Act on its head. Indeed, "[A] limited liability company is a legal entity distinct from its members." S.C. Code Ann. § 33-44-201 (1976). This corporate form is desired because of the protection it offers from personal liability. For this and the aforementioned reasons, the Commission has jurisdiction over the claim because Defendant LLC employed at least 4 regular, full-time employees at the time of Claimant's accident, and it is subject to the Act's requirements to carry workers' compensation insurance at the time of Claimant's work accident.

10. There is no disagreement that Claimant sustained an "injury by accident arising out of and in the course of employment." See S.C. Code Ann. § 42-1-160 (2021). Therefore, Claimant is entitled to medical and indemnity benefits under the Act. See S.C. Code Ann. § 42-15-60 (2021) and S.C. Code Ann. § 42-9-30 (2021).

11. Defendant LLC shall prospectively provide all causally related and authorized medical treatment for Claimant's left leg fractures. Section 42-15-60 provides in relevant part that: "The Employer shall provide medical surgical, hospital and other treatment including medical and surgical supplies as reasonably may be required . . . to effect a cure or give relief and for an additional time as in the judgment of the commission will tend to lessen the period of disability." S.C. Code Ann. § 42-15-60(A) (2021); *Dodge v. Bruccoli, Clark, Layman, Inc.*, 334 S.C. 574, 580 (1999) (citing *Rice v. Froehling & Roberston, Inc.*, 267 S.C. 155, 159 (1976)("the employer is liable for medical treatment which will tend to lessen the time in which injury renders an employee incapable to 'earn the wages which the employee was receiving at the time of the injury in the same or other employment.'"). Nearly a year and a half after the accident, Claimant continues to complain of "clicking" and "popping" in his left knee and experience pain upon genuflection. Dr. Tobin, Claimant's IME physician, has recommended repeat radiologic exams and additional surgical intervention. Defendant LLC shall provide the recommended radiologic exams and any additional treatment recommended by an authorized treating orthopedic surgeon of Defendant's choosing.

12. Claimant is not entitled to choose his authorized treating physician. "[T]he employee shall accept [sic] an attending physician and any medical care or treatment that is considered necessary by the attending physician, unless otherwise ordered by the Commission for good cause shown." S.C. Code Ann. § 42-15-60(A) (2021). See also S.C. Code Reg. 67-509(A) (2021) ("The employer's representative chooses an authorized health care provider and pays for authorized treatment."). Claimant has not set forth any justification of the Commission to usurp Defendant LLC's statutory right to direct care. Therefore, consistent with the statutory requirements,

Claimant is entitled to and Defendant LLC shall provide treatment for causally related injuries with an authorized treating orthopedic surgeon of Defendant LLC's choosing.

13. However, Defendant LLC shall reimburse Claimant for the emergency treatment expenses including related charges for his hospital stay and surgery. If an employee receives emergency medical treatment by an unauthorized physician, the employer must reimburse the reasonable cost of the emergency medical services, if ordered to do so by the Commission. See S.C. Code Ann. § 42-15-60(A) (2021). Claimant sustained left tibia and fibula fractures after falling 6 ft. from a ladder while replacing a window at a residential property on behalf of his employer. This serious injury required emergency surgical treatment and resulted in the placement of retained hardware in the affected limb. Because Defendant LLC was covered entity at the time of the accident and the claim is otherwise compensable, it is liable to reimburse Claimant for his emergency medical expenses. Defendant LLC is not responsible for the resulting charges of follow-up care with Dr. Scott, Dr. Tobin, or physical therapy, as this treatment was unauthorized.

14. In addition to medical benefits, Claimant is entitled to a closed period of temporary total disability benefits from October 29, 2018, through December 12, 2018. See S.C. Code Ann. § 42-9-30(16)(2021). "Temporary total or temporary partial compensation is incurred . . . from the first day of incapacity if the injury results in incapacity unless the injured person received full pay for the day." S.C. Code Regs. 67-502A (2021). No out of work notes were introduced into evidence. The only mention of return-to-work activities is in Dr. Scott's December 13, 2018, treatment note which states that claimant was released to "gradually return to working duties as tolerated." Claimant testified that he was released to light duty after completion of physical therapy in January or February, but no physical therapy records corroborating this statement were offered into evidence. Claimant's 60-day testimonial estimate of his return-to-work date is inconclusive on the

matter. Claimant waited until April 15, 2019, to procure employment with Crossroads Construction when he was eligible for light duty 4 months earlier. Furthermore, it was incumbent upon him to notify his employer of his eligibility to return to light-duty work on December 13, 2018. Testimony is conflicting as to whether Defendant LLC made an offer of employment consistent with Claimant's light duty restrictions. Communications between the parties eventually deteriorated for unknown reasons. Determination of any period of incapacity other than what has been referenced in the medical notes would be speculative. See *Burnette v. City of Greenville*, 401 S.C. 417, 427-428 (Ct. App. 2002)("[w]hile a finding of fact of the Commission will normally be upheld, such a finding may not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it.").

15. Claimant's average weekly wage is $749.25 and his compensation rate is $499.50. See S.C. Code Ann. § 42-1-40 (2021)("Where the employment, prior to the injury, extended over a period of less than fifty-two weeks the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed."). This conclusion is based on Claimant's payroll records submitted into evidence at the Hearing.

16. Defendant LLC is not entitled to a credit for the financial assistance provided to Claimant pos-accident. No check stubs were produced into evidence and the payroll records are devoid of any payments made to Claimant after November 9, 2018. Given the vast discrepancy between Claimant's testimony (that he received $100.00 in post-accident financial assistance from his employer) and Mr. Jamie Brown's testimony (that he paid Claimant $1,100.00 in post-accident financial assistance) it would be speculative to artificially award a credit based upon either self-serving assertion. See *Hutson v. South Carolina State Ports Authority*, 399 S.C. 381, 389-390

(2012)(citing *Holland v. Ga. Hardwood Lumber Co.*, 214 S.C. 195, 205 (1949); *Wynn v. People's Natural Gas Co. of S.C.*, 238 S.C. 1, 12-13 (1961)).

17. Because Defendant LLC was subject to the Act at the time of the accident and was operating without insurance, Defendant South Carolina Uninsured Employer's Fund (SC UEF) shall be responsible for paying the awarded benefits on behalf of Defendant LLC. See S.C. Code Ann. § 42-7-200 (2021). During the Hearing, Mr. Jamie Brown admitted that the LLC was uninsured.

18. The SC UEF retains all statutory rights of attachment and recovery against the uninsured defendant employer. See S.C. Code Ann. § 42-7-200 (2021).

FINDINGS OF FACT
(APPELLATE PANEL)

1. Notice of Hearing was timely and properly served on all parties of interest.
2. Venue, set in Beaufort County is proper as agreed by the parties.
3. Claimant was hired as a construction laborer by Defendant Southeastern Services HHI, LLC (the LLC) in mid to late October 2018.
4. On October 29, 2018, Claimant fell 6 ft. from a ladder while replacing a window on a residential remodeling project for Defendant Southeastern Services sustaining a left tibia and fibula fracture.
5. Claimant testified that two other employees of the LLC were working with him on the day of the accident, Daniel Smith and Taylor Smith. No subcontractors were working on the jobsite with him on October 29, 2018.
6. Testimony at the hearing established that Claimant worked for Defendant LLC for approximately 3 weeks prior to the accident.

7. Claimant was treated at the Hilton Head Hospital Emergency Room on the day of the accident.

8. After receiving an orthopedic evaluation at the hospital, he was admitted for an emergency open reduction and internal fixation of the left midshaft tibia fracture with intramedullary nailing.

9. Upon release from the hospital, Claimant was instructed to attend a follow-up visit with his attending surgeon, Dr. Scott, remain non-weightbearing on his left lower extremity, and provided a knee brace for post-operative use.

10. Claimant attended two post-operative follow-up appointments at Orthopedic Associates of the Lowcountry. After the second appointment, on December 13, 2018, he was released to "gradually return to working duties as tolerated."

11. Though the records were not offered into evidence, Claimant attended physical therapy. He testified that the day he was released from physical therapy when he was given a boot and advised that he could perform light duty work at his last appointment in January or February.

12. Approximately a year and a half after his surgery, Claimant presented to Dr. Tobin at Tobin Bone & Joint Surgery for an independent medical evaluation complaining of clicking and popping in his left knee, and pain while kneeling.

13. Dr. Tobin opined, to a reasonable degree of medical certainty, that at the time of the evaluation, Claimant had not reached maximum medical improvement and that Claimant required additional treatment in the form of repeat x-rays, an MRI of the left knee to address the possibility of an untreated meniscal tear, and additional surgical intervention.

In his medical opinion, Claimant's current symptoms were caused by the treatment he received for his work-related injury.

14. Claimant did not return to his job with the LLC. By his July 28, 2020 IME with Dr. Tobin, he worked for Pro-Wash Plus pressure washing houses. Prior to his employment with Pro-Wash, Claimant returned to work at full capacity with Crossroads Construction on April 15, 2019 and worked there until leaving their employ on October 12, 2019. He did not work from the date of injury, October 29, 2018, to April 14, 2019.

15. No out of work notes form Claimants physicians were admitted into the evidentiary record.

16. Mr. Jamie Brown, the sole member of Southeastern Services HHI, LLC, testified during his deposition and during the hearing that he wanted Claimant to return to work and offered him a job after the accident, but Claimant did not respond. It was "known to [Claimant] that if he wanted to return his job was there for him."

17. Claimant testified that Mr. Jamie Brown did not offer him light duty work after the accident. Instead, he received $100.00 in financial assistance from Southeastern Services.

18. Though his testimony wasn't initially clear about how much he paid to Claimant as post-accident financial assistance, Jamie Brown eventually testified during the hearing and during his deposition that he paid Claimant about $1,100.00. This is not reflected in the payroll records.

19. Payroll records submitted into evidence show that Claimant worked: 56 hours during pay period ending October 19, 2018 earning gross wages totaling $756.00, 50 hours during pay period ending October 26, 2018 earning gross wages totaling $540.00, earning $200.00 in gross wages during pay period ending November 9, 2018.

20. Payroll records and Federal Tax Forms from 2018 also evince that Daniel Smith and Taylor Smith were working full time and being paid by the LLC.

21. Beginning with pay period ending November 2, 2018, payroll records confirm that an additional employee, Chance Jones consistently worked between 34-40 hours per week and was paid by the LLC. Defendant employer's tax records also indicate that Chance was paid wages by the LLC in 2018, though there are no dates of employment on the W2.

22. There was no dispute that Claimant, Daniel Smith, and Taylor Smith were regular, full-time employees on the day of the accident.

23. There was conflicting evidence presented at the hearing regarding whether Chance Jones was also employed by the LLC on October 29, 2018. Claimant testified during his deposition that Chance Jones would "come [sic] in once per week or so if he could help out" and that he worked with him about 3 times." At the Hearing, Claimant testified that Chance did some work for the LLC right before the accident. Daniel Smith testified during his deposition that Chance Jones worked intermittently prior to the accident but wasn't on the jobsite the day of Claimant's accident. Chance had worked off and on for Defendant Southeastern Services for the past 8 years. Jamie Brown also testified during his deposition that Chance works intermittently and wasn't working for Defendant Southeastern Services during Claimant's tenure. Payroll records submitted into evidence from 2017 indicates that Chance Jones was consistently being paid by the company until September 2017, received wages for two pay periods in October 2017, but was not paid wages again until November 2018.

24. In addition to testimony regarding the LLC's number of direct employees, Jamie Brown offered testimony regarding the business's use of subcontractors. Mr. Brown testified that

he is a licensed general contractor and possesses the requisite skill to build a residential home "from the ground up" though his business does not build homes or construct major additions. The LLC mainly performs interior remodels focusing on kitchens, baths, window and door replacement, and occasionally exterior decking.

25. He admitted that the LLC sometimes performs plumbing, flooring, tile, and painting work and that these services are an integral part of his business as a general contractor, but he regularly hires subcontractors for these services.

26. If the project requires electrical work, he will subcontract to Dedicated Electric for those services. Dedicated Electric's owner is its only employee.

27. However, according to his testimony, Jamie Brown did not hire any subcontractors to work on the residential window replacement project the day Claimant was injured. He hadn't hired any subcontractors during the time Claimant worked for the LLC. Claimant observed 1 electrician, purportedly from Dedicated Electric, on a different job site. No financial records or check copies were entered into evidence indicating that any subcontractors were paid during claimant's tenure.

28. Jamie Brown testified during the hearing that he formed Southeastern Services HHI, LLC in January 2018. He is the sole member of the LLC, and the entity is taxed as a sole proprietorship. This is corroborated by the tax records.

29. He admitted that the LLC does not carry workers' compensation coverage.

30. Jamie Brown also testified that he does not consider himself an employee of the LLC because he doesn't draw a paycheck though he admitted during his deposition that the LLC pays for his groceries, family vacations, and bills. He has no personal checking account.

31. In exchange for this remuneration, Jamie Brown performs his own office work. He works alongside his crew as a foreman 3-5 days per week and acts as the customer service, sales, and procurement divisions of the company.

32. Mr. Jamie Brown operated a sole proprietorship under the name Jamie Brown d/b/a Southeastern Services HHI. Since the formation of the LLC, he no longer does business under that name.

33. The Commission File contains no Form 5 filed by Mr. Jamie Brown.

CONCLUSIONS OF LAW
(APPELLATE PANEL)

1. Notice of Hearing was timely and properly served on all parties of interest.

2. Venue, set in Beaufort County, is proper as agreed by the parties.

3. The South Carolina Workers' Compensation Commission has jurisdiction over the claim because the LLC employed 4 or more employees at the time of the accident. Not all employers are subject to the Act and required to obtain workers' compensation insurance. The Act specifically exempts "any person who has regularly employed in service less than 4 employees in the same business within the State. . ." S.C. Code Ann. § 42-1-360 (2021). A company regularly employs the requisite number of employees if it employs "the same number of persons with some consistency throughout a relevant time period." *Hernandez-Zuniga v. Tickle*, 374 S.C. 235, 257 (2007). The relevant time period is determined by "considering (1) the employer's established mode of operation; (2) whether the employer generally employs the jurisdictional number at any time during his operation, and (3) the period during which employment is definite and recurrent rather than occasional, sporadic, or indefinite. *Id* (Holding that employer was not subject to the Act because it did not regularly employ 4 or more employees where 2 employees regularly worked for Tickle, testimony was inconclusive as to whether a 3rd individual was regularly employed, and

the homeowner never observed "more than [3] workers painting her house.") "The issue of whether an employer regularly employs the requisite number of employees to be subject to the [Act] is jurisdictional." *Harding v. Plumley*, 329 S.C. 580 (Ct. App. 1998).

4. The South Carolina Workers' Compensation Act defines employee as "[E]very person engaged in an employment under any appointment, contract of hire, or apprenticeship, expressed or implied, oral or written, including aliens and also including minors, whether lawfully or unlawfully employed, but excludes a person whose employment is both casual and not in the course of trade, business, profession, or occupation of his employer." S.C. Code Ann. § 42-1-130 (2021). This definition includes corporate officers but excludes sole proprietors or partners of a business. See S.C. Code Ann. § 42-1-130 (2021)[5] and S.C. Code Ann. § 42-1-520 (2021). Corporate officers may exclude themselves form coverage under the Act by filing a Corporate Officer Notice to Reject, Form 5 with their insurance carrier. See S.C. Code Regs. 67-402 (1997).

5. The relevant time period to determine whether the LLC consistently employed 4 or more employees begins with the LLC's formation in January 2018 and continues until December 2018. Payroll records and federal tax forms establish that Daniel Smith and Taylor Smith were full-time, regular employees of Defendant LLC since its formation in 2018 and until the time of Claimant's accident. There is also no dispute that Claimant was a regular, full-time employee beginning in mid-October 23018 and on the date of accident. In addition to Claimant, Daniel, and Taylor, the sole member of the LLC, Mr. Jamie Brown is considered an employee under the Act. He was and

[5] Chapter 44, section 1205 of the South Carolina Uniform Liability Company Act synonymizes the terms "partnership" or "general partnership" with "limited liability company" when used in any other statute or regulation in the South Carolina Code. Because the legislature specifically set forth the terms that could be interchanged with "limited liability company" and those terms do not include "sole proprietor" or "partner" as used in section 42-1-130, members or owners of an LLC are treated as corporate officers for purposes of the Workers' Compensation Act. See *Nelson v. Ozmint*, 390 S.C. 432, 436-437 (2010)(citing *Hodges v. Rainey*, 341 S.C. 79, 86 (2000)("the cannon of construction 'expressio unius est exclusion alterious' or 'inclusio unius est exclusion alterius' holds that "to express one thing implies the exclusion of another, or the alternative.")

continues to be consistently and regularly employed by the LLC since its formation. As a member of an LLC his status is not a "sole proprietor," but is akin to that of a corporate officer. "[A] limited liability company is a legal entity distinct from its members." S.C. Code Ann. § 33-44-201 (1976). "Each member is an agent of the limited liability company for the purposes of its business." S.C. Code Ann. § 33-44-301 (1976). He testified that though he did not draw a paycheck form the LLC, he received compensation form the LLC for his services as office staff, foreman, customer services, sales, and procurement and that he used the LLC business checking account to pay his personal expenses such as bills and travel. That Mr. Jamie Brown chose to disregard the corporate formalities and pay his bills directly from the LLC instead of issuing himself a paycheck does not transform his employment status with the LLC. Similarly, his status as a sole proprietor for tax purposes[6] has no bearing on his status as an employee under the Workers' Compensation Act. Mr. Jamie Brown's status as an LLC member in this context required him to file a Form 5 excluding himself from coverage under the Act. The Commission file is devoid of a Form 5 from Mr. Jamie Brown. Defendant LLC became subject to the Act the day it hired Claimant in October 2018 as its 4th full-time employee.[7]

[6] Pursuant to S.C. Code Ann. § 12-2-25, a single member limited liability company is not regarded as an entity separate from its member for tax purposes. S.C. Code § 12-2-25 (2021).

[7] Defense counsel cites *Hartzell v. Palmetto Collision* as standing for the proposition that sole members of limited liability companies are excluded from the jurisdictional number of employees. See *Hartzell v. Palmetto Collision*, 406 S.C. 233 (Ct. App. 2013) reversed by *Hartzell v. Palmetto Collision, LLC*, 415 S.C. 617 (2016). In *Hartzell*, the Court of Appeals held that a single-member LLC employed 4 or more employees during the relevant time period notwithstanding Stallings, the LLC's sole member. *Hartzell, 406 S.C. at 245.* It notes as dicta in footnote 7, that Stallings never indicated his desire to be subject to the Act. *Id., fn. 7.* Regardless of the Court of Appeals' disposition of the jurisdictional issue, the Supreme Court's reversal of the claim renders the entire Court of Appeals opinion null and void. See *Moore v. North American Van Lines*, 319 S.C. 446, 448 (1995)("Generally, reversal of a judgment on appeal has the effect of vacating the judgment and leaving the case standing as if no judgment had been rendered.") Similarly, North Carolina authority on this issue is unpersuasive. The North Carolina Legislature has specifically codified the status of LLC members as sole proprietors and partners. The South Carolian Code language, as cited above, effects a different result in this jurisdiction. If the legislature desires to carve out an exception for single member LLCs, it must act.

6. Even if Mr. Jamie Brown, as a corporate officer of the LLC could not be counted as an employee of Southeastern Services, the preponderance of evidence in the record indicates that Chance Jones consistently and regularly worked for Defendant LLC during the aforementioned time period. The Act excludes "casual" employment form the definition of employee. S.C. Code Ann. § 42-1-130 (2021). An individual will not be considered an "employee" where the employment is causal, impermanent, occasional, by chance, or "with the intention and understanding on both the part of the employer and employee that it shall not be continuous." *Hernandez-Zuniga*, 374 S.C. at 248 (internal citations omitted). In *Harding v. Plumley*, the Court of Appeals affirmed the Commission's determination that Plumley Construction only regularly employed two employees as evidenced by weekly payroll records. *Harding v. Plumley*, 329 S.C. 580, 586-587 (Ct. App. 1998). The other three employees received 1 or 2 payroll checks at a maximum during the relevant period between July - November 1991 and, therefore were not "regularly employed" by Plumley Construction. *Id.* "Workers' compensation statutes are construed liberally in favor of coverage, and South Carolina's policy to resolve jurisdictional doubts in favor of the inclusion of employees within workers' compensation coverage." *Hernandez-Zuniga v. Tickle*, 374 S.C. 235, 243 (Ct. App. 2007) (internal citations omitted); see also *Poch v. Bayshore Concrete Prod. South Carolina, Inc.*, 405 S.C. 359, 367 (2013) (internal citations omitted). "If an employer has once regularly employed enough [employees] to come under the act, it remains there even when the number employed temporarily falls below the minimum." *Hernandez-Zuniga v. Tickle*, 374 at 246 (citing 4 Larson, Workers' Compensation §§74.01-02).

7. Payroll records indicate that Chance consistently worked between 30-40 hours per week as of pay period ending November 2, 2018. Defendant's tax records indicate that Chance received

wages during 2018, though neither the payroll records nor he W2 includes his date of hire. Claimant testified at the hearing that Chance "would come in once per week or so if he could help out" and that he worked with him about 3 times. Additional testimony at the hearing established that Chance worked intermittently prior to the accident but wasn't on the jobsite the day Claimant was injured. Mr. Jamie Brown's testimony, that Chance didn't work for Defendant LLC during Claimant's tenure, is inconsistent with the payroll records. Chance was paid for 34 hours of his services for the week ending November 2, 2018. It would be physically impossible to work 34 hours in 1 day. Furthermore, the testimony supports the conclusion that Chance regularly "filled in" when needed and worked intermittently prior to the accident including during Claimant's tenure. Unlike the employees in *Harding* who received 1 or 2 paychecks in a 4-month period, Chance was paid by the LLC beginning in November and worked consistent 40-hour work weeks until December 2018. His employment, though perhaps irregular, remained consistent. His employment was not causal. Therefore, he is counted as an additional employee for purposes of the Jurisdictional requirement subjecting Defendant LLC to the provisions of the Act requiring it to maintain workers' compensation insurance.

8. Though Subcontractors, as statutory employees, may be counted towards the jurisdictional number of employees, the evidence submitted into the record inconclusively determines whether and with what frequency the LLC employed subcontractors. See *Ost v. Integrated Products, Inc.*, 296 S.C. 241, 248-249 (1988) (Statutory employees may be included to satisfy the jurisdictional requirement of Section 42-1-360). In *Keene v. CAN Holdings*, the Court refocused the test to determine whether a subcontractor's employee could be considered an employer's statutory employee.[8] In determining 'whether the work contracted out is part of [the owner's] trade,

[8] Testimony at the hearing established that Defendant LLC did not control the right to hire or fire the putative subcontractor's employees, the subcontractors were paid upon completion, and the LLC did not direct the

business or occupation' – the court should focus initially on what the owner decided is part of its business." S.C. Code Ann. § 42-1-400 (2021); *Keene v. CNA Holdings*, 2021 WL 3521085 (S.C. Sup. Ct. 2021). An owner's business decision to subcontract work will not be disturbed unless it was made for the purposes of avoiding the costs of properly insuring its workers. *Id.* Testimony at the hearing established that Defendant LLC utilized subcontractors to perform services integral to a general contracting business. However, Mr. Jamie Brown did not hire any subcontractors to work on the residential window project the day Claimant was injured and stated that he hadn't hired any subcontractors while Claimant was working for him. Claimant's testimony partially corroborated this assertion as he admitted that there were no subcontractors working with him at the jobsite on the day of the accident, but contradicted Mr. Jamie Brown's testimony asserting that Claimant worked with an electrician thought to be an employee of Dedicated Electric on an alternate jobsite. There are no check copies or financial records indicating that any subcontractors were paid during the relevant time period in 2018. In *Keene*, the predecessor corporate entity to CAN Holdings (Hystron Fibers) subcontracted with Daniel Construction to provide plant maintenance and repair. *Id.* The claimant performed various maintenance and repair jobs onsite at Hystron Fibers. *Id.* The difference between *Keene* and this claim is that the purported statutory employee was onsite at the time of the accident. Counting statutory employees hired unreasonably expands the boundaries of the Act beyond the policy it intends to serve: To protect small businesses form incurring additional coverage expenses. Therefore, no statutory employees can be included as employees to satisfy the jurisdictional minimum.

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subcontractor's methods used to complete the work. (Hr. Tr. p. 70, ln. 13-25, p. 71, ln. 1-15). This line of questioning confuses the test used for determining whether a subcontractor's employees can be considered statutory employees. See *Ramirez v. May River Roofing*, 433 S.C. 519 (Ct. App. 2021) cf. *Keene v. CAN Holdings*, 2021 WL 3521085 (S.C. Sup. Ct. 2021). Subcontracting company employees are not direct employees but could be considered statutory employees in certain circumstances.

9. As additional support for the conclusion that the LLC employed 4 or more employees, Claimant alleged that the LLC is the alter ego of Mr. Jamie Brown's former sole proprietorship, Jamie Brown d/b/a Southeastern Services HHI. According to Claimant's theory, the sole proprietorship's failure to file a Form 38 withdrawing from the Act after having procured workers' compensation insurance is imputed to the LLC bringing the LLC within the purview of the Act. This argument is unpersuasive. Both *Poch v. Bayshore* and *Monroe v. Monsanto* address the relationship of a parent company and its active subsidiary but address this relationship in the context of tort immunity under the Act. See *Poch v. Bayshore*, 405 S.C. 359 (2013) and *Monroe v. Monsanto*, 531 F. Supp. 426 (D.S.C. 1982). Aside from the issue litigated in that line of cases, the main difference between *Poch* and *Monsanto* and the claimant bar is that Mr. Jamie Brown's sole proprietorship no longer exists. He ceased operating as a sole proprietorship after the formation of the LLC in January 2018. While Mr. Jamie Brown may be personally liable for the sole proprietorship's failure to file a Form 38, a finding that the LLC is liable for the obligations of a separate and non-existent sole proprietorship, turns the South Carolina Liability Company Act on its head. Indeed, "[A] limited liability company is a legal entity distinct from its members." S.C. Code Ann. § 33-44-201 (1976). This corporate form is desired because of the protection it offers from personal liability. For this and the aforementioned reasons, the Commission has jurisdiction over the claim because Defendant LLC employed at least 4 regular, full-time employees at the time of Claimant's accident, and it is subject to the Act's requirements to carry workers' compensation insurance at the time of Claimant's work accident.

10. There is no disagreement that Claimant sustained an "injury by accident arising out of and in the course of employment." See S.C. Code Ann. § 42-1-160 (2021). Therefore, Claimant is

entitled to medical and indemnity benefits under the Act. See S.C. Code Ann. § 42-15-60 (2021) and S.C. Code Ann. § 42-9-30 (2021).

11. Defendant LLC shall prospectively provide all causally related and authorized medical treatment for Claimant's left leg fractures. Section 42-15-60 provides in relevant part that: "The Employer shall provide medical surgical, hospital and other treatment including medical and surgical supplies as reasonably may be required . . . to effect a cure or give relief and for an additional time as in the judgment of the commission will tend to lessen the period of disability." S.C. Code Ann. § 42-15-60(A) (2021); *Dodge v. Bruccoli, Clark, Layman, Inc.*, 334 S.C. 574, 580 (1999) (citing *Rice v. Froehling & Roberston, Inc.*, 267 S.C. 155, 159 (1976)("the employer is liable for medical treatment which will tend to lessen the time in which injury renders an employee incapable to 'earn the wages which the employee was receiving at the time of the injury in the same or other employment.'"). Nearly a year and a half after the accident, Claimant continues to complain of "clicking" and "popping" in his left knee and experience pain upon genuflection. Dr. Tobin, Claimant's IME physician, has recommended repeat radiologic exams and additional surgical intervention. Defendant LLC shall provide the recommended radiologic exams and any additional treatment recommended by an authorized treating orthopedic surgeon of Defendant's choosing.

12. Claimant is not entitled to choose his authorized treating physician. "[T]he employee shall accept [sic] an attending physician and any medical care or treatment that is considered necessary by the attending physician, unless otherwise ordered by the Commission for good cause shown." S.C. Code Ann. § 42-15-60(A) (2021). See also S.C. Code Reg. 67-509(A) (2021) ("The employer's representative chooses an authorized health care provider and pays for authorized treatment."). Claimant has not set forth any justification of the Commission to usurp Defendant

LLC's statutory right to direct care. Therefore, consistent with the statutory requirements, Claimant is entitled to and Defendant LLC shall provide treatment for causally related injuries with an authorized treating orthopedic surgeon of Defendant LLC's choosing.

13. However, Defendant LLC shall reimburse Claimant for the emergency treatment expenses including related charges for his hospital stay and surgery. If an employee receives emergency medical treatment by an unauthorized physician, the employer must reimburse the reasonable cost of the emergency medical services, if ordered to do so by the Commission. See S.C. Code Ann. § 42-15-60(A) (2021). Claimant sustained left tibia and fibula fractures after falling 6 ft. from a ladder while replacing a window at a residential property on behalf of his employer. This serious injury required emergency surgical treatment and resulted in the placement of retained hardware in the affected limb. Because Defendant LLC was covered entity at the time of the accident and the claim is otherwise compensable, it is liable to reimburse Claimant for his emergency medical expenses. Defendant LLC is not responsible for the resulting charges of follow-up care with Dr. Scott, Dr. Tobin, or physical therapy, as this treatment was unauthorized.

14. In addition to medical benefits, Claimant is entitled to a closed period of temporary total disability benefits from October 29, 2018 through December 12, 2018. See S.C. Code Ann. § 42-9-30(16)(2021). "Temporary total or temporary partial compensation is incurred . . . from the first day of incapacity if the injury results in incapacity unless the injured person received full pay for the day." S.C. Code Regs. 67-502A (2021). No out of work notes were introduced into evidence. The only mention of return-to-work activities is in Dr. Scott's December 13, 2018 treatment note which states that claimant was released to "gradually return to working duties as tolerated." Claimant testified that he was released to light duty after completion of physical therapy in January or February, but no physical therapy records corroborating this statement were offered into

evidence. Claimant's 60-day testimonial estimate of his return-to-work date is inconclusive on the matter. Claimant waited until April 15, 2019 to procure employment with Crossroads Construction when he was eligible for light duty 4 months earlier. Furthermore, it was incumbent upon him to notify his employer of his eligibility to return to light-duty work on December 13, 2018. Testimony is conflicting as to whether Defendant LLC made an offer of employment consistent with Claimant's light duty restrictions. Communications between the parties eventually deteriorated for unknown reasons. Determination of any period of incapacity other than what has been referenced in the medical notes would be speculative. See *Burnette v. City of Greenville*, 401 S.C. 417, 427-428 (Ct. App. 2002)("[w]hile a finding of fact of the Commission will normally be upheld, such a finding may not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it.").

15.Claimant's average weekly wage is $749.25 and his compensation rate is $499.50. See S.C. Code Ann. § 42-1-40 (2021)("Where the employment, prior to the injury, extended over a period of less than fifty-two weeks the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed."). This conclusion is based on Claimant's payroll records submitted into evidence at the Hearing.

16. Defendant LLC is not entitled to a credit for the financial assistance provided to Claimant pos-accident. No check stubs were produced into evidence and the payroll records are devoid of any payments made to Claimant after November 9, 2018. Given the vas discrepancy between Claimant's testimony (that he received $100.00 in post-accident financial assistance from his employer) and Mr. Jamie Brown's testimony (that he paid Claimant $1,100.00 in post-accident financial assistance) it would be speculative to artificially award a credit based upon either self-serving assertion. See *Hutson v. South Carolina State Ports Authority*, 399 S.C. 381, 389-390

(2012)(citing *Holland v. Ga. Hardwood Lumber Co.*, 214 S.C. 195, 205 (1949); *Wynn v. People's Natural Gas Co. of S.C.*, 238 S.C. 1, 12-13 (1961)).

17. Because Defendant LLC was subject to the Act at the time of the accident and was operating without insurance, Defendant South Carolina Uninsured Employer's Fund (SC UEF) shall be responsible for paying the awarded benefits on behalf of Defendant LLC. See S.C. Code Ann. § 42-7-200 (2021). During the Hearing, Mr. Jamie Brown admitted that the LLC was uninsured.

18. The SC UEF retains all statutory rights of attachment and recovery against the uninsured defendant employer. See S.C. Code Ann. § 42-7-200 (2021).

ORDER

By majority decision, the Order of the Single Commissioner from which this appeal has been taken is hereby Affirmed by the Appellate Panel. This order shall constitute the final Decision and Order of the South Carolina Workers' Compensation Commission.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Findings of Fact and Conclusions of Law of the Single Commissioner are incorporated herein as if set forth verbatim and the Claimant is entitled to receive, and Defendant SC UEF is ordered to provide all recommended and causally related medical treatment for Claimant's left leg injury by an authorized treating orthopedic surgeon of Defendants' choosing.

IT IS ORDERED, ADJUDGED AND DECREED that the Defendant SC UEF shall pay for or reimburse Claimant for the costs of his emergency medical treatment and prescriptions. Payment is to be made within 30 days of the date of this Order.

IT IS ORDERED, ADJUDGED AND DECREED that Defendant SC UEF shall pay Claimant $3,146.85 ($499.50 x. 6.3 weeks) in back-due temporary indemnity benefits within 14 days of the date of this Order.

IT IS ORDERED, ADJUDGED AND DECREED that Defendant SC UEF retains all statutory rights of attachment and reimbursement pursuant to S.C. Code Ann. § 42-7-200 (2021).

AND IT IS SO ORDERED!

MAJORITY AFFIRMATION:

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

BY: _____

_____

Commissioner Avery B. Wilkerson, Jr.

DISSENTING:

_____

Commissioner Aisha Taylor

Order Served via E-Mail:

Joshua Fester, Esquire (for the Claimant) jfester@johnsonslawoffice.com Michael P. Bennett, Esquire (for the Employer) michael@carrlegal.com Patrick W. Carr, Esquire (for the Employer) patrick@carrlegal.com Timothy B. Killen, Esquire (for the SCUEF) tkillen@hplplaw.com Lisa C. Glover, Esquire (For the SCUEF) lglover@saf.sc.gov	

Order Served via USPS:

CERTIFICATE OF SERVICE
THIS IS TO CERTIFY THE UNDERSIGNED HAS THIS DATE SERVED THIS ORDER IN THE ABOVE-ENTITLED ACTION UPON ALL PARTIES ELECTRONICALLY OR BY DEPOSITING A COPY HEREOF, POSTAGE PAID, IN THE UNITED STATES MAIL

This 20th **day of** July **2021**

By: Valerie D Deller

SCWCC Judicial Department