THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC 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.

APPELLANT'S BRIEF OF APPELLANT-RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Whether the Workers' Compensation Commission erred in limiting Rachel Turner's temporary total disability compensation to the period from September 6, 2015 through September 30, 2015 when there is no evidence: (1) her period of disability ended; (2) the legal conditions to terminate or suspend compensation were not met; (3) she did not refuse employment suitable to her capacity; and (4) even if her period of total disability ended on September 30, 2015, no bona fide offer of suitable employment was made after that date.

2. Whether the Workers' Compensation Commission erred in holding that the average weekly wage of an employee must be based on after tax earnings instead of the actual wages paid to her by her employer as required by Section 42-1-40.

3. Whether the Workers' Compensation Commission erred in denying Turner's motion to submit additional evidence.

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." [R.P. 2972, 2976].

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.

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.

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

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

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

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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.

allegations.

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." [R.P. 53, 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." [R.P. 77].

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." [R.P. 77].

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. [R.P. 79-126]. 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." [R.P. 125].

On May 4, 2021, Turner filed a Motion to Submit Additional and Newly Discovered

Evidence. [R.P. 218-227, 3554-3599]. The Appellate Panel made no ruling on the Motion within the 30 day appeals period.

Turner appealed to this Court on June 15, 2021. Condustrial filed a cross-appeal.

Turner filed a Motion for Partial Remand for the Commission to address the pending Motion to Submit Additional and Newly Discovered Evidence. [R.P. 228-234]. The Court granted the motion and remanded to the Commission. [R.P. 127-128].

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. [R.P. 129].

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. [R.P. 3325-3348]. 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**. [R.P. 2972, 2976 (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*** [R.P. 2980], 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." [R.P. 2991]. 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." [R.P. 2995]. She signed a ***Terms of Employment*** form listing various requirements which if violated were "grounds for termination." [R.P. 2997]. She signed an ***Attendance Policy*** stating violations "could/may result in further disciplinary actions up to termination of employment." [R.P. 3003]. 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." [R.P. 3014].

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. [R.P. 2942-2947, 3053].

On September 5, 2015, Turner and another nurse were captured and held hostage by two inmates. Turner graphically described her ordeal at trial.[2] [R.P. 593-600]. 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 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

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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. [R.P. 740, line 2-page 742, 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. [R.P. 602, lines 15-25; page 520, lines 5-9; page 625, lines 2-4; page 639, lines 1-8; page 660, line 13-15; page 677, line 2-page 678, line 6; page 700, lines 20-22]. She panicked several times during the hearing, notably when the lights went out around 7:00 p.m. [R.P. 739, line 23-page 740, line 3].

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. [R.P. 2733-2911].

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. [R.P. 3063]. 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. [R.P. 3061].

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. [R.P. 2734-2790]. Dr. Berg consistently kept her out of work, stating: "Due to incident 9/5/15, patient has not worked since that date." [R.P. 2762, 2774, 2780]. 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. [R.P. 2743]. As of the hearing, the treatment had not been successful in improving her to the point she could return to work. [R.P. 2792-2906].

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. [R.P. 738, lines 8-19; pages 3025-3032].

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 Commission is permitted to disregard medical evidence only when there is other competent evidence in the record to support their conclusion. Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 716 S.E.2d 123 (Ct. App. 2011). Where a finding is based on "the medical opinion of the single commissioner, adopted by the Commission," rather than on the opinion of a medical provider, the finding must be reversed as unsupported by substantial evidence. Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012). A conclusion by the Commission "based on rank speculation . . . cannot now be used as the basis for denying [an injured worker's] claim for lost wages. Hutson at 504, 732 S.E.2d 694.

ARGUMENT

1. Turner proved she is entitled to temporary disability compensation from the date she was assaulted and continuing on a running award.

Under the Workers' Compensation Act, an injured worker is entitled to compensation for a total disability resulting from a work-related injury. S.C. Code Ann. § 42-9-10 (2007). Disability is statutorily defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." S.C. Code Ann. § 42-9-10 (2007). "Disability is presumed to continue until the employee returns to work or compensation is otherwise suspended or terminated according to Section 42-9-260." S.C. Code Reg. 67-502 B (2)(2007).

The Single Commissioner ruled Turner was entitled to temporary total disability compensation ("TTD") from September 6, 2015 through September 30, 2015, but denied compensation thereafter. She based this ruling on two points: (1) Turner was explicitly written out of work for her PTSD from September 16, 2015 through September 30, 2015 based on a doctor's report written for Victim's Assistance; and (2) Turner was "offered work within the restrictions issued by Dr. Hess and Dr. Westerkam [and] did not accept the offer." [R.P. 58, Finding of Fact G 16].

This was error. Turner never recovered sufficiently from her PTSD to the point where she could return to work. Once disabled, her disability was presumed to continue until she returned to work – which, of course, she never did. Furthermore, not only was the purported offer of light duty made in bad faith, the offer was made *one time* on September 24, 2015 when Turner was explicitly written out of work and never renewed. Her disability continued past this date.

A. Turner has not been able to work in any capacity since the assault.

The evidence shows Turner is unable to work due to her psychological overlay. As part of her application to the Office of Victim's Assistance (SOVA), her family doctor signed a Physician's Disability Report - Lost Wages stating:

> Multiple contusions on back (middle) above left elbows on right upper arm. Pat states hands & back are tender & stiff. States she is having issues with night sweats, sleeping, and small places. She is having difficulty eating. . .. Not permanent physical but appears to be anxious and fearful. However Patient states she is having mental health issues due her altercation. She is to f/u with PCP in 2 wks. As well as MHC.

The doctor wrote "Patient will be totally unable to work from 09/16/2015 through 09/30/2015.[3] [R.P. 3027]. The Single Commissioner relied entirely on this report, ignoring the totality of the evidence showing Turner had not improved to the point of being able to return to work in any capacity.

Turner testified she was given more out work statements. She testified:

> They gave me 'til my follow-up appointment. Then they would say, okay, she's still not ready to go back to work, and they would issue another one. . . . I received many of these. I received all the way until $7,000 worth of these. Do you see what I'm saying. They maximumed me out at [$7,000]. South Carolina Association for Victim's assistance has a max out of $7,000. But up until then I had to provide those proving that I was unable to work in order to continue funds from them.

[R.P. 738, lines 8-19].

Turner lost all her records when she was evicted because she could not pay her rent. She testified "I've lost everything." [R.P. 714, line 10]. "A lot of my stuff – most of my stuff got lost.

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[3] A similar Physician's Disability Report was written by Dr. Berg. She wrote "Patient will be totally unable to work from 10/21/15 through 11/20/15." [R.P. 3557]. The dates coincided with her return appointment on November 19, 2015. This report is not part of the trial record. It was submitted to the Commission as an exhibit to Turner's Motion to Submit Additional and After Discovered Evidence. Should the Court hold the Commission erred in denying the motion, the report is further confirmatory evidence that Turner remained incapable of working due to her PTSD. It also confirms the veracity of Turner's testimony.

I lost pictures of my children when they were babies, too. . . . Pretty much left with the clothes on my back and a few boxes. . . Furniture lost, car lost, everything lost." [R.P. 715, lines 4-13].

Turner further testified "My doctor is not letting me back to work because I have PTSD." [R.P. 726, lines 5-6]. "And my doctor has not written me back work yet." [R.P. 593, lines 1-6]. Turner testified she was not able to work in any job in her current condition "according to [her] doctors . . ." [R.P. 588, lines 18-20]. She further testified: I can't be in small, closed places. I have trouble with doors closing. I get claustrophobic. I get short of breath. I have to work on my coping techniques that the counselor had taught me. I lose focus a lot when I'm in closed places. [R.P. 588, line 21-page 589, line 2].

At the hearing, Turner appeared extremely anxious and nervous. She reacted strongly at the approach of any unfamiliar male - to the point where she could only be approached by a female attorney when asked by the defense attorneys to examine documents in the record.

Her orthopaedic surgeon, Dr. Hess, gave her restrictions which precluded her from working as a nurse due to her physical injuries. He also wrote on October 20, 2015, "She also is suffering from PTSD symptoms and she had to begin treatment for this tomorrow. *She has not yet returned to work. It sounds as I though this is primarily due to her PTSD issues.*" [R.P. 2727 (emphasis added)]. Dr. Hess gave this opinion twenty days after the September 30th date the Single Commissioner held TTD should end.

Records from her mental health providers confirm her continuing inability to work due to her PTSD. Turner was enrolled in a 5-week "partial hospitalization program" through Palmetto Health. On October 21, 2015, her psychiatrist, Dr. Stephanie Berg wrote "Out of work since [the assault]." [R.P. 2739]. In the treatment notes, Dr. Berg describes:

> Since the assault, she has wanted to isolate and not be around people. She is anxious and depressed. She is having difficult with lout noises and anxiety increasing with

> hearing doors slam. She can't tolerate doors being closed. She has flashbacks to the assault when she is in small places and people who look like the perpetrators. She is having nightmares most nights. She has trust difficulties and feels afraid all the time. She has panic attacks which she describes as that she becomes annoyed. Her appetite has been poor but she has not lost weight. She denies any suicidal thoughts. [R.P. 2738].

Dr. Berg put her GAF (Global Axis of Functioning) at 40. This score shows: "Some impairment in communication, psychosis (loss of touch with reality) or both, or **major impairment in school, work**, family life, judgment, thinking, or mood." [DSM IV (emphasis added)]. The treatment note from November 12, 2015 states "Due to incident 9/5/15 patient has not worked since that date." [R.P. 2780].

The Single Commissioner misquoted a statement in Dr. Berg's discharge summary and took it completely out of context, writing "In releasing Claimant, Dr. Berg found on November 23, 2015 that Claimant was psychiatrically sound . . ." [R.P. 58, Finding of Fact G 15]. In fact, Dr. Berg wrote "Psychiatrically *stable*." [R.P. 2759]. "Stable" does not mean she has improved or recovered. It means her condition is "not changing or fluctuating." In short, it means she is still disabled and in need of treatment. She was not discharged because she had gotten better. She was discharged because the 5-week in-patient program had been concluded. This was shown by the fact she immediately transferred to an out-patient program through Lexington County Community Mental Health.

Treatment records from Community Mental Health further confirm she was still unable ro work at the time of the hearing in July 2017. Although she did not actually get a note from her doctor, the records show she was supposed to be given one. Her social worker wrote "Pt inquired if she would be able to get a note to give to her employer excusing her from work. LMSW told Pt that program therapist could provide a note signed by the doctor." [R.P. 2743].

Turner consistently desired to get better and return to work. Turner's treatment goal was "I want to go back to work. I've always been independent." [R.P. 2745,2761,2773, 2779]. Despite her desire, the records consistently state she cannot work due to the assault: "Due to incident 9/5/15, patient has not worked since that date." [R.P. 2762, 2764, 2780].

From the legal standpoint, once Turner became disabled, her "[d]isability is presumed to continue until the employee returns to work . . ." S.C. Code Reg. 67-502 B (2)(2007). The Commission was required to analyze this issue from the standpoint of the statutory presumption. In other words, once she adduced evidence of disability, the disability continued until there was evidence she was no longer disabled and had returned to work. Thus, even though the doctor's report relied on by the Commission had a finite date, it did not mean that her disability ended on September 30, 2015. It merely meant that the doctors would reconsider her disability on the next visit. We know from later medical records that she "Due to incident 9/5/15, patient has not worked since that date." [R.P. 2762, 2774, 2780].

Furthermore, even if the Commission's finding that her mental disability ended on September 30, 2015 were supported by substantial evidence, the Commission also found that she was incapable of working as a nurse due to her physical injuries. This confirms that there is no evidence to rebut the presumption, as not only had she not "return[ed] to work," she continued to suffer "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." S.C. Code Ann. § 42-1-120 (2007).

There is simply no evidence Turner was ever able to work in any capacity. The Single Commissioner's decision to end TTD on September 30, 2015 violates the statutory presumption of continuing disability and is unsupported by substantial evidence. Furthermore, it is arbitrary and capricious to conclude that a single work note with a finite end date is substantial evidence of

recovery, particularly when Turner testified the note was simply written to her next appointment and she testified extensively about her ongoing disability – testimony which was supported by her medical records. Therefore, the Court should reverse and hold TTD should be paid on a running award from the date of the assault.

B. The Single Commissioner erred in holding Turner refused employment suitable to her capacity.

The Single Commissioner ruled TTD was barred after September 30, 2015 because Condustrial offered light duty work on September 24, 2015 "within the restrictions issued by Dr. Hess and Dr. Westerkam [and] Claimant did not accept the offer]." [R.P. 58, Finding of Fact G 16]. This was error for multiple reasons.

1. Turner could not have accepted any offer of employment on September 24, 2015 and any such offer was never renewed.

It is undisputed that Turner was incapable of accepting any offer on September 24, 2015. She was completely written out of work on that date. Moreover, Dr. Hess opined a month later on October 20, 2015 that "She also is suffering from PTSD symptoms and she had to begin treatment for this tomorrow. *She has not yet returned to work. It sounds as I though this is primarily due to her PTSD issues.*" [R.P. 2727(emphasis added)]. It is frankly preposterous to conclude she had magically and spontaneously recovered from her PTSD on September 30, 2015.

When the letter was delivered, Condustrial's manager had to force Turner to open the door. At the time, she was not sleeping, bathing or eating nor was she leaving her house – such that the manager called the police to do a wellness check on Turner. [R.P. 592, lines 17-24; page 3063].

The purported offer was made *one time* on September 24, 2015. Turner was completely unable to work and necessarily had to refuse the supposed offer of employment.[4] It is elementary black letter law that when an offer is made and refused, the offer is null and void unless renewed or a counteroffer is made.

Turner had one more conversation with Tom Sears. He told her then that she was not their employee and not eligible for workers' compensation benefits. She was asked "Has Condustrial ever contacted you since then and made a similar offer of employment?" She responded:

> 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.

[R.P. 755, lines 1-9].

Our supreme court addressed a comparable scenario in Johnson v. Rent–A–Ctr., Inc., 398 S.C. 595, 730 S.E.2d 857 (2012). Johnson injured her back. She received a period of TTD when her employer refused to offer her a light duty job. She then resigned from her job after being released to full duty because "she would have been paired with the same co-worker whom she faulted for the accident. Employer then offered [Johnson] a second position in Florence, which she also refused because Employer would not offer additional compensation for the extra transportation and child care costs she would incur working so far from home. [Johnson] then resigned from her job and sought other gainful employment." Id.

Johnson's doctor then released her to full duty. She obtained employment with another employer. However, when that employer learned she had an open workers' compensation case, she was not allowed to return to work unless she was examined and submitted a new full duty release.

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[4] One might note that Condustrial has continuously claimed that Turner is not an employee. One wonders then whether the supposed offer of employment would have actually been a concession that she was an employee.

Johnson returned to the same doctor, who put her back on work restrictions – thus her new employer refused to let her work. Her original employer refused to pay TTD contending that by resigning she had constructively refused employment suitable to her capacity.

The supreme court rejected this argument noting

> it is highly speculative to presume Employer would offer [Johnson] light duty work had she remained with Employer. The Record, in fact, points the other way. When [Johnson] was first placed on lifting restrictions by Dr. DeHoll, rather than accommodate [Johnson], Employer refused to let [Johnson] return to work at all. [Johnson] also testified that sometime after she resigned her position in Manning, she subsequently went back to Employer to ask for work, but rather than offer light duty work, Employer turned Employee away on the ground that there was no open position.

Johnson v. Rent–A–Ctr., Inc., 398 S.C. 595, 604-605, 730 S.E.2d 857. 860 (2012).

The parallels to the instant case are striking. Condustrial made a one-time offer of ostensibly suitable employment on September 24, 2015. Turner could not have accepted any employment at the time as she was undisputedly totally disabled – never mind the fact that her condition was so bad that the employer literally had to force their way into her home to deliver the letter. The offer was never renewed. In fact, when Turner contacted Condustrial asking for help, she learned for the first time that she was not considered to be an employee and was not covered under workers' compensation.

Since then, Turner "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." [R.P. 755, lines 1-9]. In Johnson, the same thing happened. Johnson attempted to obtain light duty work from Rent-A-Center, they "turned [her] away on the ground that there was no open position." Id.

Condustrial and Rent-A-Center employed the same strategy. They claim the employee refused suitable employment, yet refuse to acknowledge or communicate with the employee. Both

employers sought to use constructive refusal as a shield to avoid paying TTD to their disabled workers.

It is not merely that Condustrial would have had to make a genuine bona fide offer at a time when Turner was actually able to accept such an offer. It is also that Condustrial should not be able to evade TTD by taking an inconsistent position that Turner was not their employee – thus barring her from outside assistance – yet be able to bar her from TTD on the ground that they made a one-time offer of employment after the fact. This would be an unwarranted windfall for Condustrial.

Even if Turner had recovered enough at some point to accept *any* employment, the fact Condustrial never renewed the offer and refused to take her phone calls – all the while insisting she was not their employee – prevents them from barring her claim to TTD. Therefore, the Single Commissioner should be reversed.

2. <u>The purported offer was not made in good faith and was not genuine</u>.

Condustrial presented Turner with a letter at her home on September 24, 2015. At the time, Turner was unable to leave her home, to the point that Condustrial representatives called the police to conduct a wellness check. The letter purported to offer office work to Turner. It is not clear how, if Turner was an independent contractor as alleged by Condustrial, she could be compelled to accept such work. In any case, the offer is not specific as to the hours, schedule, duties, job description and physical demands. The letter also provides for an hourly rate of $15.00 per hour, which is significantly less than Turner's actual $21.00 hourly pay rate as a nurse. The letter specifically states:

- In order to expedite your return to work, we would be like to place you in a low-key nursing home or special needs facility.
- We would like to extend an offer to come work in the office and assist with minor filing and paperwork needs. You are welcome to set your own

schedule in order that you may come and go as you please; pay would be $15/hour.

- We would like to receive a copy of your medical bills so that we might negotiate on your behalf with the medical companies to mark them down in order to work with. you in getting these paid.[5] [R.P. 3063].

Condustrial's corporate counsel, Tom Sears, is a former workers' compensation defense attorney. Mr. Sears wrote this letter for Ms. Colachi's signature not out of a genuine desire to help an injured employee, but as a defense in the event Condustrial lost on the employee/independent contractor issue. Once they obtained the refusal to accept employment – at a time they knew it was impossible to accept – they cut off all further communication with Turner. As Turner 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. [R.P. 755, lines 1-9].

The fact of the matter is these parties hate each other. It is simply not possible for Turner to go to work for a company which cut off communication, abandoned her, and defrauded her, SCDC and Guarantee Insurance Company. Condustrial's management resents Turner for pursuing this claim (and a payment of wages lawsuit) that exposed their business practices. As such, it is "highly speculative to presume Employer would offer Employee light duty work had she remained with Employer." Johnson v. Rent–A–Ctr., Inc., 398 S.C. 595, 730 S.E.2d 857 (2012)(employee entitled to TTD because she did not constructively refuse suitable employment "where she would be paired with the co-worker whom she faulted for the accident . . .").

When analyzing a refusal of suitable employment, the rule is that there is a two-step inquiry, with the first step being whether the employment is suitable to the employee's physical capacity. The second step requires the Commission to consider other factors which would justify the employee

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[5] Turner testified Condustrial provided no assistance in getting her medical bills paid.

in refusing the proffered employment. See Food Lion Inc. v. Lee, 431 S.E.2d 342 (Va. App. 1993); Johnson v. Rent–A–Ctr., Inc., 398 S.C. 595, 730 S.E.2d 857 (2012)(reasonable to refuse employment when employer would not pay for child care and travel costs to remote location). The general test is whether"a reasonable person desirous of employment would have refused the offered work." Id. This involves "a much broader inquiry than merely considering whether the intrinsic aspects of the job are acceptable to the prospective employee." Id. As shown in the Johnson case, being placed with a worker who caused the injury is a justifiable reason for refusing otherwise suitable employment. When the even more extreme personal tension exists as in this case, it is reasonable and appropriate for the employee to refuse such an offer. This is particularly true when the Employer has treated someone as badly as Condustrial has in this case, thus further aggravating her fragile mental state.

To a more general point, the purpose of encouraging an employer to offer suitable employment is to facilitate continued employment with the same employer. "For sound policy reasons, the workers' compensation system encourages an injured employee who is still able to perform light-duty work to continue working for his current employer until he reaches maximum medical improvement and then, if possible, to return to his previous position." Lee v. Bondex, Inc., 406 S.C. 97, 103, 749 S.E.2d 155, 157 (Ct. App. 2013). That public policy is not served when an employer makes a purported offer of suitable employment to an employee who is incapable of accepting it; then using that offer as a defensive shield to paying TTD even while refusing to communicate with the employee.

The purported offer made here could not have been accepted. It was obvious from Turner's condition at the time that she could not accept it. An SCDC supervisor reported to Condustrial *before* the letter was delivered that "Rachel is not bathing, eating, or simply taking care of herself

..." [R.P. 764-765; page 3061]. Condustrial sent one of their managers, Lisette Collachi, to deliver the letter knowing Turner was in no condition to go back to work. The letter was plainly created for purposes of litigation. Had Condustrial genuinely cared about Turner, they would not have refused further communication; they would have remained in contact and – had she gotten better – renewed the offer.

The Court should find the purported offer of employment was not a bona fide offer and, given the totality of the circumstances, Turner was both unable and more than justified in refusing to accept. The Commission should be reversed and TTD should be paid on a running award.

3. As the conditions to suspend or terminate TTD were never met, TTD should be continued after September 30, 2015 on a running award.

The Act provides "Disability is presumed to continue until the employee returns to work or compensation is otherwise suspended or terminated according to Section 42-9-260." S.C. Code Reg. 67-502 B (2)(2007). The Single Commissioner held TTD was to be paid from September 6-30, 2015. Once Turner proved entitlement to TTD for that period, TTD could only be stopped if one of several legal preconditions had been met. None of the statutory conditions to suspend TTD were met after September 30, 2015; thus TTD should have been paid on a running award until legally stopped.

The statute and regulations provide a blueprint as to how this case should have been handled. The Commission found Turner was written completely out of work due to her PTSD from September 6, 2015 through September 30, 2015. Once she had been out of work for more than seven days, she was entitled to be paid compensation. See Martin v. Rapid Plumbing, 369 S.C. 278, 631 S.E.2d 547 (Ct.App.2006)(the Workers' Compensation Act "requires employers to pay temporary total disability to an employee who has 'been out of work due to a reported work related injury' for eight days."), *quoting* S.C. Code § 42-9-260(A) (2007).

TTD may be suspended within the first 150 days if "the employee has been released by the treating physician to limited duty work and the employer provides limited duty work consistent with the terms upon which the employee has been released." S.C. Code Ann. § 42-9-260 (2007). There is no evidence of this occurring. Turner had not been released to limited duty work on September 24, 2015. Even if one finds that the first out of work note expired on September 30, 2015, it does not follow that Turner was cured and automatically capable of accepting light duty work – certainly not even twenty days later when Dr. Hess and Dr. Berg were writing reports stating she was out of work due to PTSD from the September 5, 2015 assault. Even beyond that, the offer of light duty began and ended on September 24, 2015 when Turner did not accept it. No new offer was made. As such, the statutory requirements were never met. Therefore, the Court should reverse and hold TTD must be paid from the date of accident on a running award.

C. The Single Commissioner erred in holding she was barred from awarding TTD by the *Burnette* case.

The Single Commissioner held Turner was barred from awarding TTD after September 30, 2015 as a matter of law by Burnette v. City of Greenville, 401 S.C. 417, 737 S.E.2d 200 (Ct. App. 2013). She held "[t]he Commission cannot issue an opinion that would be the equivalent of a medical opinion." [R.P. 58, Finding of Fact G 15]. This was error. The determination that an injured worker is entitled to TTD is not the equivalent of a medical opinion or diagnosis.

In Burnette, the Court of Appeals held the Commission's findings on a particular injury were unsupported by substantial evidence. The court wrote "Particularly disturbing is the finding that the 2008 MRI showed 'only a 'minimal' protrusion with no nerve root displacement or impingement, and comparatively, no greater pathology of any significance (if any) than the MRI of 2004....' Because no evidence indicates this opinion originated from a medical provider, yet it appears in the single commissioner's order, we are forced to conclude it is the medical opinion of the single

commissioner, adopted by the Commission." Burnette v. City of Greenville, 401 S.C. 417, 737 S.E.2d 200 (Ct. App. 2013).

The right to TTD is predicated on multiple factors. While it may be most obvious when a medical provider writes an injured worker completely out of work, such a medical opinion is not the *sine qua non* for awarding TTD. The analysis is multifactorial requiring analysis of all the evidence Both lay and expert medical testimony can support an award of TTD. To slavishly require a medical note taking someone out of all work is an error of law.

For example, in Grayson the commission held the claimant would only be entitled to TTD if the treating physician had written him completely out of work. The supreme court reversed holding that because Grayson was released *with* work restrictions, there was in reality no evidence that his period of temporary total disability ever ended – even though he had returned to work and then been fired. Grayson v. Carter Rhoad Furniture, 317 S.C. 306, 454 S.E.2d 320 (1995). See also Cranford v. Hutchinson Constr., 399 S.C. 65, 731 S.E.2d 303 (Ct. App. 2012)(TTD due because employee was not at MMI and had never been released to work without restrictions).

Even if it could somehow be concluded that Turner's PTSD had resolved and she was able to work without psychological restrictions, she still was under physical restrictions and not at MMI. She was still disabled.

Ironically, if the Commission is correct that it must have medical evidence to award TTD, then the decision to stop TTD on September 30, 2015 is legal error based on speculation. Dr. Berg and Dr. Hess both opined that Turner was out of work due to PTSD from the assault. They gave their opinions on October 20, 2015 – twenty days after the Commission stopped TTD. The medical evidence shows Turner was still disabled. The Single Commissioner effectively rejected this

medical evidence and made her own medical opinion, adopted by the Commission, that her PTSD had spontaneously resolved.

Therefore, the Court should reverse the Commission and hold TTD is payable on a running award from the date of the assault.

2. The average weekly wage of an employee must be based on wages paid by the employer.

The Single Commissioner correctly held Turner's average weekly wage "is to be based on gross wage records using the primary method set forth in the statute. This resulted in an average weekly wage of $1,130.86 and a compensation rate is $753.94." [R.P. 52]. The Single Commissioner reasoned that because Turner was an employee – as opposed to a business owner who elected coverage under the business owner's policy – her average weekly wage was to be based on wages received from her employer.

The Appellate Panel reversed. The Panel reasoned that

> the Single Commissioner was presented with a false dilemma of choosing between two extreme results – an AWW extrapolated from gross payments Claimant received before deduction of business expenses for federal income tax purposes or an AWW based on Claimant's NET taxable income as reflected on her returns. The Single Commissioner chose the former, which was error. [R.P. 125].

The Panel "employed an analysis of Claimant's income tax returns to discern and approximate her 'actual earnings in accordance with South Carolina law." [R.P. 126]. It then "extrapolated Claimant's 'earnings' from her 2014 Schedule C by excluding mileage deductions and expenses unequivocally incurred to generate the gross payments." The Panel took deductions "clearly only incurred as a result of her occupation as an LPN" to reduced her average weekly wage to $762.21 from the $1,130.86 shown by Condustrial's wage records. [R.P. 126, 3943-2947, 3053].

The Appellate Panel's determination is novel, overreaching and completely unsupported by the law of South Carolina – or any other state. To use *any* employee's net taxable income as a basis

for the average weekly wage would be a radical departure from the plain language of the statute as well as long-established practice.[6] See, e.g. Bazen v. Badger R. Bazen Co., 388 S.C. 58, 693 S.E.2d 436, 440 (Ct. App. 2010)(rejecting employer's argument that the commission should "consider Claimant's actual earnings as reported for tax purposes" and holding that § 42-1-40 "requires the average weekly wage be based on the 'actual number of weeks for which wages were paid . . ."); Mozie v. Frazier Pulpwood, 37 8 S.E.2d 61, 29 8 S.C. 34 (Ct. App. 1989)(rejecting employer's attempt to use tax deductions to show a lower annual income for average weekly wage purposes). See, also Craft v. Bill Clark Const. Co, 474 S.E.2d 808 (N.C. App. 1996)("Even if such expenses were incurred by the plaintiff, the Commission is not required to deduct those expenses from the income earned to properly calculate the average weekly wages. . . . [It] would be unjust and unfair to treat plaintiff employee as a subcontractor."). This is particularly so in a case such as this where the Employer paid the Employee on a 1099 as part of a scheme to defraud SCDC and its own insurance carrier.[7]

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[6] The Court should be aware that nurses can take several work related deductions whether they file under a 1099 or a W2. For example, scrubs and nursing shoes are tax deductible because they are specialized uniforms not normally wearable in public. This distinction explains why nurses can deduct scrubs but attorneys cannot deduct suits. These nuances within the tax law show how impossible and arbitrary it would be were the Commission to review tax returns from employees.

Under the Workers' Compensation Act, employer provided housing and vehicles can be added to the average weekly wage. See Patel v. BVM Motel, LLC., 431 S.C. 337, 857 S.E.2d 564 (Ct.App. 2021)("[W]e find no error in the Appellate Panel's consideration of the fair market value of Decedent's use of the motel room in calculating her average weekly wage"); Bazen v. Badger R. Bazen Co., 388 S.C. 58, 64, 693 S.E.2d 436, 439 (Ct. App. 2010); ("Because ample evidence in the record indicates Claimant's living arrangement was not merely a gift but part of his wage contract, we [affirm] the Appellate Panel's decision to award Claimant the fair market value of the use of the house as part of Claimant's average weekly wage."). It is logical to add employer provided housing and vehicles to increase the average weekly wage, yet illogical and inconsistent to lower the average wage because an employee incurs expenses which are unreimbursed by the employer.

[7] Becky Barnette, Guarantee's underwriter, testified she would have "void[ed] the policy for misrepresentation." [R.P. 2497 lines 4-12; page 2497, line 2-page 2514, line 18].

Condustrial argued "that *a contractor's compensation rate* should be determined on his net taxable income because 'earnings' of the injured employee means the actual sum paid to the employee as his wages, not the totality of payments received, including reimbursements." The logical flaw here is obvious. Turner is not a contractor; she is an employee. To quote Condustrial, her average weekly wage "means the actual sum paid to the employee as [her] wages."

Even though Condustrial attempted to misclassify Turner as an independent contractor rather than an employee, they paid her hourly wages. Indeed, she even signed a W4 requesting payroll taxes be withheld from her paychecks when she was hired. [R.P. 2999]. She understandably had every expectation of being paid wages; not anticipating that Condustrial would not actually pay payroll taxes (nor cover her under workers' compensation).[8]

The Single Commissioner properly applied the governing statute. The statute states:

> "Average weekly wages" means the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of fifty-two weeks immediately preceding the date of the injury . . . "Average weekly wage" must be calculated by taking the **total wages paid** for the last four quarters immediately preceding the quarter in which the injury occurred . . . divided by fifty-two or by the actual number of weeks for which wages were paid, which ever is less.

S.C. Code Ann. § 42-1-40 (2007)(emphasis added).

Condustrial nonetheless argued that Turner must be treated as an independent contractor rather than an employee for average weekly wage purposes. As the Single Commissioner found:

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[8] The first time Turner learned Condustrial was misclassifying her was when she called about workers' compensation after her accident and Tom Sears told her she was not an employee. She testified:

> Being abandoned by my employer, I did not appreciate. Being abandoned after I'd been beaten and abused in a prison facility working for them, being told I was one of their best employees and then turn abound and say I'm not your employee after I get hit, after I get beat down, after I get held hostage and threatened my life, that's when I found out they claimed that I was not their employee. They never said that before [September 5, 2015]. [R.P. 669, line 21-page 670, line 3].

> This argument is rejected as it is premised on a logical flaw, to wit, that Turner is an *independent contractor operating a business* whose expenses must be deducted from her wages to arrive at her average weekly wage. The statute is plain that for an *employee* the average weekly wage is based on the wages paid by the employer. Had Condustrial completed a Form 20, it would show the same average weekly wage calculated by Claimant. Taken to its logical conclusion, Defendants' argument would require the Commission to review the tax returns of every single injured worker to determine if there are any business-related tax deductions that should be used to reduce the average weekly wage. It would also result in a windfall for employers, particularly those who issue 1099s in an effort to misclassify their employees as independent contractors. These are absurd results plainly contrary to the legislature's intent.

[R.P. 50].

Not only is the statute controlling; the case law compels the same result. In Paschal, the Court rejected the identical argument made here. Pascal worked as a repo man repossessing automobiles. He too was misclassified as an independent contractor. His employer argued "the Form 20 was erroneously based on Paschal's gross earnings rather than his net earnings, that is, his gross earnings less his expenses [claimed on his tax return]." The Court rejected this argument, affirming the Commission's finding that "this result, regardless of the method that is used, most accurately reflects Paschal's earnings and is fair to both Price and Paschal." Paschal v. Price, 670 S.E.2d 374, 3 80 S.C. 4 19 (Ct.App. 2008). See, also Mozie v. Frazier Pulpwood, 37 8 S.E.2d 6 1, 29 8 S.C. 34 (Ct. App. 1989)(rejecting employer's attempt to use tax deductions to show a lower annual income for average weekly wage purposes); Craft v. Bill Clark Const. Co, 474 S.E.2d 808 (N.C. App. 1996)("Even if such expenses were incurred by the plaintiff, the Commission is not required to deduct those expenses from the income earned to properly calculate the average weekly wages. . . . [It] would be unjust and unfair to treat plaintiff employee as a subcontractor.").

At oral argument before the Appellate Panel, Condustrial argued "As this Panel is probably

aware the case that governs the calculation of average weekly wage for independent contractors who are subsequently adjudicated to be employees for some reason . . . is Stephens versus Avins. . . . Basically what the Stephens case held was that the appropriate manner of calculating an injured worker's earnings is her net income after deduction of business expenses." Notwithstanding the obvious mischaracterization by counsel, the Appellate Panel agreed, citing Stephen for the proposing that there is an "unequivocal rule in South Carolina that mileage deductions should NOT be used in wage calculations." [R.P. 126]. Nowhere does the Appellate Panel cite to the governing statute, nor does it consider that the cases it relied on (Stephen and Williams) both dealt with business owners who elected coverage under the Act.

The analysis is fatally flawed because Turner was *never* an independent contractor or business owner. When the Commission found she was an employee, it naturally found that she was *always* an employee. Her right to benefits under the Act is predicated on her being an employee; not a business owner who elected to be covered under the business's insurance.

The Stephen case is easily and obviously distinguishable. Stephen was a subcontractor. The issue was "whether *a subcontractor's compensation rate* should be computed based on his net, as opposed to gross, earnings." His general contractor deducted workers' compensation premiums from the payments it made to Stephen for the jobs he did. "The single Commissioner found that 'any income paid to [Stephen] was for an entire job' and did not solely reflect his earnings. The single Commissioner further found that '[o]ut of these payments came *the costs of materials, wages paid to other individuals*; and other expenses related thereto.' . . ." Stephen v. Avins Const. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996)(emphasis added).

Throughout the opinion, this Court makes it clear that Stephen was *not an employee* – he was a subcontractor business owner who elected to come under the Act by paying premiums to the

general contractor. The Court saw the issue as one of statutory interpretation observing that "This statute does not specify whether 'wages' refers to *net or gross earnings of a business owner* operating as a subcontractor." Id. This is an entirely different arrangement than the one under which Turner and Condustrial operated. The instant case is simply one where the Employer misclassified its employees to evade paying workers' compensation premiums and payroll taxes. Condustrial should not receive a windfall on the compensation rate for defrauding SCDC, Turner, and the State and Federal government.[9]

The other case relied on by the Commission is similarly inapposite. In Wright, the claimant was a self-employed heating and air contractor who elected to be covered under the Act. See S.C. Code Ann. § 42-1-130 (1997)(allowing "sole proprietors or partners of a business [to] elect to be included as employees under the worker's compensation coverage of the business . . ."). The Court noted:

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[9] Condustrial and the other defendants argue that Turner "wants to 'have her cake and eat it too' by claiming entitlement to an AWW based on her gross earnings as an independent contractor for federal income tax purposes, while at the same time eschewing that designation for coverage under the Act as an employee."

Turner expected taxes to be withheld when she signed the W2. When she was paid on a 1099, she took her tax documents to her tax preparer. She relied on this professional to file her taxes. She testified: "1099,whatever the paper that I get at the end of the year, I take it to my tax man with my log book and he files my taxes. He asks me questions and I answer them. I don't know tax law." [R.P. 706, lines 1-4]. It was not her fault her taxes were filed based on the 1099. Condustrial ignored the W4 and sent her a 1099 instead of a W2. See Pizza Hut Delivery v. Blackwell, 204 Ga.App. 112, 418 S.E.2d 639 (Ga. App. 1992)(rejecting employers 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.").

Unlike Condustrial, Turner testified that if required to amend her tax returns, she would do so but would have to get her tax guy to do that because she did not "even know now to begin." [R.P. 726, lines 10-22].

> Wright deducted business expenses on his Federal Income Tax Return, including hotels, meals, tools, classes, and insurance. He deducted mileage on the same form. We find that the mileage deduction is no different from the *other expenses of doing business*; therefore, it should not be included as part of Wright's income for the purpose of worker's compensation. Wright v. Wright, 306 S.C. 331, 335, 411 S.E.2d 829, 831 (Ct. App. 1991)(emphasis added).

As Wright operated his own business, his true earnings were not based on wages (as it would be if he were merely an employee).

In Baldwin, the North Carolina case cited by the Commission (and this Court in Stephen), the claimant was *"operating his own business."* The North Carolina Court of Appeals observed that "The calculation of compensation is difficult in this case. G.S. 97-38 provides compensation will be based on average weekly wages. The decedent did not receive wages from Piedmont Woodyards but sold pulpwood to Piedmont for a certain price per cord." Baldwin v. Piedmont Woodyards, Inc., 293 S.E.2d 814, 58 N.C.App. 602 (N.C. App. 1982).

Turner is an employee. She was not a business owner. She was paid wages. As such, her average weekly wage must be based on the $22.00 per hour paid to her by her employer, Condustrial. See S.C. Code Ann. § 42-1-40 (2007)("'Average weekly wage' must be calculated by taking the total wages paid for the last four quarters immediately preceding the quarter in which the injury occurred . . . "). The average weekly wage finding from the Appellate Panel is incorrect as a matter of law and must be reversed. The finding by the Single Commissioner that the average weekly wage is $1,130.86 should be reinstated as it is the legally correct result.

3. The Full Commission erred in denying Turner's Motion to Submit Additional and After Discovered Evidence.

The Court granted Turner's petition for partial remand for the Commission to address her Motion to Submit Additional and After Discovered Evidence. On remand, the Commission summarily denied the motion on a Form Order. [R.P. 129]. This was error.

In the Decision and Order of the Appellate Panel, the Panel affirmed the Single Commissioner's ruling that Rachel Turner was entitled to temporary total disability compensation through September 30, 3015. The Panel denied additional compensation because this finding was based on a SOVA form filled out by Turner's family doctor stating "Patient will be totally unable to work from 09/16/2015 through 09/30/2015." [R.P. 3027]. The Decision and Order further stated: "There are no other out of work notes from her family doctor, and no further SOVA forms in the record that address work ability or disability" [R.P. 105-106, Findings of Fact G 7-8].

The Panel further found:

> The Claimant was treated at Palmetto Day Treatment from October 21, 2015 until November 20, 2015. The Claimant asked her therapist at Palmetto on October 21, 2015 if she would be able to get a note to give to her employer excusing her from work. (Claimant's APA page 38) The counseling note states that the LMSW told patient that program therapist could provide a note signed by the doctor. The record in this case does not contain such note.

[R.P. 106-107, Finding of Fact G 12].

Turner's Counsel had previously obtained what was believed to be the entire SOVA file directly from SOVA. As noted by the Appellate Panel, that file did not contain the work note referenced in the note from the LMSW.

At the hearing, Turner testified that other work notes existed and that she had in fact submitted additional work notes to SOVA. She testified:

> They gave me 'til my follow-up appointment. Then they would say, okay, she's still not ready to go back to work, and they would issue another one. . . . I received many of these. I received all the way until $7,000 worth of these. Do you see what I'm

> saying. They maximumed me out at [$7,000]. South Carolina Association for Victim's assistance has a max out of $7,000. But up until then I had to provide those proving that I was unable to work in order to continue funds from them.

[R.P. 738, lines 8-19].

Turner lost all her records when she was evicted because she could not pay her rent. She testified "I've lost everything." [R.P. 714, line 10]. "A lot of my stuff – most of my stuff got lost. I lost pictures of my children when they were babies, too. . . . Pretty much left with the clothes on my back and a few boxes. . . Furniture lost, car lost, everything lost." [Tr. I, page 300, lines 4-13]. Upon learning of the Single Commissioner's ruling as to the lack of additional records from SOVA, Turner personally contacted SOVA to obtain the missing out of work slips. On August 20, 2020, Turner received an email from the Compensation Recovery Coordinator at the Department of Crime Victim Compensation of the South Carolina Office of Attorney General. Attached to the email were various documents.

Turner reasonably presumed these documents had been sent to her attorney. However, the Compensation Recovery Coordinator misspelled the email address for her attorney's office. The email was addressed to *records@samuelreynolds.com*. The correct address is *records@samuelsreynolds.com*. The sender left the "s" off "Samuels." Due to the sender's error, her attorney was unaware that these records had been sent.

On April 19, 2021, Turner learned that her attorney had not been sent the records in question – despite his specific records request to SOVA and her arranging for the Attorney General's office to email their file to her attorney. She located the email from August 20, 2020 and forwarded it to her attorney on April 19, 2021.

The Commission's regulations allow a party to file a motion to submit "additional evidence necessary for the completion of the record in a case on review." S.C. Code Ann. § Reg. 67-707 A. (2007). The regulation requires:

C. The moving party must establish the new evidence is of the same nature and character required for granting a new trial and show:

> (1) The evidence sought to be introduced is not evidence of a cumulative or impeaching character but would likely have produced a different result had the evidence been procurable at the first hearing; and
>
> (2) The evidence was not known to the moving party at the time of the first hearing, by reasonable diligence the new evidence could not have been secured, and the discovery of the new evidence is being brought to the attention of the Commission immediately upon its discovery.

S.C. Code Ann. § Reg. 67-707 C (2007).

The newly discovered evidence received from the AG includes various documents such as incident reports from the Department of Corrections and additional forms from SOVA. Among those forms is a document signed by Dr. Berg stating: "Patient will be totally unable to work from 10/21/15 through 11/20/15. [R.P. 3557]. These dates coincide with the date of Turner's next appointment with her psychiatrist and counselors. An image of this statement is shown below:

Date of crime related injury 09/05/15 (must be completed)

Briefly describe the injury/injuries sustained as a direct result of the crime: diagnosed with PTSD

Treating Physician must provide a start and end date of the disability period:

Patient will be totally unable to work from: 10/21/15 through: 11/20/15

Check all that applies in accordance to the patient's ~~physical~~ mental ability:

- ☐ May resume work immediately without restrictions
- ☐ May resume work immediately with the following restrictions _____
- ☐ Patient may return to work at full capacity on (date) ___/___/_____
- ☐ Patient may return to work at partial capacity on (date) ___/___/_____
- ☑ Patient has ~~a return~~ follow up appointments with therapist/MD appointment on (date) 11/19/15 - MD 11/20/15 - therapist

Type or print Treating Physician's name Stephanie Berg MD Phone (803) 296-8765

The newly discovered evidence would entitle Turner to a new trial on the issue of ongoing entitlement to TTD. The evidence is neither cumulative or impeaching. As the Commission specifically based its denial of TTD on there being no such note in the record at trial, this new evidence would likely have produced a different result had it been procurable at the first hearing.

The evidence was unknown to the moving party at the time. While there was testimony that this record existed from Turner and it is consistent with Dr. Berg's medical records (which state "Due to incident 9/15/15, patient had not worked since that date"), this particular work note was not included in the materials Turner's attorney obtained from SOVA.

As SOVA did not provide this specific note to Turner's attorney through the normal discovery process, the new evidence could not have been secured by reasonable diligence. Furthermore, even when Turner on her own initiative obtained the records from the Attorney General's office, the records were not sent to her attorney due to the mistake by the Attorney General. As soon as Turner learned of the error in the email address by the Attorney General, she forwarded the evidence to her attorney.

The new evidence was brought to the Commission's attention immediately upon discovery with an accompanying affidavit supporting the factual background concerning its acquisition. .

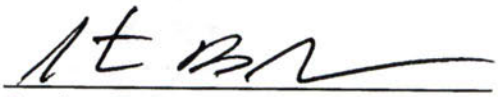
As the elements of Regulation 67-707 are satisfied, the Appellate Panel should have received and considered the additional evidence. The Court should reverse the Appellate Panel's denial of the motion.

Additionally, the Court should find that Turner is entitled to be paid TTD on a running award until she either returns to work or is deemed to be at MMI after an evidentiary hearing. As the newly discovered work note conclusively establishes that she is still totally disabled due to PTSD, the Court can make this ruling as a matter of law.

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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September 14, 2022
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SEP 15 2022
SC 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.

CERTIFICATE OF COUNSEL

The undersigned certifies that this final Brief of Appellant complies with Rule 211(b), SCACR.

Respectfully Submitted

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September 14, 2022