THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Unpublished Opinion No. 2024-UP-110
Heard February 6, 2024 – Filed March 27, 2024
Withdrawn, Substituted, and Refiled July 3, 2024

Rachel J. Turner, Employee,. . . . . Petitioner,

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.

PETITION FOR WRIT OF CERTIORARI

Stephen B. Samuels
SC Bar 15394
SAMUELS REYNOLDS LAW FIRM, LLC
1320 Richland St.
Columbia, SC 29201
(803) 779-4000
stephen@samuelsreynolds.com

ATTORNEY FOR PETITIONER

OTHER COUNSEL OF RECORD:

George D. Gallagher, Esquire
SPEED, SETA, MARTIN, TRIVETT & STUBLEY
PO Box 11669
Columbia, SC 29211
ggallagher@speed-seta.com

ATTORNEY FOR CONDUSTRIAL, INC.

James P. Newman, Jr., Esquire
HOWSER, NEWMAN, BESLEY, LLC
PO Box 12009
Columbia, SC 29211
jnewman@hnblaw.com

ATTORNEY FOR COUNTRYWIDE STAFFING SOLUTIONS GROUP, INC

Gregory M. Alford, Esquire
PO Drawer 8008
Hilton Head Island, SC 29938
Gregg@alfordlawsc.com

ATTORNEY FOR COUNTRYWIDE STAFFING SOLUTIONS GROUP, INC

Erin Farthing, Esquire
STATE ACCIDENT FUND
PO Box 1166
Lexington, SC 29071
efarthing@saf.sc.gov

ATTORNEY FOR STATE ACCIDENT FUND

Edwin P. Martin, Jr., Esquire
STATE ACCIDENT FUND
PO Box 1166
Lexington, SC 29071
emartin@saf.sc.gov

ATTORNEY FOR STATE ACCIDENT FUND

Lisa C. Glover, Esquire
SC UNINSURED EMPLOYERS' FUND
PO Box 1815
Lexington, SC 29071
lglover@saf.sc.gov

ATTORNEY FOR SOUTH CAROLINA UNINSURED EMPLOYER'S FUND

Beth Richardson, Esquire
ROBINSON GRAY STEPP & LAFFITTE, LLC
PO Box 11449
Columbia, SC 29211
brichardson@sowellgray.com

ATTORNEY FOR SOUTH CAROLINA PROPERTY AND CASUALTY INSURANCE GUARANTY

Grady L. Beard, Esquire
Robinson Gray Stepp & Laffitte, LLC
PO Box 11449
Columbia, SC 29211
gbeard@robinsongray.com

ATTORNEY FOR SOUTH CAROLINA PROPERTY AND CASUALTY INSURANCE GUARANTY

Jasmine Smith, Esquire
ROBINSON GRAY STEPP & LAFFITTE, LLC
PO Box 11449
Columbia, SC 29211
Jsmith@robinsongray.com

ATTORNEY FOR SOUTH CAROLINA PROPERTY
AND CASUALTY INSURANCE GUARANTY

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on July 3, 2024.. [App. p. 180].

QUESTIONS PRESENTED

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:

   (1) there is no evidence 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 denying Turner's motion to submit additional evidence.

STATEMENT OF THE CASE

Petitioner Rachel Turner was employed as a nurse by Condustrial. Under the trade name Medustrial, Condustrial placed nurses at various correctional facilities operated by the Department of Corrections. Condustrial entered into a contract with SCDC whereby it was obligated to provide nurses who were employees covered by Condustrial's workers' compensation insurance.

Turner was placed as a nurse at the Broad River Correctional Institute – a maximum security prison. On September 5, 2015, Turner and another nurse were kidnaped, held hostage and assaulted by two inmates in the medication room of the prison.

Due to the ordeal Turner suffered multiple injuries including physical injuries to her back and

arm along with severe post-traumatic stress disorder. As to the PTSD, Turner suffers from nightmare, 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.

Turner requested workers' compensation benefits from Condustrial. Condustrial informed her that workers' compensation was unavailable to her because she was an independent contractor; not an employee. As Condustrial was uninsured, Turner filed her claim against additional parties including SCDC as a statutory employer and the Uninsured Employer's Fund.

On September 24, 2015, Condustrial learned from SCDC that Turner was locked in her home, not sleeping, eating or bathing. Condustrial sent one of their managers, Lisette Collachi to Turner's home purported offering her light duty work. At the time, Turner had not even started treatment for her PTSD and was completely unable to accept any work. Moreover, Condustrial continued to deny that she was an employee and refused to cooperate with Victim's Assistance request for information.

Turner began a five-week treatment program with a psychiatrist, Dr. Stephanie Berg. 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 completing the five-week program, Tunrer began treatment with Community Mental Health. As of the hearing, the treatment had not been succedsful in improving her to the point she could return to work.

The case was tried over multiple days from July 24, 2017 to November 6, 2017. The single commissioner issued an order on July 31, 2020. She found Turner was an employee and awarded treatment for both the physical and mental injuries. However, as to compensation, she held "[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]. The Commissioner reasoned Turner was offered work on September 24, 2015 and refused it (notwithstanding her inability to work), thus was barred from additional TTD. She also ruled the Commission could not award TTD benefits after September 30, 2015 in the absence of an explicit medical statement taking her out of work because to do otherwise would be the Commission making its own medical opinion in violation of Burnette v. City of Greenville, 401 S.C. 417, 737 S.E.2d 200 (Ct. App. 2013).

The Appellate Panel affirmed with a modification to the compensation rate. During the pendency of the appeal, Turner filed Motion to Submit Additional and After Discovered Evidence. The motion was summarily denied.

Turner and Condustrial filed cross-appeals. Condustrial contested the finding Turner was an employee and findings that they lacked insurance. Turner appealed the compensation rate issue and the denial of TTD.

The Court of Appeals reinstated the single commissioner's compensation rate and affirmed the holdings on employment status and insurance. On the core issue of this Petition, the court held "Turner was not entitled to temporary total disability benefits after September 30, 2015, because Turner only provided documentation she was written out of work from September 16, 2015, through September 30, 2015." Turner v. Medustrial Healthcare Staffing Service and Condustrial, Inc., Op. No. 2024-UP-110 (S.C. Ct. App. filed July 3, 2024). The Petition for Rehearing was denied. This appeal followed.

ARGUMENT

This case presents novel issues in an underdeveloped area of workers' compensation law. The Legislature enacted a series of statutes to ensure that injured workers would receive temporary compensation swiftly, surely and certainly. Temporary total disability compensation (TTD) is one of the core benefits under the Act – essential to meet the societal goal of "prevent[ing] injured employees and their dependents becoming charges on society." Cokely v. Robert Lee, Inc., 197 S.C. 157, 14 S.E.2d 889 (1941).

Petitioner asks this Court to issued the Writ for two purposes: (1) to explain and clarify the myriad legal issues raised in this case and either misinterpreted or misunderstood by the Commission and Court of Appeals; and (2) to right a wrong in a case where a South Carolina citizen suffered life-changing injuries because she undertook to minister health care to underserved population in the most dangerous of circumstances only to be denied workers compensation benefits due to the acts of an unscrupulous employer and the timidity of the Commission.

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

In her Brief, Turner raised multiple *legal* issues as to why the Commission erred in denying ongoing temporary total disability compensation. The Court of Appeals overlooked these issues, instead summarily affirming based on "substantial evidence in the record to support the Appellate Panel's finding [that] Turner was not entitled to temporary total disability benefits after September 30, 2015, because Turner only provided documentation she was written out of work from September 16, 2015, through September 30, 2015." Turner v. Medustrial Healthcare Staffing Service and Condustrial, Inc., Op. No. 2024-UP-110 (S.C. Ct. App. filed March 27, 2024).

The issues in this case are far more complicated than indicated by the court's opinion. To make sense of this – and to arrive at the correct decision – one must fully analyze the statutory scheme and case law underlying payment and suspension of temporary compensation.

The Act is replete with examples of how seriously the Legislature regarded the employee's right to receive temporary compensation. Weekly benefit checks are designed to replace the injured worker's wages. As such, the Legislature included a provision requiring temporary compensation "shall be paid periodically, promptly and directly to the person entitled thereto . . ." S.C. Code Ann. § 42-9-220 (2007). Payments must be made on the same day of the week. S.C. Code Ann. § 42-9-230 (2007). An employer who does not make timely payments is subject to a 10% penalty. S.C. Code Ann. § 42-9-240 (2007). Illegal suspension or termination of temporary compensation requires the employer be assessed a mandatory 25% penalty. S.C. Code Ann. § 42-9-260 (G) (2007).

The Legislature intended to protect an injured workers' right to ongoing temporary compensation by enacting multiple procedural protections to ensure that once payments were started they could not be stopped without strictly applied due process. See § 42-9-260 (2007)(setting forth conditions which must be met before the employer can suspend or terminate temporary compensation); Martin v. Rapid Plumbing, 369 S.C. 278, 631 S.E.2d 547 (Ct.App.2006)(ordering reinstatement of temporary compensation with a 25% penalty for illegal termination of compensation because "the statute is explicit that . . . an employer can only terminate or suspend temporary compensation if one of the specified conditions [in § 42-9-260] is met."); Last v. MSI Const. Co., Inc., 305 S.C. 349, 409 S.E.2d 334 (1991))("entitlement to workers' compensation benefits constitutes a property interest" entitled to due process protection).

In the instant case, the Appellate Panel took the first step in the analysis – determining that

Turner proved her initial right to temporary compensation. She was awarded compensation beginning on September 6, 2015 (the day after the kidnaping). However, the Appellate Panel (and the Court of Appeals) overlooked the second half of the analysis, to wit: whether the conditions to overcome the presumption of disability[1] and thus suspend ongoing TTD were met. As noted in the briefs and the discussion below, these conditions were not met. It was error to terminate temporary compensation on September 30, 2015.

A. Turner has been actually and presumptively disabled since the September 5, 2017 kidnaping and assault.

The Court of Appeals held "Turner was not entitled to temporary total disability benefits after September 30, 2015, because Turner only provided documentation she was written out of work from September 16, 2015, through September 30, 2015." Turner v. Medustrial Healthcare Staffing Service and Condustrial, Inc., Op. No. 2024-UP-110 (S.C. Ct. App. filed July 3, 2024). The court reasoned that such a finding was supported by substantial evidence. The problem with this reasoning is that the Commission refused to consider the extensive evidence of ongoing mental disability. The court correctly noted "while medical testimony is entitled to great respect, the fact finder may disregard it if other competent evidence is presented," yet the Appellate Panel held it could not award TTD based on other evidence of disability *as a matter of law* because "The Commission cannot issue an opinion that would be the equivalent of a medical opinion." [R.P. 58, finding of Fact G 15].

The Commission ruled *as a matter of law* that the *only evidence* by which an injured worker

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[1] 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).

could prove temporary disability was an explicit out-of-work note from a physician. Specifically, the Commission ruled:

> The Claimant was not written out of work by any medical provider due to psychological disability, except for the period of time from September 16, 2015 through September 30, 2015. As indicated above, a doctor's note requested of the therapist by the Claimant in October of 2015 was not within the record. It would be speculation as to whether one was refused, issued, or if issued, what it may have contained. Further, Dr. Berg discharged the Claimant as being psychiatrically sound [sic] on November 25, 2015. . . . In the psychological treatment records there is mention of Claimant's not working in the reporting symptoms and problems, but *the undersigned cannot extrapolate a reporting of symptoms to be the actual opinion of the provider or physician with regards to ability or disability to work related to the injury*. In releasing Claimant, Dr. Berg found on November 23, 2015 that Claimant was psychiatrically sound [sic] and Dr. Westerkam did not issue any psychological work restrictions. *The Commission cannot issue an opinion that would be the equivalent of a medical opinion.*

[R.P. 108, Finding of Fact E15 (emphasis added)].

In making this finding, the Appellate Panel abdicated its role as the determiner of disability based on the totality of evidence in the record. Furthermore, the Panel failed to follow the law protecting an injured worker's right to receive temporary disability compensation during an ongoing period of disability. These laws were written for the benefit of injured workers; not to create artificial barriers to receiving benefits. As this Court has stated, "Common sense indicates that a compensation law passed to increase workers' rights (because their common law rights were too narrow) should not thereafter be narrowly construed." Pierre v. Seaside Farms, Inc., 386 S.C. 534, 689 S.E.2d 615 (2010), *quoting* Pelfrey v. Oconee County, 207 S.C. 433, 440, 36 S.E.2d 297, 300 (1945).

Petitioner detailed the extensive and pervasive evidence of her disability in her Briefs. Rather than fully restate that evidence in this Petition, Petitioner asks the Court to review the record with these points in mind.

It is concerning that the Appellate Panel treated Turner's mental injuries differently than they

treated her physical injuries. The Panel found as a fact that "Turner is unable to physically work as a nurse. The restrictions from Drs. Hess and Westerkam prevent her from working as a nurse. She testified she is unable to work as a nurse due to her physical injuries." [R.P. 56, Finding of Fact 11]. Dr. Hess saw Turner one time on October 20, 2015. On that date, he wrote an order stating: "Please allow Ms. Turner to return to work with no lifting greater than 10-20 pounds." [R.P. 2732].

The Court should note that as to Turner's physical injuries, the Commission considered both the lay testimony and medical evidence as required. Yet, as to the mental disability, the Commission refused to consider the testimony or the medical evidence of psychological disability, instead concluding that it was barred from doing so under Burnette. The Commission erroneously concluded that it must have a separate work note explicitly "excusing her from work." [R.P. 107-108, Finding of Fact G 15]

It is wholly illogical that an employee's testimony that she cannot work as a nurse due to her physical injuries would be sufficient proof of disability, yet her testimony as to her mental disability is disregarded in toto.

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 [sic] 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 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].

Turner's testimony is wholly consistent with the treatment records from her mental health providers. She did not even begin treatment for her PTSD until October 21, 2015. How can the Commission cut off temporary compensation on September 30, 2015 – essentially finding her PTSD is cured – when treatment has not even started? How can the Appellate Panel disregard Dr. Berg's explicit statement "Due to incident 9/5/15 patient has not worked since that date." [R.P. 2780]. The term *due to* means *because of* or *attributable to*. Put another way, the "incident 9/5/15" is the *but for* cause of Turner's disability and inability to work. It is deeply cynical to attribute any other meaning to Dr. Berg's statement. Yet the Appellate Panel arbitrarily injected its own ambiguity into this straightforward medical report stating "in the psychological treatment records there is mention of Claimant's not working in the reporting symptoms and problems, but the undersigned cannot extrapolate a reporting of symptoms to the actual opinion of the provider or physician with regards to ability or disability to work related to the injury." [R. P. 108, Finding of Fact 16]. The Appellate Panel made the previous statement about extrapolating a meaning different than the "actual opinion of the provider or physician," yet astonishingly in the same finding of fact, the Panel 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.

The Appellate Panel abdicated its duty to consider the evidence as a whole. When the Appellate Panel is charged with making disability determinations – both temporary and permanent – it must consider both lay and medical evidence. Testimony from the injured worker cannot simply be discarded. While in certain instances, the Appellate Panel can give diminished weight to testimony that is inconsistent or not credible, that is not what happened her. The Appellate Panel found Turner's testimony about her inability to work as a nurse to be reliable and probative. It should have done the same for her testimony about her mental injury.

This is not a simple question of a trier of fact weighing disputed evidence. This is a case where the evidence of disability is all one way. See Doe v. South Carolina Dept. of Disabilities and Special Needs, 377 S.C. 346, 660 S.E.2d 260 (2008)(reversing Commission's denial of claim because the "only evidence of causation is that Claimant's mental injury was caused by her stress at work as stated by Dr. Lowe"). The Court should issue the Writ and reverse the Appellate Panel on the issue of ongoing temporary total disability compensation.

B. The Appellate Panel erred in holding Condustrial made a bona fide offer of employment suitable to her capacity and that Turner "did not accept the offer."

Turner argued that the purported offer of employment did not meet the requirements of § 42-9-190 because (1) it was not a genuine offer of *employment*; (2) at the time of the purported offer on September 24, 2015, Turner was mentally disabled and unable to accept any offer of employment; and (3) the offer was made one time and thereafter Condustrial cut off all communication from Turner. The Court of Appeals addressed none of these arguments, instead summarily citing Lee v. Bondex, 406 S.C. 97, 102, 749 S.E.2d 155, 157 (Ct. App. 2013), for the proposition that "For temporary disability benefits, a claimant must prove only that work restrictions prevent h[er] from performing the job [s]he had before the injury, and that h[er]current emplloyer has not offered h[er] light-duty employment." This is a gross oversimplification of the issues in this case, which ultimately leads to an erroneous result. The Court should issue the writ to hear the arguments and evidence on the proper analysis of the application of § 42-9-190.

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

The Appellate Panel ruled Turner was entitled to temporary total disability compensation ("TTD") from September 6, 2015 through September 30, 2015, but denied compensation thereafter. The ruling was based 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].

Turner was incapable of accepting *any* offer of employment 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 she did not even begin mental health treatment until October 21, 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." 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.

Even if we assume *arguendo*, that the offer of "employment" on September 24, 2015 was genuine, it remains undisputed that Turner was mentally incapable of accepting it due to her PTSD. If we also assume her PTSD had resolved by October 1, 2015 (despite the lack of treatment and overwhelming evidence of ongoing symptoms), does she then have an obligation to reach back out to Condustrial and ask to be put to work under the terms of the September 24th letter? Does Condustrial have an obligation to renew the offer that necessarily was rejected?

From that point, 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 (emphasis added)].

Condustrial cut off all contact with Turner. They refused to accept her calls. They refused to help her with Victims's Assistance because the forms required them to list her as an employee.

This begs the question as to how the Act is designed to work when an employer makes a one-time offer of "employment" and thereafter blackballs the employee because she is prosecuting a workers' compensation case. Under the Appellate Panel's reasoning, this scenario bars temporary compensation notwithstanding the fact that the employee has no ability to accept an offer of suitable employment. And not only because she is still disabled, but also because the employer refuses to talk to her or give her an opportunity to accept an offer.

At some point, we need to get past the theoretical and look at the reality here. Condustrial made the offer not out of genuine concern for Turner's welfare, but for its own benefit. When SCDC's facility nurse supervisor called to find out what Condustrial "was doing to assist Rachel Turner," Condustrial's manager "told Mr. Harper that we are trying to assist her *but it had to be in the scope of how we operate since our nurses are independent contractors. . .* Matt Harper mentioned that a lot of people, nurses were looking at Medustrial right now to see what we were going to do. That it could make the difference between nurses signing on with us or going to another agency to work." [R.P. 3061 (emphasis added)].

Condustrial was interested in two things: (1) maintaining its business with SCDC whilst treating its nurses as independent contractors rather than employees as required under the contract; and (2) avoiding liability for compensation should it lose the employment status issue in Turner's workers' compensation claim. This is why they refused to actually help Turner. And this is why

they never offered actual *employment*.

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 Court should address this overlooked issue and reverse the Appellate Panel.

2. The purported offer of "employment" was not made in good faith and was not genuine.

The Act provides "If an injured employee refuses employment procured for him suitable to his capacity and approved by the commission he shall not be entitled to any compensation at any time during the continuance of such refusal." S.C. Code Ann. § 42-9-190 (2007). The Panel applied this statute to bar Turner from ongoing temporary compensation after September 30, 2015.

The key predicate is that the employer must procure and offer "employment . . . suitable to his capacity . . ." Id. Condustrial never offered Turner *employment.* Tom Sears was asked about the September 24, 2015 letter. He testified "There was an actual bonafide offer or 'There are some things we can do to keep you working to try to assist you in this situation.'" When asked "Would she become an employee at that time," he responded "No, she would not." He confirmed "She would still have been an independent contractor." [R.P. 1156, lines 4-11]. As Condustrial never offered *employment*, Condustrial never met the requirements of the statute. The Court should hold as a

matter of law that Condustrial's purported offer of "things we can do to keep you working" was ineffective as a matter of law and cannot be used to bar ongoing TTD.

The second predicate is that the offered employment be "suitable to his capacity." As we know, Turner had no capacity for work on September 24, 2015. She could not have refused employment because she was not capable of accepting it.

At the time the letter was delivered, 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. Even if Turner could have accepted the work, she would still be entitled to temporary partial disability compensation because her wages would have been substantially less than her pre-injury average weekly wage. See S.C. Code Reg. 67-502 B (2007)(defining Disability as "Incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment.").

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 genuine offer of suitable employment, the 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 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. The Appellate Panel did not undertake this analysis, nor did the Court of Appeals.

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 uses that offer as a defensive shield to paying TTD even while refusing to communicate with the employee – all the while denying that there ever was an employee/employer

relationship.

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 Court of Appeals overlooked or misapprehended the second part of the analysis. 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 Appellate Panel held temporary compensation 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.

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 weekly 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 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 kidnaping and assault, and continuing her on physical restrictions.

The Legislature created the presumption of ongoing disability to protect an employee's right to compensation, thus relieving an employee of continually proving she was disabled. Once temporary compensation starts, it cannot be stopped unless the employee has returned to work (and no temporary partial compensation is due) or the employee has reached MMI. See Grayson v. Carter Rhoad Furniture, 317 S.C. 306, 454 S.E.2d 320 (1996)(temporary compensation improperly suspended because claimant not at MMI and still under restrictions by the doctor, thus no evidence period of temporary total disability ever ended); Cranford v. Hutchinson Constr., 399 S.C. 65, 731 S.E.2d 303 (Ct. App. 2012)(temporary total disability compensation should have been awarded because employee was not at MMI and had never been released to work without restrictions).

Theoretically, Condustrial could have suspended TTD by offering actual *employment* suitable to Turner's capacity after September 30, 2015. This they failed to do. Turner's "Incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment" remained in force. She was still deemed disabled as a matter of law. S.C. Code Reg. 67-502-B (2007)(defining Disability).

As Turner had not reached MMI, temporary compensation must continue on a running award from September 6, 2015. See Smith v. S.C. Dept. of Mental Health, 335 S.C. 396, 399, 517 S.E.2d 694, 696 (1999)("The rationale for ceasing temporary benefits upon a finding of MMI is to permit

entry of a permanent award."); Hendricks v. Pickens County, 335 S.C. 405, 414, 517 S.E.2d 698, 703 (Ct.App.1999)(MMI is the appropriate point to terminate temporary benefits).

Therefore, the Court should issued the writ, reverse and hold TTD must be paid from the date of accident on a running award.

C. The Appellate Panel erred in holding it was barred from awarding TTD by the *Burnette* case.

The Court of Appeals did not address Petitioner's argument concerning the misapplication of Burnette v. City of Greenville, 401 S.C. 417, 737 S.E.2d 200 (Ct. App. 2013). The Appellate Panel held Turner was barred from awarding TTD after September 30, 2015 as a matter of law by Burnette. The Panel 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.

This point was illustrated in Pate. In Pate, the Commission held Pate's injury was limited to her back because there was no explicit physician's opinion stating that her legs and psyche were also injured or affected. The Court of Appeals reversed holding because there "is ample evidence [employee's] back injury affects other parts of her body . . . it was legal error for the commission to reject . . . an award under the 'general disability" regime by summarily stating her claim was limited to the back without providing any analysis." Pate v. Coll. of Charleston, 437 S.C. 139, 876 S.E.2d 877 (Ct. App. 2022), *cert. dismissed*, Op. 2024-MO-013,(S.C Supreme Court. May 29, 2024). The "ample evidence" consisted of numerous medical records documenting Pate's reports of pain, numbness and weakness in her legs along with a diagnosis of cervical radiculopathy. Pate shows that the Appellate Panel is required to analyze all the evidence in the record and draw appropriate inferences therefrom.

An even clearer example occurred in Grayson, where the commission held the claimant would only be entitled to TTD if the treating physician had written him completely out of work. This 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 briefly 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 a specific type of medical evidence to award TTD, then the decision to stop TTD on September 30, 2015 is legal error based on speculation. The period of TTD was awarded solely on a doctor's note writing Turner out of work for PTSD. 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 and before treatment for PTSD had commenced. The medical evidence and lay testimony shows Turner was still disabled. The Single Commissioner effectively rejected this evidence and made her own medical opinion, adopted by the Commission, that Turner's 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 Full Commission erred in denying Turner's Motion to Submit Additional and After Discovered Evidence.

The Court of Appeals 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.

The court affirmed the denial of the motion reasoning "The record does not show that Turner or her counsel attempted to secure these records until the Appellate Panel filed an unfavorable ruling in 2021 – more than three years after the conclusion of the hearing in front of the single commissioner." Turner v. Medustrial Healthcare Staffing Service and Condustrial, Inc., Op. No. 2024-UP-110 (S.C. Ct. App. filed March 27, 2024).

Respectfully, the court was mistaken on the actual timeline. The motion was timely. The single commissioner issued her Order on July 31, 2020. The Full Commission issued its Order on April 6, 2021.

Turner lost all her records well before the hearing 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. Contrary to the court's Opinion, Turner attempted to secure the missing records immediately after the Single Commissioner's Order and well before the Appellate Panel convened to address the initial appeal.

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.

Turner's counsel filed Motion to Submit Additional Evidence on May 4, 2021. While this was admittedly after the initial Full Commission Order of April 6, 2021, the Order was not yet final due to Condustrial's Motion to Reconsider dated April 12, 2021. At that point, the Order was not final due to the pending motion for rehearing. It only became final when the Panel denied the motion for rehearing on May 17, 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)(emphasis added). As the case was still pending, the Full Commission was required to rule on the merits of the motion.

Turner satisfied all the requirements for admission of after-discovered evidence set forth in the regulations.[2] The Court faults Turner for a lack of diligence based on its misapprehension of the timeline. Turner obtained the additional evidence immediately after the Single Commissioner issued her order on July 31, 2020. She had it sent to her attorney via email from the Attorney General's

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[2]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).

office. The sole reason her attorney did not receive it is because the AG misspelled her attorney's email address. This unfortunate mistake was not on her part and was beyond her control.

The regulation contemplates a party obtaining additional evidence in the period between the Single Commissioner's Order and the Full Commission's issuance of a final order. See S.C. Code Reg. 67-707 ("When additional evidence is necessary for the completion of the record in a case on review the Commission may, in its discretion, order such evidence taken before a commissioner."). That is exactly what happened in this case. It was error of the Commission to summarily deny the motion without analyzing the nature of the evidence. See Morris v. BB & T Corp., 438 S.C. 582, 885 S.E.2d 394 (2023)("no court is entitled to the deference associated with the discretion standard of review until that court has earned deference by fulfilling the responsibility of exercising its discretion according to law."). It was error of the Court of Appeals to find as a fact that "The record does not show that Turner or her counsel attempted to secure these records until the Appellate Panel filed an unfavorable ruling in 2021 – more than three years after the conclusion of the hearing in front of the single commissioner." The Record confirms that Turner obtained these records no later than April 21, 2020 and immediately arranged for them to be sent to her attorney. She should not be penalized because a third-party misspelled her attorney's email address.

Therefore, the Court should reconsider the denial of the motion to submit additional evidence. The Court should either hold that she met her burden and the evidence should be admitted as a matter of law or remand to the Commission to use its discretion and analyze the motion on the merits.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition and issue the Writ of Certiorari. The Court should hold (1) Turner is entitled to ongoing temporary compensation as a matter of law; and (2) the Motion to Submit Additional Evidence should be granted.

Respectfully Submitted

Stephen B. Samuels
S.C. Bar 15394
SAMUELS REYNOLDS LAW FIRM, LLC
1320 Richland Street
Columbia, SC 29201
(803) 779-4000
Stephen@SamuelsReynolds.com

COUNSEL FOR THE PETITIONER

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Columbia, South Carolina