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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM SOUTH CAROLINA

Workers' Compensation Commission

Appellate Case No.: 2021-000633

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

v.

Medustrial Healthcare Staffing Service and Condustrual, 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 Condustrual, Inc. f/k/a Medustrial Healthcare Staffing
Service, Employer, is the Respondent-Appellant.

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Nikki R. Haley
Governor

Cheryl M. Stanton
Executive Director

Mailing Date: June 1, 2016

Condustral Inc
C/O Thomas M Sears Jr
514 E North Street
Greenville, SC 29601-3007

Re: Condustral Inc- Account #383432

ADMINISTRATIVE DETERMINATION:

STATUS OF WORKERS – Independent Contractors, under S.C. Code Ann. § 41-27-230(1)(b) and S.C. Code Ann. Regs. § 47-8.

Dear Mr. Sears:

In February 2016, the South Carolina Department of Employment and Workforce (DEW) conducted an investigation concerning the relationship between Condustral and an individual performing nursing services. The DEW field auditor found that the workers in your employ are employees (for unemployment purposes) and not independent contractors. DEW is in receipt of your written request, dated February 16, 2016, to review this decision and issue an Administrative Determination.

ADMINISTRATIVE DETERMINATION

STATUS OF WORKERS, Independent Contractors under S.C. Code Ann. § 41-27-230(1)(b) and S.C. Code Ann. Regs. § 47-8.

This determination is based on the following legal authority and analysis of the facts related to this case.

LEGAL AUTHORITY

In order to fund the payment of unemployment insurance (UI) benefits, DEW is responsible for the proper collection of employer UI tax contributions.¹ As part of that responsibility, DEW

¹ See generally S.C. Code Ann. § 41-27-20 (where the Legislature declared public policy of UI law which includes ensuring "the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own").

must determine the status of workers, and if DEW determines there is an Employer-Employee relationship, then those employees' wages are subject to UI tax contributions.²

Under South Carolina common law, the primary consideration in determining whether workers are employees or independent contractors is whether the purported employer has the right to control and direct the workers' performance of their work and the manner in which the work is done.³ The test is not the actual control exercised, but whether there exists the right and authority to control and direct the particular work.⁴ If the right to control is found, then the workers are deemed employees for purposes of unemployment.

DEW examines the following factors when determining if an employer-employee relationship exists:

- a. Whether the employer has the right to control or exercises control over the services performed for the job;
- b. Whether the employer furnishes the equipment;
- c. Whether the method of payment indicates an employment relationship; and
- d. Whether the employer has the right to terminate the employment relationship.⁵

Ultimately, the inquiry is a balance of factors based on the totality of the circumstances and a simple, fact-based consideration—did the business exercise sufficient control over the workers in question to create an employer-employee relationship.⁶ Each factor is evaluated equally and the existence of one factor in favor of an employer-employee relationship is not dispositive.⁷

ANALYSIS

Conductrial Inc is a staffing agency that provides construction staffing, medical staffing and medical brokerage for their clients. Conductrial considers the individuals referred to provide medical services to be independent contractors. A DEW field auditor obtained information regarding Conductrial Inc and its operations from Ms. Amy Woodruff, Accounting/Payroll Assistant for Conductrial and Ms. Christin Sayles, Claimant. Based on the information, the field auditor classified the medical workers as employees of Conductrial.

1. RIGHT TO OR EXERCISE OF CONTROL

The medical workers sign a Licensed Professional Independent Contract Agreement with Conductrial Inc. The workers must maintain licensure required by the federal, state and/or local governmental authorities. Conductrial does not guarantee working hours or the amount of work available. The workers do not have to accept referral opportunities that are offered and it is their

² See S.C. Code Ann. § 41-27-230(1)(b) (common law rules apply to determine employer-employee relationship); S.C. Code Ann. Regs. § 47-8.

³ *Todd's Ice Cream, Inc. v. S.C. Emp. Sec. Comm'n*, 281 S.C. 254, 258, 315 S.E.2d 373, 375 (Ct. App. 1984).

⁴ *Kilgore Grp., Inc. v. S.C. Emp. Sec. Comm'n*, 313 S.C. 65, 68, 437 S.E.2d 48, 49 (1993).

⁵ S.C. Code Ann. Regs. § 47-8.

⁶ *Lewis v. L.B. Dynasty*, 411 S.C. 637, 642, 770 S.E.2d 393, 395 (2015), *reh'g denied* (Apr. 22, 2015).

⁷ *Id.*

choice to contact Condustrial when available for work. The medical workers are encouraged to provide services to other brokers. Condustrial does not provide any training or reimburse for any training. The medical workers are allowed to secure a substitute for any accepted referrals and will be held liable for any loss of commission suffered by Condustrial as a result of securing a substitute.

These factors indicate an independent contractor status.

II. FURNISHING OF EQUIPMENT

Per the Licensed Professional Independent Contract Agreement signed by the medical workers, the workers are responsible for all equipment, licenses, continuing education, materials, uniforms, insurance, manuals and any and all other expenses. None of the above items are provided by Condustrial Inc. All medical services are provided at the client locations so any large medical equipment used to provide medical care would be provided by the client and not Condustrial Inc or the worker.

These factors also indicate an independent contractor status.

III. METHOD OF PAYMENT

The medical workers are paid hourly based on an agreed upon fee schedule. The workers record their time on a timesheet that is verified by the client. The clients remit funds to Condustrial who in turn pay the workers based on the agreed upon fee schedule. Condustrial does not provide any bonuses, vacation or leave pay, health insurance, workers' compensation insurance, or any other benefits. Condustrial does not withhold any state or federal taxes, and each worker is provided a 1099 Form in order to prepare his/her personal or business taxes.

The methods of payment factors outlined above also suggest an independent contractor status.

IV. RIGHT TO FIRE

Based on the questionnaire completed by Ms. Amy Woodruff, Accounting/Payroll Assistant for Condustrial, the firm may discharge the worker at any time without incurring a liability and the worker may terminate their services at any time without incurring a liability. However, the Licensed Professional Independent Contract Agreement states that the worker "shall pay liquidated damages in the amount of \$100.00 per day of unfilled obligation to compensate the broker for its lost commission" or the worker "may elect the remedy of instructing the broker to offset such amounts against any other payment due" to the worker.

These factors indicate an independent contractor status.

CONCLUSION

DEW has determined that all similarly situated workers performing services as medical workers for Condustral Inc. are independent contractors, and therefore, Condustral's medical workers are not included in the definition of employment under S.C. Code Ann. § 41-27-230(1)(b) and S.C. Code Ann. Regs. § 47-8. Therefore, Condustral is not required to report the wages paid to these workers on the employer's quarterly wage and contribution reports to DEW.

This will be the final decision of the Department, unless you file an appeal to the Appeal Tribunal setting forth in detail the grounds for appeal within thirty (30) calendar days, including weekends and holidays, from the mailing date of this decision. If the thirtieth day falls on a Saturday, Sunday or holiday, the appeal period is extended to the next business day. Your appeal may be filed by mail addressed to "Appeal Tribunal Post Office Box 995, Columbia, South Carolina, 29202", or by fax at 803.737.0287. For additional information on filing an appeal, please see the attached Regulation or consult an attorney.

REGARDLESS OF ANY FURTHER APPEAL(S), ALL REPORTS AND TAXES ARE DUE AND PAYABLE UNTIL SUCH TIME AS THE DECISION IS EITHER MODIFIED OR REVERSED. FAILURE TO TIMELY REPORT AND PAY WILL SUBJECT YOU TO PENALTIES AND INTEREST.

Employer Tax Services

Page 5

PROOF OF MAILING

I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to the individual or business stated above on June 1, 2016.


Debbi Hawkins
Admin Support

715

S.C. Code of Regulations R. 47-36

47-36. Review of Rulings with Respect to the Status, Liability, and Rate Contributions of an Employer or Employing Unit.

- A. At the request of an employing unit or employer or a field deputy, the Unemployment Insurance Tax Director or his designee shall make an administrative determination with respect to the status, liability, and rate of contributions applicable thereto, provided that such request is made within thirty (30) calendar days of the date of mailing of a proposed audit report, a liability notice, or a rate notice.
- B. An administrative determination by the Unemployment Insurance Tax Director or his designee concerning the status, liability, or rate of contributions of an employing unit or employer (whether issued initially or in accordance with paragraph A, *supra*), will be reviewed by the Department upon the appeal of such employing unit or employer, **PROVIDED:**
 1. The appeal be made in writing by an officer/owner of the business or an attorney and mailed or delivered to the Department not more than thirty (30) calendar days after the date of mailing of such administrative determination, and
 2. The appeal contains a clear and concise statement of the reasons therefore.
- C. The Department shall designate a hearing officer employed by it to conduct a hearing at a place convenient for the employing unit or employer concerned at which testimony shall be taken and evidence received in the matter.
 1. Notice of the hearing shall be mailed by the hearing officer or deputy to the employing unit or employer, directed to its last known address, at least seven (7) calendar days prior to the date of the hearing. The notice shall state the time set for the hearing, together with a brief statement of the question or questions to be determined.
 2. The hearing shall be conducted under the same procedure as that provided for the hearing of appeals of claims for benefits. Testimony will be recorded and exhibits will be received into evidence in the same manner. A record shall be prepared consisting of the pertinent ruling or rulings of the Unemployment Insurance Tax Director or his designee, the motion for review by the Department, a transcription of the testimony, and the documentary evidence and exhibits. This record will be reviewed by the hearing officer who will issue a decision.
 3. An appeal of this decision may be made to the Appellate Panel, provided that it be made in writing by an officer/owner of the business or an attorney and mailed or delivered to the Department not more than thirty (30) calendar days after the date of mailing of such administrative ruling and contains a clear and concise statement of the reasons therefore.
- D. The Appellate Panel shall give notice of at least seven (7) calendar days of a hearing to be held at its offices in Columbia for the purpose of receiving the oral or written arguments in the case. No further testimony or evidence will be received at this hearing and the Appellate Panel shall make its determination on the basis of the record submitted to it by the Appeals Hearing Officer. A written decision will be issued by the Appellate Panel setting forth its findings of fact and conclusions of law in affirmation, modification, or reversal of the administrative ruling or rulings presented for review.

HISTORY: Amended by State Register Volume 24, Issue No. 5, eff May 26, 2000; State Register Volume 35, Issue No. 6, eff June 24, 2011.

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Rachel J. Turner,

WCC FILE NO. 1514359

Claimant,

v.

DECISION AND ORDER

SC Department of Corrections - Kirkland,
Medustrial Healthcare Staffing Service,
Condustrual, Inc., and/or Countrywide
Staffing Solutions Group, Inc.,

Employer(s),

and

State Accident Fund, South Carolina Property
and Casualty Insurance Guaranty Association
on behalf of the Guarantee Insurance
Company, and/or SC Workers' Compensation
Uninsured Employers' Fund,

Carrier(s),

Defendants,

HEARING:

Held in Columbia, South Carolina beginning on July 24,
2017 and concluding on November 6, 2017.

PURPOSE OF THE HEARING:

To determine issues as set forth on the Forms 50 and 51.

DECISION AND ORDER:

by Melody L. James, Commissioner

FILED:

July 31, 2020

APPEARANCES:

Claimant represented by Stephen B. Samuels, Esquire, of Samuels Law Firm, LLC.

Medustrial Healthcare Staffing Service and Condustral, Inc., represented by T. Jeff Goodwyn, Esquire, of the Goodwyn Law Firm, LLC.

Guarantee Insurance Company represented by Beth Richardson, Esquire (coverage), and Grady L. Beard, Esquire (merits), both of Robinson Gray Stepp & Laffitte, LLC.

Countrywide Staffing Solutions Group, Inc., represented by James P. Newman, Jr., Esquire (merits), of Howser, Newman & Besley, LLC, and Gregory M. Alford, Esquire (coverage).

South Carolina Department of Corrections and State Accident Fund represented by Erin Farthing, Esquire.

South Carolina Uninsured Employer's Fund represented by Lisa C. Glover, Esquire.

On the first day of trial held on July 24, 2017, Countrywide Staffing Solutions Group, Inc., and Guarantee Insurance Company were represented by William R. Harbison, Esquire, and Ellen H. Goodwin, Esquire, of Gallivan, White & Boyd, PA. At the call of the second day of trial on July 31, 2017, Mr. Harbison moved to be relieved due to a conflict of interest between Countrywide and Guarantee. The motion was granted, and the hearing was continued until October 12, 2017 to allow separate counsel to be retained for these parties.

APA SUBMISSIONS

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37	Department of Justice News Release: Mississippi Phosphates Corp. Pleads Guilty to Clean Water Act Violation and Agrees to Transfer 320 Acres to Grand Bay National Estuary	8/19/15	743-744
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¹ Pagination on original submission incorrectly listed these page numbers as 375 - 534.

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² Pagination on original submission incorrectly listed these page numbers as 773 - 773.

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64	Post and Courier Article regarding Kirkland Correctional Institute	4/8/17	1400-1403
65	Transcripts from deposition taken in this matter, including depositions of: Claimant, George Kaspars, Kristen Hildebrand, Darryl McLaughlin, Justin Gudvangen, Zach Collier (To be used and/or submitted at Hearing)		
66	Classcodes.com main page information regarding Insurance Class Codes	undated	1404-1411
67	Construction Professionals Inc. website	undated	1412-1413
68	Classcodes.com List of South Carolina Workers' Compensation Class Codes	undated	1414-1478
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70	Condustrial Worker's Compensation Policy with Guarantee Insurance Company	3/28/14 - 3/28/15	1487-1537
71	Condustrial Worker's Compensation Policy with Guarantee Insurance Company Audit Endorsement	9/30/15	1538-1548

South Carolina Department of Corrections:

APA		DATES	PAGES
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B.	Personnel Services Agreement between South Carolina Department of Corrections and Medustrial Healthcare, 815 Dutch Square Blvd., Suite 119, Columbia, SC 29210		
C.	Personnel Services Agreement between South Carolina Department of Corrections and Medustrial Healthcare, 720 Gracern Rd., Suite 115, Columbia, SC 29210		
D.	Certificates of Liability Insurance		

STIPULATIONS

The parties stipulate to the following matters:

1. The Commission has jurisdiction to hear the matters presented.
2. Venue is proper in Richland County.
3. The parties had notice of the hearing. All parties were represented by Counsel.
4. This matter came before the Commission on Forms 50 and 51.
5. The Commission's file and the Administrative Procedures Act submissions are a

part of the record. (Please see findings below in Documentary Evidence.)

6. The hearing in this matter lasted eight (8) days beginning on July 24, 2017 and concluding on November 6, 2017.

7. Additionally, on November 27, 2017, Guarantee Insurance Company ("GIC ") consented to and was placed into liquidation by the Second Judicial Circuit Court in and for Leon County, Florida. Thereafter, the South Carolina Property and Casualty Insurance Guaranty Association (SC Guaranty Association) has appeared on behalf of the Guarantee Insurance Company in this matter.

STATEMENT OF THE CASE

This matter came before the Commission on Forms 50 and 51. The parties placed their contentions on the record. (The statement of each party's respective position(s) was made at the beginning of the first day of hearing, July 24, 2017, and was restated at the commencement of the October 12, 2017 hearing date (Date hearing resumed with substituted counsel.))

Claimant Rachel Turner:

Turner contends she is an employee of Condustrail, Inc. It is her position that she suffered an injury by accident arising out of and in the course of her employment in a hostage incident on September 5, 2015. Turner works as a nurse for Condustrail. Condustrail placed her at the South Carolina Department of Corrections. She and another nurse, Kristen Hildebrand, were held hostage by two inmates. Turner was assaulted physically – including having a shank held at her throat. She suffered physical injuries to her right shoulder, right arm and back. She also suffered psychological overlay in the form of severe PTSD. She has been disabled since the assault.

Turner contends her average weekly wage is \$1,130.45 with a compensation rate of \$753.67. She seeks payment of TTD on a running award from September 6, 2015 and continuing. She seeks reimbursement for prior medical treatment, along with ongoing treatment for her physical

and mental injuries.

Turner contends she is the direct employee of Condustrail and the statutory employee of SCDC. Alternatively, she contends she is a direct employee of SCDC under Shatto v. McLeod Reg'l Med Ctr., 406 S.C. 470, 753 S.E.2d 416 (2013)

Medustrial Healthcare Staffing Service and Condustrail, Inc.:

Medustrial Healthcare Staffing Service ("Medustrial") and Condustrail, Inc. ("Condustrail") contend that Medustrial and Condustrail are not separate entities, but rather that Medustrial is the medical staffing division of Condustrail.

Condustrail takes the position that Rachel Turner was a 1099 independent contractor for Condustrail as evidenced by the signed independent contractor agreement, the fact that she could choose if and when to take shifts at SCDC, the fact that she could take shifts for companies other than Condustrail, and the fact that prior SC Department of Labor Licensing and Regulation (LLR) and Employment Security Commission rulings finding the class of nurse Ms. Turner was a part of were in fact independent contractors. At no time did she object to being an independent contractor.

Condustrail contends that Claimant is not entitled to temporary total disability benefits from the date of the injury through the date of the hearing because she was offered work within any work restrictions issued by her medical providers and she refused their light duty offer of employment. In addition, Claimant had not been written out of work by a physician prior to the hearing.

Condustrail contends that Claimant's average weekly is \$333.29 which represents the net taxable income as reported on her 2015 tax returns divided by the number of weeks she worked

in 2015 prior to the date of accident pursuant to SC Code §42-1-40, Stevens v. Avins, 478 S.E.2d 74 (SC App. 1996), and Wright v. Wright, 306 S.C. 331(1991).

Condustrail contends that it approached CSSG to provide Condustrail with a comprehensive workers' compensation insurance program to cover all of its employees and anyone found by the WCC to be an employee of Condustrail. CSSG agreed to this and the Contract Labor Services Agreement (the "Contract") was entered into for this purpose. CSSG argues that this theory of a comprehensive program is supported in verbal conversations, e-mails, and even a letter in November of 2015, affirming that Condustrail was covered under Guarantee's program through a "variety of Carriers," among other representations and warranties. GIC was the insurance carrier to provide coverage for all of Condustrail's employees and anyone found by the WCC to be an employee of Condustrail. Condustrail contends that just as with any insurance program, when the WCC found Claimant an employee, the Claimant was now covered by the Contract and GIC's policy with GIC and/or CSSG having the right to assess an audit premium for the additional insureds. Condustrail takes the position that CSSG's argument that they only cover employees reported to them is not valid when you consider new hires that would not be reported until the first pay period. Condustrail takes the position that CSSG concedes that these unreported employees would be covered. Condustrail argues that Ms. Turner now occupies the position of a new employee and should therefore be covered. It further contends that to rule CSSG's way would mean that Condustrail was buying something less than full coverage which is illegal as workers compensation is required for all employees and would never have been attempted by Condustrail or any employer.

Condustrail argues that Countrywide and/or Guarantee is required to provide Condustrail a defense to this action.

Condustral contends that it has taken all measures that it reasonably could to ensure that its treatment of the nurses taking shifts at SCDC were being properly categorized as independent contractors. Condustral had a 2008 LLR report and a 2016 DEW decision confirming that their 1099 IC model was proper. Condustral contends that it correctly reported the existence of these IC nurses to Countrywide and Guarantee. Condustral did not report to SCDC that it had WC coverage for these IC nurses and SCDC knew that the nurses that were being provided were IC's.

Condustral contends that at no time did it ever tell GIC that these IC nurses were covered by SCDC or by any other WC policy other than occupational accident policies that the nurses purchased for themselves. The audit report notes are not supported by any admissible testimony from the author and are contradicted by every witness that testified on this issue. In fact, the audit report notes indicate that a board of directors gave approval for certain information, but being privately held, there is no board of directors for Condustral.

Condustral had a comprehensive WC policy with GIC the year prior to entering into the agreement with Countrywide to be a co-employer on a policy with GIC. Condustral takes that position that it left GIC because of their improper and illegal handling of its policy with Condustral. Condustral contends that the two nurse codes at issue were covered by Guarantee during the direct policy year and that all the parties were aware of this including Condustral, GIC and their agent.

Guarantee Insurance Company (represented now by the SC Guaranty Association):

Guarantee Insurance Company (GIC) contended Claimant was placed as an independent contractor nurse - through Medustrial - at the Kirkland prison facility in Columbia because (1) Claimant signed several documents and applications confirming she was an independent contractor; (2) operated and worked in a manner consistent with an independent contractor; (3) was treated in all aspects as an independent contractor; and (4) filed her federal and state income taxes as an independent contractor claiming she had her own business and taking various business expenses she incurred while working at Kirkland as deductions from her business income. In the alternative, should the Commission find the Claimant was an employee, GIC contended CSSG (which operates as the legal "employer of record") had no employment relationship with the Claimant and did not hire her either as an employee or an independent contractor. Thus, should the Claimant be found to be an employee under the Act, GIC contended that:

- Condustral/Medustrial should be found liable with the UEF responsible for paying the claim; or

- The SCDC should be found liable as an employer or direct employer, with the State Accident Fund paying the claim because, upon information and belief, the SCDC did not have a valid Certificate of Insurance that would insulate it from liability at the time of this alleged work accident.

- Condustral/Medustrial should be found liable with the UEF responsible for paying the claim; or

- The SCDC should be found liable as an employer or direct employer, with the State Accident Fund paying the claim because, upon information and belief, the SCDC did not have a

valid Certificate of Insurance that would insulate it from liability at the time of this alleged work accident.

Further, as to Claimant's Average Weekly Wage and Compensation Rate, GIC argued that, whether an independent contractor or employee, Claimant's AWW/CR should be based on her adjusted gross income/net taxable income. Stephen v. Avins Construction Company, 324 S.C. 334, 478 S.E. 2d 74 (1996) (holding that "a subcontractor's compensation rate should be determined based on his net taxable income even though the subcontractor was charged Workers' Compensation premiums based on his gross earnings."). Claimant's Federal and State income tax returns showed Claimant's adjusted gross income was as follows: \$13,088.00 in 2013; \$15,430.00 in 2014; and \$11,808.00 in 2015, thereby creating the following AWW/CR for the Claimant: 2013-AWW-\$251.69; CR-\$167.80; 2014-AWW -\$296.73; CR-\$197.83; and 2015 - AWW \$227.08; CR -\$151.39, and a resulting maximum compensation rate of \$197.83.

In addition, the SCDEW had specifically addressed one of the primary issues before the WCC and held that the Condustrual/Medustrial 1099 nurses were independent contractors and, therefore, not included "in the definition of employment under S.C. Code Ann. §41-27-230(1)(b) and S.C. Code Ann. Regs. §47-8." GIC argued that the DEW's decision gave rise to issue preclusion in this claim, or, in the alternative, the decision of one State agency (DEW) should be given deference and weight by another State agency (WCC). *See, e.g., Stephen v. Avins Construction Company*, 324 S.C. 334, 478 S.E. 2d 74 (1996) (holding that "construction of a statute by an agency that is charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons.") Finally, following the alleged work accident, the Claimant declined several alternative and light duty work assignments

offered by Condustrail/Medustrial. Thus, GIC argued there was no justifiable reason for her to turn down these offers, and Claimant should be precluded from TTD since the DOA.

As to the coverage issue, GIC also contended that it provided workers' compensation insurance to Countrywide Staffing Solutions Group, Inc. (CSSG) from June 30, 2015 through June 30, 2016 under Workers Compensation Insurance Policy Number WCP500069701GIC (Exhibit 24), with Endorsements dated July 20, 2015 (Exhibit 51), and July 30, 2015 (Exhibit 25) (collectively referred to as "GIC/CSSG Policy"). Under the GIC/CSSG Policy, GIC contended it only insured properly reported CSSG employees in States and in class codes and locations approved by GIC. GIC stated that Claimant is not an employee of record of CSSG, and not an employee in a class code or location approved GIC. Condustrail never reported Claimant's payroll information to CSSG as required under its Service Agreement with CSSG, or the general class code or location in which Claimant was working so that CSSG could properly seek coverage for such employee under the GIC/CSSG Policy. Therefore, Claimant is not covered under the under the GIC/CSSG Policy. Furthermore, GIC argued that Condustrail is not a party to and has never been an Insured under the GIC/CSSG Policy. Therefore, even if the Commission deems Claimant an employee, as opposed to an independent contractor, of Condustrail, Claimant is not covered under the GIC/CSSG Policy, as Condustrail's employees of record are not covered under the GIC/CSSG Policy.

Countrywide Staffing Solutions Group, Inc.:

CSSG argued that a valid, binding and enforceable contract existed between Condustrail and CSSG, wherein CSSG agreed to provide workers' compensation insurance for those persons which Condustrail submitted to CSSG as a "Select Staffing Employee." Under the contract,

Claimant was not covered as a “Selected Staffing Employee” because Condustral did not submit Claimant to be included as a Selected Staffing/Employee. Therefore, neither CSSG nor CSSG’s insurance carrier had any liability to Claimant.

South Carolina Department of Corrections and State Accident Fund:

Defendants South Carolina Department of Corrections (“SCDC”) and State Accident Fund (“SAF”) contend that Claimant was never an employee of the SCDC. Rather, any work she performed at the SCDC was pursuant to a contract between SCDC and Medustrial/Condustral. That contract clearly and unequivocally sets forth that the individuals provided to SCDC pursuant to that contract would not be employees of the SCDC. Further, the records and testimony clearly set forth that Claimant never thought she was an employee of the SCDC, and did not want to be an employee of the SCDC.

Defendants SCDC and SAF further contend that, if the Commission deems Claimant an employee, as opposed to an independent contractor, of Medustrial/Condustral and finds that they did not have workers’ compensation insurance covering Claimant at the time of her accident, that liability should be transferred to the Uninsured Employers’ Fund pursuant to S.C. Code Ann. §42-1-415. Alternatively, Defendants SCDC and SAF argue that any liability of SCDC and SAF with regard to Claimant is secondary to that of Medustrial/Condustral.

As for any contention that Claimant is a direct employee of SCDC under Shatto v. McLeod Reg’l Med Ctr., Defendants SCDC and SAF contend that the present matter is clearly distinguishable from the Shatto case and the evidence does not support a finding that Claimant ever was a direct employee of SCDC.

As for Claimant's average weekly wage and compensation rate and her entitlement to past TTD benefits, Defendants SCDC and SAF join in the other Defendants' positions and would further contend that Claimant is not entitled to past TTD benefits as she has not provided any documentation to establish that she was written out of work by any physician after September 30, 2015. Finally, Defendants SCDC and SAF contend that, should Claimant be deemed to be a covered employee of any of the Defendants, that the direction of medical care for her compensable injuries should remain with the Defendants pursuant to the South Carolina Workers' Compensation Act.

South Carolina Uninsured Employer's Fund:

The Fund joins the position of Condustrial as to the merits.

As to transfer of liability to the Fund, the Fund contends there is no evidence to support a transfer of liability.

EVIDENCE OF THE CASE

Testimony:

The following witnesses testified:

Justin Gudvangen

Rachel Turner

Tommy Burgess

Thomas Sears

Toney Durham

Jo Ann Whitaker

Albert Hyndshaw

Dolores Lissette Collachi

Rebecca Barnette

Sandra Sidney

Charles Edward Lee, Jr.

Russell Lloyd Rush

(Additional witnesses testified via deposition. Also, the deposition of one the live witnesses, Tom Sears, was submitted into evidence. The depositions are listed below in the Documentary Evidence.)

Documentary Evidence:

As per the evidence introduced by the Parties through the APA submissions and exhibits presented at trial.

Testimony in this matter was commenced on July 24, 2017. Testimony was presented over six (6) additional days and concluded on November 6, 2017. *In addition to the live testimony reflected above, the parties submitted the deposition testimony of Jess Carrillo, Zachary A. Collier, George Kaspars, Tom Sears (two transcripts), and Kristen Hildebrand, LPN.*

After review of all evidence presented and review of the completed trial transcripts, a conference was held on May 24, 2018. At this conference, order instructions were issued that consisted of approximately sixteen (16) written pages of instruction, along with additional oral instructions. As a proposed order had not yet been presented to the Commission, a telephone conference was held on February 24, 2019 to address the status of the preparation of the order,

and deadlines were set for the proposed order and each parties' objections and additional written proposals. A second in-person conference was set for December 12, 2019; at this conference, the first proposed draft was presented to the Commission. The parties submitted additional proposals and objections to the proposed order until February 26, 2020. Revised proposed orders were submitted, along with each parties' unresolved objection(s).

The proposed orders were then reviewed. In review, the undersigned noticed that the proposed orders did not have a complete or accurate listing of evidence or testimony submitted and reviewed by the undersigned. The undersigned is not requesting the revision of the listing of APA submissions or other admitted evidence in the proposed order, but would crave reference to the actual record for a reflection of the admitted evidence.

In the review of the proposed order it was discovered that the listing of APA submissions above appears to be copied from each of the parties' Pre-trial Briefs and is not the actual admitted APA submissions. ***The correct listing of APA submissions and Trial Exhibits as introduced into evidence is contained in the trial transcript.*** The listing of live witnesses has been corrected in this order.

The actual exhibits submitted during the trial were not listed within the proposed order. ***A correct summary listing the Trial Exhibits that were introduced into the record by each party is noted at the end of trial at page 90 of the November 6, 2017 transcript.*** This is by numeration only. A descriptive listing and discussion of the trial exhibits would present a substantial addition to this order. ***(The actual Exhibits submitted into the record were reviewed by the unsigned while revising this order. The summary of Exhibits at page 90 is correct. The Exhibits are: Guarantee 1 to 14; Condustrail 1 to 7; Claimant 1 to 2; SCDC 1 to 2; and Countrywide 1 to 6.)***

As indicated, the notation and listing of the APA submissions in the submitted proposed order appear to contain documents as listed by the parties' respective Pre-trial Briefs. As such, the outlines above of the APA submissions contain documents and depositions that were not submitted into evidence. Examples of such listed depositions is that of Justin Gudvangen and the Claimant. *The above paragraph in this section (Documentary Evidence) contains a correct listing of the depositions that were ultimately submitted at trial.* Some of the parties' listed APA submissions above are not correct and were not introduced and/or admitted as APA submissions. For instance, Condustrial listed APA submissions as pages 1 through 559. However, Condustrial's APA submissions were only pages 1 to 169. *The only APA submissions were accepted on the first day of trial, July 24, 2017, and are reflected accurately on pages 55 to 58 of that transcript.*

Based on the review as outlined above, the undersigned would therefore again state that the actual record itself, as reflected by the transcript, can be the only accurate reflection of the testimony, correct APA submissions, and voluminous exhibits entered into the record.

FINDINGS OF FACT

A. Background:

1. Claimant Rachel Turner is 44 years old. She has three children aged 20, 21 and 24.
2. Turner has a high school diploma from Horizon High School in California and a nursing degree from Pacific Coast College. She holds an LPN.
3. Turner moved to South Carolina after receiving her LPN.
4. Turner has worked as a nurse for numerous nursing agencies including Medical Express, Medical Staffing Network, MedAmerica and Condustrial (Medustrial).

B. Employee versus Independent Contractor with Medustrial/Condustral.

1. This matter is a determination of the Claimant's status and relationship with Condustral (Medustrial).

2. Collateral Estoppel.

a. Condustral contends Turner is estopped from claiming employee status as that issue has previously been decided in favor of Condustral in an administrative hearing before the South Carolina Department of Employment and Workforce. Claimant contends she is not estopped because: (1) orders of DEW have no preclusive effect in proceedings before the Commission; and (2) she was not a party nor in privity to any party to the DEW hearing, such that she cannot be bound by the DEW order.

b. In Shelton v. Oscar Mayer Foods Corp., 325 S.C. 248, 254, 481 S.E.2d 706, 709 (1997), the South Carolina Supreme Court held that the factual findings of the employment security commission (now DEW) are not preclusive in a subsequent action for wrongful discharge. The Court reasoned giving preclusive effect to informal unemployment proceedings would make them "become lengthy and more detailed, and will no longer be suited to the prompt resolution of unemployment compensation claims." Accordingly, the Court held "because application of the doctrine of collateral estoppel would frustrate the purposes of the [DEW], findings of fact made during an [DEW] hearing will not be given preclusive effect in any subsequent litigation between the employer and employee." Id. I therefore conclude that the DEW order has no preclusive effect in this case.

c. As further grounds for finding no preclusive effect, there is no privity of the parties, which is required for estoppel. Only a party to a prior action or one in privity with the party can be precluded from relitigating an issue on the basis of offensive collateral estoppel. Carrigg v. Cannon, 347 S.C. 75, 552 S.E.2d 767 (Ct.App. 2001). One not a party to a prior action can be precluded from litigating an issue only if he is in privity with a party to the prior action against whom an adverse finding is made. Privity deals with a person's relationship to the subject matter. Having an interest in the same question or in providing or disproving the same set of facts does not establish privity. Even if one whose interest is almost identical to that of a party, but who does not claim through him, is not in privity with that person. Due process prohibits estopping litigants who never had a chance to present their evidence and arguments on a claim, despite other adjudications of the same issue that stand squarely against their position. Wade v. Berkeley County, 330 S.C. 311, 317, 498 S.E.2d 684, 687 (Ct.App.1998) ("A party may assert nonmutual collateral estoppel to prevent relitigation of a previously litigated issue unless the party sought to be precluded did not have a fair and full opportunity to litigate the issue in the first proceeding, or unless other circumstances justify providing the party an opportunity to relitigate the issue."). In the instant case, I find there is no privity of the parties. Turner was unaware of the DEW proceeding; could not have participated; and cannot reasonably expect that her interests would be decided in that hearing. Applying offensive collateral estoppel would violate Claimant's due process rights, such that the motion to give the unrelated DEW order preclusive effect is denied. The facts as they actually occurred in this matter may not mirror the facts/model presented to DEW, as a basis for its decision.

3. General Law and Analysis.

a. Jurisdiction

An Employment relationship is required for jurisdiction of the Commission and application of the Act. The burden of proving the relationship of employer and employee is upon the claimant, and this proof must be made by the greater weight of the evidence. South Carolina's policy is to resolve jurisdictional doubts in favor of the including of employers and employees under the Act. See, e.g., Sellers v. Tech Serv., Inc., 803 S.E.2d 731 (Ct. App. 2017).

Condustrial is subject to the Act as it is undisputed that, including its tradespeople, it regularly employs four or more people within the state.

b. Test for Employment Relationship.

South Carolina uses a four-factor test to determine whether a worker is an employee or an independent contractor. All four factors are weighed equally to determine whether the putative employer possesses the right of control – which is the lynchpin of the analysis. The factors are: 1) direct evidence of the right or exercise of control; 2) furnishing of equipment; 3) right to fire; and 4) method of payment. Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 676 S.E.2d 700 (2009). The test is not the actual control exercised, but whether there exists the right and authority to control and direct the undertaking. In the instant case, all four factors preponderate in favor of status as an employee. The Supreme Court has previously ruled that a nurse anesthetist in a similar employment arrangement was an employee. See Shatto v. McLeod Reg'l Med. Ctr., 406 S.C. 470, 753 S.E.2d 416 (2013).

c. Application of the four-factor test for employment between Turner and Condustrial.

The factors predominate in favor of an employment relationship. I therefore conclude that Turner was an employee of Condustrial on September 5, 2015.

d. Direct Evidence of the Right to Control.

This factor shows Turner is an employee. There are numerous documents – some of which state she is an employee; some of which state she is an independent contractor. It is uncontroverted that when Turner was given the package of documents at the time of her initial engagement she was told that the package was her employment package, and that the one document she read and filled out was an employment application. [Tr. 1]. Turner repeatedly testified “I don’t remember all the documents. I just signed whatever they gave me to sign.” [Tr. 1, page 138, lines 20-21]. Turner further testified repeatedly that “I didn’t read any of the documents. I signed where it said to sign.” [Tr. 1, page 209, lines 20-21]. While there are other documents to the contrary, I find that the great weight of the documents weigh strongly toward an employment relationship.

Condustrail, in particular, relies on a LICENSED PROFESSIONAL CONTRACTOR AGREEMENT executed by Turner on February 8, 2012 and October 9, 2014. At the outset, I note that such a written document is not dispositive, but merely evidence of the intent of the parties. As our supreme court noted in Wilkinson, “These arrangements must be carefully scrutinized to ensure that the actual relationship between the [employer] and the purported independent contractor truly reflects the parties’ stated agreement. We are sensitive to the unequal bargaining power that may exist between the [employer and putative employee].” Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 676 S.E.2d 700 (2009). See also S.C. Code Ann. § 42-1-620 (2007) (“No agreement by an employee to waive his rights to compensation under this title shall be valid.”). Moreover, Condustrail did not strictly enforce the Agreement. Notably, Turner was not required to provide her own professional liability coverage, such coverage being provided by Condustrail. In many other aspects, Condustrail treated Turner as an employee.

While the LICENSED PROFESSIONAL CONTRACTOR AGREEMENT supports the

argument that Turner was an independent contractor, the record contains many documents and practices indicating that Turner was considered an employee. The Defendant, Medustrial, argues that these were mistakes by a “blue collar” worker. Mistake or not, it occurred in 2013 at the time of engagement, and in 2014 when the company did its yearly update.

Two other agreements signed by some of the parties to this case strongly indicate an employment relationship. Condustrail contracted with the Department of Corrections to provide *employees* rather than independent contractors. Condustrail specifically contracted that “Contractor shall provide workers’ compensation coverage for Contractor’s *employees* who are assigned to SCDC.” [Claimant’s Exhibit G]. The fact Condustrail represented to SCDC that the nurses were employees covered by workers’ compensation insurance is evidence favoring an employment relationship. See Sellers v. Tech Serv., Inc., 803 S.E.2d 731, 421 S.C. 30 (Ct.App.2017) (Commission properly considered fact that “In obtaining permits with the City for the job on which Sellers was injured, Tech Service represented that no subcontractors or independent contractors would be involved.”). Indeed, the contract between SCDC and Condustrail is particularly important because Condustrail contracted to provide employees and that workers’ compensation insurance would be provided for the employees.

While Condustrail represented to SCDC that the nurses were covered by workers’ compensation insurance, Condustrail represented to its former workers’ compensation insurer (Guarantee) that nurses assigned to SCDC were covered by the State of South Carolina, such that the nurse payroll (in excess of two-million dollars) would not be included in the premium¹.

¹ Condustrail’s primary line of business was providing skilled tradespeople to the construction industry. Condustrail considered these workers to be employees (along with other nurses assigned to private employers) which were included in the payroll audit for its workers’

A key document is an APPLICATION FORM WAIVER signed by Turner on October 9, 2014. This document states the applicant agrees that no act can “change in any respect the employment-at-will relationship between [Condustrial] and the undersigned . . .” The form further states “I further understand that my employment with the Company shall be probationary for a period of ninety (90) days and . . . my employment relationship with the Company is terminable at will for any reason by either party.” [Claimant’s Exhibit U]. Condustrial’s president confirmed on cross-examination that only he can alter the terms of the at-will employment relationship described in this agreement, which he did not do in Turner’s case. The APPLICATION FORM WAIVER unambiguously describes an at-will employment relationship.

Other documents signed by Turner weigh strongly towards an employment relationship. When she was first hired, Turner filled out an *Employment Application* and a *Form I-9, Employment Eligibility Verification*. [Claimant’s Exhibits H and I]. She completed a *Form W-4, Employee’s Withholding Allowance Certificate*. [Claimant’s Exhibit O]. She also signed a document stating:

I am orienting at DMH through Medustrial Healthcare. I am an employee of Condustrial, Inc. I will work my first forty hours through Medustrial and if I want more hours it is my responsibility to notify my employer. I will also notify my employer of the agency I will do over forty hours with before doing so. [Claimant’s Exhibit P].

Turner signed a CONDUSTRIAL FAIR CREDIT REPORTING ACT DISCLOSURE AND AUTHORIZATION authorizing Condustrial to obtain a “‘consumer report’ or an ‘investigative consumer report’ from a ‘consumer reporting agency’ when: 1) considering your application for employment, 2) making a decision to offer you employment, 3) deciding whether to continue your employment (if you are hired), or 4) making other employment-related decisions directly affecting

compensation premium determination. Medustrial was created as a separate division or trade name to provide nursing.

you.” [Claimant’s Exhibit J].

A written substance abuse policy indicated that the “Employee is to keep this page.” [Claimant’s APA page 265].

The documents signed by Turner and testimony of the witnesses strongly show that Condustral and SCDC had “the right and authority to control and direct the particular work or undertaking.” Young v. Warr, 252 S.C. 179, 189, 165 S.E.2d 797, 802 (1969).

In the specific area of workers’ compensation documents, Turner was given an Accident/Injuries Procedure sheet. [Claimant’s APA page 266]. This document presents procedures for an injury to be followed by an injured “employee.” (Please note that this document is captioned AMS Staffing. This is a PEO or staffing group that Condustral previously used. However, the record establishes that these are the documents presented by Condustral at the time of engaging Turner’s services). Also, Condustral presented and had Turner fill out a Post-Offer-of-Employment Form. [Claimant’s APA page 268]. This would be applicable to an employer’s application to the Second Injury Fund (no longer in existence), or possible defenses in a workers’ compensation matter.

Nurse Sidney testified that the nurses were required by Medustrial and SCDC to wear a uniform, scrubs, closed-in shoes, and socks or stockings. They had to cover any piercings, earrings or studs. Jewelry had to be a wedding ring and watch. Hair had to be neatly in place. [Tr. 8 at 35-36].

Although there was flexibility with whether a nurse took a shift or not, once the shift was filled the nurses were required to work. This was not on a daily or even weekly basis. The shifts were set a month in advance. [Testimony of Nurse Sidney, Tr. 8 at 52-53]. If the nurse was out sick, the contract stated that nurses were required to find their own replacement. However, in

practice, the testimony showed that Claimant never found her own replacement, but Condustral replaced her absence like any other employee. Condustral contends one of the differences in an employee versus an independent contractor is the flexibility in taking shifts. However, it is noted in the *Terms of Employment* that hourly pay may change based on duties performed and/or assignments, and further that “the decision to accept that pay and assignment will be yours.” [Claimant’s APA page 272]. (This is one of the documents Condustral contends is a document given to Turner by mistake that belongs to an employee package and not with an independent contractor package). Furthermore, a flexible schedule is hardly inconsistent with an employee/employer relationship as many hourly jobs offer flexible schedules. The fact there is a written schedule with specific shifts which the nurses are required to work is evidence showing the nurses are employees.

On a day to day basis, there was no difference between nurses employed by SCDC directly and those placed at SCDC by Condustral and MedFirst. SCDC required nurses to wear specific uniforms; carry specific identification badges; and park in employee parking. LPN’s were directly under the control of the nursing supervisor (charge nurse or an RN) as to where they worked; what hours they worked; which patients they treated; how they charted the care they provided; and myriad other daily tasks. “The right to control does not require the dictation of the thinking and manner of performing the work. It is enough if the employer has the right to direct the person by whom the services are to be performed, the time, place, degree, and amount of said services.” Nelson v. Yellow Cab Co., 343 S.C. 102, 110, 538 S.E.2d 276, 280 (Ct.App.2000), *overruled on other grounds* by Wilkinson, 382 S.C. at 300 n. 3, 676 S.E.2d at 702 n. 3.

The direct evidence of a right to control overwhelmingly indicates an employee/employment relationship between Turner and Condustral/Medustrial.

e. Furnishing of Equipment.

Turner was not furnished any equipment by Medustrial. However, this was essentially the same with the W-2 nurses also employed by Medustrial. Tony Durham indicated that some safety equipment was provided to the W-2 nurses, but there was no testimony indicating what the safety equipment would be. The physician's offices or nursing homes where the W-2 nurses were placed provided equipment. Also, because of security concerns, the nurses placed at the Department of Corrections could not bring in nursing supplies. The items/equipment were provided by the Department of Corrections. Essentially, the nurses assigned to SCDC provide their skill and labor. [Nurse G, Transcript 1, page 77]. Due to the unique circumstances/facts of this case, this factor is somewhat neutral. Items could never have been provided by Medustrial because of the limitations of the Department of Corrections. Consideration was also given to the supreme court's pronouncement in Lewis that "Because the Club, and not Lewis, bore the risk of the capital investment in the equipment used by Lewis to perform her work, we find this factor weighs in favor of an employee relationship." Lewis v. L.B. Dynasty, 411 S.C. 637, 770 S.E.2d 393 (2015).

Although Claimant contends the fact SCDC provided Turner "with everything she needed to work, including medical equipment [and] hospital supplies" as in Shatto, I find this factor to be somewhat neutral because Claimant's primary contention is that Condustrual was the direct employer.

On a checklist beside the line entitled malpractice insurance, not applicable (n/a) is indicated, and Medustrial provided the malpractice insurance for the Claimant and 1099 nurses.

f. Right to Fire.

The evidence shows Condustrual retained the right to fire its nurses. Turner was presented

and executed a *Facility and Client Requirement* documents in 2013 that indicated that failure to comply with the requirements would prevent her from working as an “employee” until such time as the non-compliant issue had been resolved. [Claimant’s APA page 271]. Turner was presented with a *Terms of Employment* document that she and the office manager signed. [Claimant’s APA page 272]. This document indicates a number of offenses that can result in disciplinary action, including termination.”

In 2014, Turner and the office manager signed a document entitled *Attendance Policy* that states that a violation of a no show/no show policy could result in disciplinary actions up to “termination of employment.” [Claimant’s APA page 275]. An *Application Form Waiver* signed in 2014 indicated that the relationship was an “employment at will” relationship, and that misrepresentations in the application is call for cause for “dismissal.” [Claimant’s APA page 282].

This factor strongly preponderates for a finding that Turner is an employee.

g. Method of Payment

Payment of a time basis is a strong indication of the status of the employment, while payment on a completed project basis is indicative of independent contractor status. Shatto. In this matter, Turner was not paid by the job, but was paid by the hour. Also, Turner and other nurses were paid overtime at time and a half. [Testimony of Turner; Testimony of Tony Durham; Testimony of Nurse Sidney]. In addition to regular hours and overtime hours, Turner was paid for “other hours.” [Claimant’s APA pages 230-232 (the definition of *other hours* was not established in the record.)]. Also, Turner was paid by Medustrial for some training time at the Department of Corrections. Medustrial paid for Turner’s orientation class with the Department of Mental Health. [Turner Tr. Page 1, 147]. Although Turner received a 1099 from Condustral, she was presented with a W-4 to sign in 2013. [Claimant’s APA page 273]. There was no evidence Turner negotiated her hourly rate

of pay. Turner testified she was paid “Twenty-two dollars an hour. I started at twenty-one, but they raised me up, saying that I was a good employee, so they gave me a raise to twenty-two dollars an hour.” [Turner Tr. 1, page 157, lines 6-11].

In Shatto, the Supreme Court held the method of payment favored the independent contractor relationship. The distinction here is that Shatto was paid by her agency but was seeking to be found an employee of the hospital where she was placed. As such, the Court found payments made to Shatto by the agency did not favor an employment relationship with the hospital. Here, Turner contends she is the direct employee of Condustral. This case is distinguishable from Shatto for that reason.

The Weekly Time Sheets were required to be filled out and signed by the “employee.” [Claimant’s APA pages 284-287]. The hourly wages paid to Turner by Condustral favor an employment relationship.

C. Statutory Employment with the Department of Corrections.

While I find that Turner was a direct employee of Condustral, I further conclude Turner is a statutory employee of the Department of Corrections. I further conclude the Department of Corrections has primary liability for this case as they are an insured employer, whereas Condustral is an uninsured employer subject to the Act.

The legislature created the category of “statutory employer” to prevent employers from evading workers’ compensation liability by subcontracting their work to smaller employers who were not subject to the Act.

The statute provides:

When any person, in this section ... referred to as “owner,” undertakes to perform or execute any work which is part of his trade, business or occupation and

contracts with any other person (in this section . . . referred to as “subcontractor”) for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him. S.C. Code Ann. § 42-1-400 (2004).

Our courts apply three tests, only one of which need be met: (1) is the activity an important part of the owner's business or trade; (2) is the activity a necessary, essential, and integral part of the owner's business; or (3) has the activity previously been performed by the owner's employees? Glass v. Dow Chemical Co., 325 S.C. 198, 482 S.E.2d 49 (1997). “[T]he guidepost is whether or not that which is being done is or is not a part of the general trade, business or occupation of the owner.” Hopkins v. Darlington Veneer Co., 208 S.C. 307, 311, 38 S.E.2d 4, 6 (1946).

Turner worked within the correctional institute as a nurse providing medical care to inmates. She worked alongside nurses who were direct employees of SCDC. Provision of medical care plainly meets the test that the work be “a necessary, essential, and integral part of the owner's business.” Glass v. Dow Chemical Co., 325 S.C. 198, 482 S.E.2d 49 (1997). Additionally, SCDC directly employed nurses who were performing identical activities to those performed by the Medustrial nurses. Having found Turner an employee and not an independent contractor, I therefore find Turner is a statutory employee of the South Carolina Department of Corrections.

D. Average Weekly Wage and Compensation Rate.

1. The parties assert contrary positions on the Average Weekly Wage.
2. Claimant contends her average weekly wage should be based on her actual wages paid over the preceding 52 weeks, as this is the primary method set forth in § 42-1-40. Using this method, her average weekly wage would be \$1,130.86 resulting in a compensation rate of \$753.94.

3. The Defendants contend this method would be unfair, arguing for various alternative methods, most particularly calculating the average weekly wage based on Turner's net income after taxes. Defendants argue that she benefitted from deducting various expenses because she was paid on a 1099 rather than a W2. Defendants rely on Stephen v. Avins Constr. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct.App.1996) for the proposition that "a subcontractor's compensation rate should be determined based on his net taxable income . . ."

Claimant contends this method should not be used because she has proven she is an employee rather than an independent contractor. She contends her situation is different than an independent contractor or business owner who elects to come under the Act.

Using net income, the average weekly wage would be \$333.29 per week resulting in a compensation rate of \$222.20.

4. Consideration was also given to various other methods including an average weekly wage based on an SCDC nurse and on paying an average weekly wage based on an analysis of Claimant's tax returns considering some but not all her deductions.

5. I conclude the primary method of calculating average weekly wage should be employed, such that I find the average weekly wage is \$1,130.86 and the compensation rate is \$753.94.

a. The relevant language in 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 as reported on the Department of Employment and Workforce's Employer Contribution Reports divided by fifty-two or by the actual number of weeks for which wages were paid, whichever is less.

When for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.
S.C. Code Ann. § 42-140 (2007).

The statute requires use of the preceding fifty-two weeks of wages unless exceptional reasons exist which would make this method unfair either to the employer or employee. “The commission must use this method unless ‘the employment, prior to the injury, extended over a period of less than fifty-two weeks,’ or unless ‘for exceptional reasons’ it would be unfair to do so. . . . the commission should make factual findings of these two predicate conditions.” Pilgrim v. Eaton, 391 S.C. 38, 703 S.E.2d 241 (Ct. App. 2010). “The overriding goal of the Workers’ Compensation Act “is to compensate workers for reductions in their earning power caused by work-related injuries . . .” Stephenson v. Rice Servs., Inc., 323 S.C. 113, 473 S.E.2d 699 (1996).

b. Turner produced fifty-two weeks of wage records covering the third quarter of 2014 through the second quarter of 2015. She provided sufficient evidence to meet her burden under the primary method. I therefore find it is practicable to use the primary method. I further find, as discussed below, that there are no exceptional reasons making use of this method unfair to the Defendants. Indeed, I find use of any other method would be unfair to Claimant.

Our appellate courts have considered various scenarios where exceptional reasons exist to depart from the primary method. The common thread to these decisions is that there are some reason why historical wages used in the wage calculation was unfair. Average weekly wage must account for increases in the rate of pay; in a difference in hours worked due to seasonal or work flow variations; for seasonal or short term employment which artificially inflate the employee’s annual earning calculations; and for a situation where a very young employee with catastrophic injuries had

not yet begun a full-time career². None of these circumstances apply here. There is no exceptional reason to depart from the primary method, particularly as the wage records in evidence cover a full fifty-two weeks, are not disputed as to accuracy, and can reasonably be inferred to be indicative of Turner's future earnings with Condustral had she not suffered her injuries.

c. Consideration was given to the various Defendants' arguments that Turner's average weekly wage should be based on her net taxable income. Defendants rely on Stephen v. Avins Const. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996). The claimant in Stephens was "self-employed as a subcontractor . . . , however, Avins Construction Company deducted a percentage for workers' compensation insurance and, therefore, he was their statutory employee." Stephens contended his average weekly wage should be based on his gross income; Avins contended it should be based on his after-tax income as shown on his tax returns. Noting the "statute does not specify whether 'wages' refers to net or gross earnings of a business owner operating as a subcontractor,"

² See, e.g. Booth v. Midland Trane Heating and Air Conditioning, 379 S.E.2d 730, 298 S.C. 251 (Ct. App. 1989)(merit increase in pay rate was an exceptional circumstance; Elliott v. South Carolina Department of Transportation, 362 S.C. 234, 607 S.E.2d 90 (Ct. App. 2004)(pre-injury salary increase should be considered in calculating average weekly wage); Brunson v. Wal-Mart Stores, Inc., 344 S.C. 107, 542 S.E.2d 732 (Ct. App. 2001)("grossly unfair to Wal-Mart to require payments based on [employee's] dual employment status since he did not intend to work both jobs after the holidays."); Bennett v. Gary Smith Builders, 271 S.C. 94, 98, 245 S.E.2d 129, 131 (1978)(reversing the lower court's calculation of claimant's average weekly wage as a full-time, year-round employee "as grossly unfair to the employer" since it would require the employer to pay almost twice what the employee, who only worked three to four months out of the year, actually earned); Pugh v. Piedmont Mech. & Zurich Ins., 396 S.C. 31, 719 S.E.2d 676 (Ct. App. 2011)(unfair to use limited period of wages following return to work from previous injury because the "natural variance in available work in this industry makes capturing the ebb and flow of work in a seventeen-week period difficult."); Sellers v. Pinedale Residential Center, 564 S.E.2d 694, 350 S.C. 183 (Ct. App. 2002)(exceptional circumstances applied to support "determination that [high school student who had not yet begun his career] most probably would have been earning and was thus entitled to a compensation rate of an electrician were it not for his spinal cord injury

the Court of Appeals held the average weekly wage should be “based upon his tax returns as a self-employed subcontractor.” Id.

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 Condustral 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.

The case law on this issue supports the conclusion that a putative independent contractor later determined to be an employee is to be paid based on actual gross earnings. There are no cases holding an employee’s average weekly wage is based on after-tax earnings.

In Paschal, a case virtually identical to this one, the Court of Appeals affirmed the Commission’s determination that the average weekly wage for a misclassified independent contractor found to be an employee was to be based on the wages reported by the employer on the Form 20. Paschal worked as a “repo man” repossessing automobiles. Paschal was paid on a 1099 and deducted expenses on his tax return. Paschal’s 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.” The Court of Appeals 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, 380 S.C. 419 (Ct.App. 2008)(*quotation in original*). As the Court explicitly rejected the identical argument made here by the Defendants, Paschal controls the result in this case. The Commission is required to use wages paid from the employer to the employee as the determinative evidence of average weekly wage.

Other cases support this approach. In Lewis, the Supreme Court was faced with determining the average weekly wage for an exotic dancer who worked for tips, kept no wage records, and filed no tax returns. Her employer had misclassified her as an independent contractor; a determination reversed by the Supreme Court. The only evidence was the testimony of the dancer/employee and a coworker about how much each earned each day in tips as an exotic dancer. The Commission held the average weekly wage was the statutory minimum of \$75.00 based on the lack of documentary evidence. The Supreme Court reversed and remanded because “the commission's finding that Lewis presented ‘no evidence whatsoever’ as to the amount of money she earned is plainly wrong.” Lewis v. L.B. Dynasty, Inc., 799 S.E.2d 304, 419 S.C. 515 (2017). Lewis is significant for its focus on the evidence of gross earnings and absence of instruction for the Commission to consider after-tax earnings on remand.

In Mozie, the claimant “was engaged in the logging business as a producer and was working exclusively for Frazier Pulpwood.” The Commission was faced with three different sets of evidence from which to determine the average weekly wage: (1) Form 1099 showing earnings of \$19,129.83; (2) unsigned tax returns introduced “in an attempt to show low annual incomes in those years after deductions for business expenses;” and (3) “statements of Frazier Pulpwood with handwritten calculations showing Mozie earned well in excess of the \$19,129.83 . . .” Mozie v. Frazier Pulpwood, 378 S.E.2d 61, 298 S.C. 34 (Ct. App. 1989). The Commission based

the average weekly wage on the handwritten calculations, rejecting the employer's attempt to use tax deductions to show a lower annual income. The Court of Appeals affirmed, holding the Commission's determination complied with the evidence and § 42-1-40.

Consideration was also given to the Craft case decided by our sister state of North Carolina. In Craft, the employee was paid a fixed price for each job, from which he deducted expenses on his taxes. The Court held "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." The Court affirmed the commission's finding that it "would be unjust and unfair to treat plaintiff employee as a subcontractor." Craft v. Bill Clark Const. Co., 474 S.E.2d 808 (N.C. App. 1996).

Although they present somewhat different facts than Pascal and the instant case, Craft, Lewis and Mozie are consistent that the correct method is to follow the statute and rely on gross wages.

I also find it would be unjust and unfair to treat Turner as a subcontractor when she is in fact an employee of Condustrail. A review of her earnings for the relevant four quarters totals more than \$58,000. Her wages are the result of working over 2,700 hours. The determination of an average weekly wage of \$333.29, as requested by the Defendants, would result in the Claimant's effective hourly rate being \$6.40 an hour. This would not be consistent with the earning capacity of an LPN, as indicated in the record. (This would also be inconsistent with Mr. Durham's testimony in regard to pricing and payment of actual LPNs.)

It is therefore concluded that the average weekly wage in this case is to be based on gross wage records using the primary method set forth in the statute. This results in an average weekly wage of \$1,130.86 and a compensation rate is \$753.94.

E. Accident and Injuries.

1. Turner and another nurse were held hostage by two inmates in the infirmary at Broad River Correctional Center for approximately six hours on September 5, 2015. During this time the inmates physically assaulted Turner. I find Turner proved she suffered an injury by accident arising out of and in the course of her employment during the assault and its aftermath.

2. As to her injuries, Turner testified: "My neck hurt, my back, my right shoulder, my right elbow, and I had some blurred vision in my right eye. My left leg feels like it goes out from under me from time to time. But mostly my back, my neck, my shoulder, and may elbow as far as my physical injuries are concerned." [Turner Tr. 1, page 168, line 18-page 169, line 4].

3. Treatment records from Dr. Hess show Turner sustained injures to her right elbow, right shoulder, neck and back.

4. An evaluation by Dr. Daniel Westerkam showed multiple injuries including the right elbow, right shoulder and mid-thoracic spine. Dr. Westerkam also diagnosed posttraumatic stress disorder as a direct result or aggravation of the assault on September 5, 2015.

5. Based on the testimony and medical evidence, I find 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.

6. Although not necessary to the decision, I further find Turner was exposed to unusual and extraordinary stress on her job which directly resulted in her psychological injuries.

F. Medical Treatment.

1. Based on the testimony and medical evidence, I find Turner is not at maximum medical improvement.

2. Additional treatment would tend to lessen her period of disability. She is entitled to causally related treatment until she reaches MMI and thereafter so long as additional treatment tends to lessen her period of disability. Dr. Westerkam issues his opinion as to recommended treatment. He specifically recommended an MRI, EMG and NCS of her right shoulder and arm, after which she is to receive physical therapy, injections or surgery, as well as other modalities. He also opines that she needs ongoing counseling and treatment for PTSD, including a psychologist for counseling on a weekly basis and a psychiatrist for medication management.

3. I do not find Dr. Westerkam able to provide these necessary modalities. Additionally, the specific treatment and modalities should be determined by the physicians that will be currently treating the Claimant. I therefore instruct the liable party to identify and provide physicians and other providers who are ready, willing and able to treatment. The liable party shall “furnish or cause to be furnished, free of charge to the employee, and the employee shall accept, an attending physician and any medical care or treatment that is considered necessary by the attending physician.” S.C. Code Ann. § 42-15-60 (2017). Should the liable party fail to designate attending physicians within 30 days of this order, the undersigned will designate the providers pursuant to Section 42-17-30 and 42-15-60.

G. Temporary Disability Compensation.

1. The parties assert contrary positions on payment of temporary total disability.

2. Claimant contends she is entitled to temporary total disability compensation from the date of the accident and continuing on a running award. Claimant contends that her injuries –

particularly her psychological injuries – render her disabled within the meaning of the Act. Claimant further contends that the putative offer of light duty was not a bona fide offer of employment, but rather a cynical attempt by Condustrail to minimize liability should she be ultimately determined to be an employee. She contends she has never been able to return to employment and could not have accepted such an offer.

3. Condustrail, joined by the other Defendants, contends Turner was offered employment suitable to her capacity which she willfully declined, thus barring her from receipt of temporary compensation. Condustrail further contends Turner presented no medical proof of disability, such that regardless of whether suitable employment was offered, Turner is not disabled.

4. Under the Workers' Compensation Act, a claimant 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. § 42-1-120 (2007).

5. The analysis requires the Commission to first determine whether Turner is disabled. The second step is to determine if Condustrail offered employment suitable to her capacity, and if so, whether Turner refused to accept suitable employment.

6. In terms of work restrictions assigned by medical providers for her physical injuries, Turner was treated at the Palmetto Health Richland emergency room. She was treated for the physical assault but given no specific work restrictions. [Claimant's APA pages 1-13].

7. As part of her application to the Office of Victim's Assistance, her family doctor signed a SOVA *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.” Most importantly, “Patient will be totally unable to work from 09/16/2015 through 09/30/2015.” [Claimant’s APA page 291].

8. 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. (There is an additional SOVA form (Mental Health Counselor’s Report) dated December 11, 2015 that does not address work status. Claimant’s APA page 294. The visit note and this form are further addressed below.)

9. Turner was placed on specific work restrictions on October 20, 2015, when she saw Dr. Hess. Dr. Hess “limit[ed] her lifting to less than 10-20 pounds for approximately six weeks.” [Claimant’s APA page 25].

10. The Claimant saw Dr. Westerkam on September 5, 2017 for an independent medical evaluation. Dr. Westerkam “recommend[ed] that she not lift any more than 10 pounds with the right arm and that she avoid all overhead work with the right arm.” He also recommended “that she not do any bending, stooping, or crawling.” [Claimant’s APA pages 215A-215C].

11. 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. [Turner Tr. 1, page 172, lines 18-23].

12. Records from the Claimant’s psychological treatment indicate in the reporting of symptoms that the Claimant had not returned to work. 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. On November 23, 2015, Dr. Berg (Palmetto) authored a note discharging the Claimant and stating that the Claimant was psychiatrically stable. (Claimant's APA 54)

13. The Claimant was also treated by Lexington County Mental Health from November 12, 2015 until May 2, 2017. There are other references in the psychological records of Lexington Mental Health noting that the Claimant was seeking disability. However, the records do not contain an actual opinion of a medical provider. In the December 11, 2015 treatment record, the Claimant was asked if she just didn't feel like going back to work by the therapist, Mandy Burgett. (Claimant's APA page 94) (Mandy Burgett is the therapist that filled out the SOVA form (Mental Health Counselor's Report) dated December 11, 2015 that does not address work status. Claimant's APA page 294.)

14. As mentioned above, the Claimant saw Dr. Westerkam on May 18, 2017. (Claimant's APA 215B) Dr. Westerkam not only concluded that the Claimant had physical injuries, but he also opined that the Claimant sustained posttraumatic stress disorder as a direct result or aggravation of the assault.

Dr. Westerkam stated his opinions as to the Claimant's work restrictions and treatment. He issued work limitations for the Claimant's physical injuries, and recommended treatment modalities. He provided his opinion as to the Claimant's post-traumatic stress condition, the required treatment for her psychological condition, but did not issue any work restrictions related to the Claimant's mental injuries.

15. 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. (Claimant's APA page 291). 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 on November 25, 2015. Dr. Westerkam does not place any restrictions on the Claimant's psychological ability/disability to work. 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 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. Burnette v. City of Greenville, 401 S.C. 417, 737 S.E.2d 200.

16. Condustral presented Turner with a letter at her home on September 24, 2015. (Condustral APA page 142) extending Claimant an offer to work in the office performing light duty work assisting with minor filing and paperwork needed. The offer allowed Claimant to work in a facility with no prisoners and for Claimant to set her own schedule. The offer was within the restrictions issued by Dr. Hess and Dr. Westerkam. Claimant did not accept the offer. (Hrg. Tr. P. 245, l. 24- P. 247, l. 21).

17. The statute 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). Pollack v. Southern Wine & Spirits of America, 405 S.C. 9, 747 S.E.2d 430 (2013)

18. The award of disability is denied from September 30, 2015 through the date of the hearing. This opinion does not purport to deny benefits beyond the date of the hearing, as the Commission would not have knowledge of whether the Claimant has or has not been issued work restrictions applicable to periods after the date of hearing.

19. As Turner is not at MMI, a finding of permanent disability is not ripe for determination at this time.

H. The Contract Labor Services Agreement between Condustrail and Countrywide Staffing Solutions, Inc.

1. A valid, binding and enforceable contract existed between Condustrail and CSSG.

Condustrail and CSSG are both sophisticated business entities who negotiated and executed a Contract Labor Services Agreement (“Contract”). Neither party argued that a contract did not exist. The record before this Court shows that Condustrail failed to acquire workers compensation coverage for Claimant under its Contract with CSSG, nor did it acquire coverage for Claimant from any other source. Condustrail seeks to modify the contract to provide coverage. For the reasons set forth below, Condustrail is not entitled to any remedy from the Commission.

The Contract provided:

“CSSG will perform the following with respect to Selected Staffing/Employees performing services for Client based on timely, accurate, and complete information and payment provided by Client: . . . provide . . . workers’ compensation benefits . . . and handle . . . workers’ compensation claims involving Selected Staffing/Employees.” (APA 43 ¶ 1 & 1.c.)

The “Selected Staffing/Employees” covered under the Contract were those “furnish[ed] and/or provide[d]” by Condustrial “to perform the type of work described on Exhibit B under [Condustrial]’s supervision at the locations described on Exhibit B.” (*Id.* ¶ 1.a.).

2. Claimant is not a “Selected Staffing Employee” as contemplated in the Contract because Condustrial did not to submit Claimant to be included as a Selected Staffing/Employee. Therefore, neither CSSG nor CSSG’s insurance carrier have any liability to Claimant.

The testimony of Tom Sears, Condustrial’s General Counsel, confirms that Condustrial had to provide to CSSG the National Council on Compensation Insurance (NCCI) codes used to classify types of businesses for workers compensation insurance and locations of these businesses to CSSG and that CSSG had to agree to accept to be contractually bound to provide workers compensation coverage for those businesses at those locations. (Trial Tr. 4 at 309.). Condustrial submits no evidence to show even an attempt to submit Claimant as a “Selected Staffing/ Employee,” until well after the claim had been submitted.

The record in its entirety demonstrates that Condustrial, as part of a business strategy, never intended to submit Claimant (or other 1099 employees) to be included as “Selected Staffing Employees.” The Contract provides in pertinent part:

“Client shall make any and all strategic, operational and other business-related decisions regarding its business. Such decisions and related outcomes shall exclusively be the responsibility of Client and CSSG shall bear no responsibility or liability for any actions or inactions by Client” (APA 43 ¶ 2.a.)

For employees that Condustrial wanted to put within the ambit of the Contract, Condustrial was required to “submit timely, complete, and accurate payroll information” which was “not misleading.” (*Id.* ¶ 2.c.)

The record is clear that Condustrail never submitted Claimant to CSSG for workers compensation coverage under the contract. Condustrail never reported to CSSG (a) Claimant's payroll information (or any 1099 workers' payroll information for that matter) and (b) that of any of its 1099 workers were staffed at the Kirkland Correctional Institution. (GIC APAs 27-28 pp. 568-641 (Condustrail Payroll for August and September 2015) & GIC APA 32 pp. 735-737 (List of locations provided by Condustrail to Countrywide).)

Sear's testimony, likewise, affirms that Condustrail never intended for Claimant to be covered by the contract with CSSG. According to Sears:

Q. So any understanding or thing you might have told them about Medustrial, if its not in this agreement, its not a part of the deal?

A. When we met with Mr. Hansen, We told him about Medustrial and said "But They're 1099's so we are not asking you for insurance for 1099's."

(Trial Tr. Page 311.) In addition, the list of locations Condustrail provided to CSSG never included the Kirkland Correctional Institution. (GIC APA 32 pp. 735-737 (List of locations provided by Condustrail to Countrywide).) The testimony of Condustrail's President, Tony Durham, as well as Sears, confirmed that Condustrail never submitted any prison facility location to CSSG for workers compensation insurance coverage for any individual under the Contract. (Sears Trial Tr. 4 at p. 315; Sears Depo II at p. 182; Durham Trial Tr. 6 at p. 264.) Under the plain and unambiguous terms of the Contract, CSSG cannot be liable for any employee Condustrail failed to report to it in a timely manner, or those for which it failed to identify the location at which an employee would be working.

Condustrail argues that under the Contract a "new hire" would be covered by the Contract even before the newly employed individual was reported to CSSG, and therefore it should not matter that it did not report Claimant in this instance. There is no support for that

argument in the plain language of the contract. In addition, Claimant was not a “new hire.” She had been in Condustrial’s employ for many years. Finally, Sears testimony as set forth above makes it clear that the parties never intended for the “1099’s” to be a part of the Contract.

Condustrial also argues that Claimant was already covered under the Contract because the NCCI Code classifying other nursing-type workers were provided workers compensation coverage under the Contract. However, Sears also testified that Condustrial failed to submit Claimant’s name, payroll information and the Kirkland Correctional Institution as a location in which Claimant’s type of business would work. In addition, as discussed in further detail below, Claimant’s class code, that is, one for workers in a prison facility, was never submitted or covered under the Contract. Rather, Condustrial had submitted for coverage nursing-type workers in class codes that worked in private hospitals and nursing homes, for example. Indeed, the credible and reliable evidence in the record demonstrates that Claimant’s class code and location were never submitted to CSSG for coverage.

3. Reformation of the Contract is not appropriate because the record demonstrates that no mutual mistake of fact was present at the time the Contract was formed.

Condustrial attempts to argue that when the parties were negotiating the Contract, CSSG misrepresented itself as a Professional Employment Organization (PEO), even though it was not licensed as one. Because of this, Condustrial argues that the Contract should be reformed to provide for workers compensation coverage for Claimant as if CSSG were a PEO. Condustrial makes these arguments in an attempt to retroactively provide coverage for Claimant. However, these arguments, have no merit and are not supported but rather contradicted by the testimony of the parties, the Contract, and applicable law.

A reformation remedy is utilized to conform writings to the actual agreement of the parties. *Crosby v. Protective Life Ins. Co.*, 293 S.C. 203, 359 S.E.2d 298 (Ct. App. 1987). “[R]eformation is adjudged because the instrument, by reason of mistake or fraud, does not embody the true agreement of the parties.” *S. Realty & Constr. Co. v. Bryan*, 290 S.C. 302, 350 S.E.2d 194 (Ct.App. 1986) (quoting 66 Am.Jur.2d Reformation of Instruments Section 6 (1973)). “A contract may be reformed on the ground of mistake when the mistake is mutual and consists [of] the omission or insertion of some material element affecting the subject matter or the terms and stipulations of the contract, inconsistent with those of the parol agreement which necessarily preceded it.” *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 747 S.E.2d 178 (2013).

The existence of a mutual mistake must be shown by clear and convincing evidence before equity will reform a contract. *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 747 S.E.2d 178 (2013) “Reformation is not available for the purpose of making a new and different contract for the parties but is confined to establishment of the actual agreement; thus, a court of equity cannot, and should not, undertake to make a new contract between the parties by reformation.” *56 Leinbach Investors, LLC v. Magnolia Paradigm, Inc.*, 411 S.C. 466, 769 S.E.2d 242 (Ct. App. 2014).

Condustrail admits that it was well-aware the Contract with CSSG set forth an arrangement different from and less than that provided by a PEO. Condustrail testified that during initial discussions between it and CSSG regarding coverage for Condustrail’s workers, CSSG representatives indicated that either it or one of its other business entities was a licensed PEO. Sears states, however, that “[t]he intent was for [CSSG] to act more like an A.S.O.; it wasn’t a true P.E.O, because they didn’t take over Condustrail’s employees.” (Trial Tr. 4 at

291). Durham likewise testified that Condustrial was not willing to do a PEO arrangement at the time and wanted to be able to pick services. (Trial Tr. 6 at 89; 280; 445). Durham testified that a PEO was a full-service package, but Condustrial wanted something less than that, something less expensive, where it could unbundle the package and just pick certain pieces out. (Trial Tr. 6 at 226). Condustrial only wanted a piece of a PEO package. (Trial Tr. 6 at 227.) Indeed, had Condustrial contracted with a licensed PEO, the PEO statute would have required Condustrial to agree to certain contractual terms that it explicitly rejected when negotiating the terms of the Contract.³

Despite its argument before the Commission, therefore, Condustrial rejected terms which would have been part of a PEO arrangement. That is, Condustrial did not want CSSG to have control over its employees, to be the employer of record, or to take over payroll functions. *Cf.*

”).

³ Trial Tr. 11/3/17 at p. 243, l. 13 – 22

(“Q: WHAT YOU WANTED WASN’T A P.E.O. YOU TOOK OUT THE ASSIGNMENT PROVISION.

A: WE DIDN’T WANT THE FULL SERVICE OF A P.E.O.”); Trial Tr. 11/3/17 at p. 244, l. 22 – p. 246, l.

10

(Q: DOES AN ASSIGNMENT OF EMPLOYEES HAVE ANYTHING TO DO WITH A P.E.O.?

A: IT HAS THEM BEING THE EMPLOYER OF RECORD IN MOST CASES. Q: WHERE YOU

ASSIGN THEM, RIGHT? A: WHERE YOU WOULD MAKE THEM THE EMPLOYER OF RECORD, PERIOD.

Q: OKAY. AND Y’ALL WEREN’T GOING TO DO THAT?

A: WE WEREN’T GOING TO DO THAT.”); Trial Tr. 11/3/17 at p. 249, l. 7 - 23

(“Q: ALL RIGHT. WELL, LET’S TALK ABOUT WHAT YOU AGREED TO. YOU DIDN’T AGREE TO A P.E.O., DID YOU?

A: NOT A FULL FLEDGED P.E.O., I DID NOT.”); Trial Tr. 11/3/17 at p. 280, l. 1 – 25

(“Q: BUT MR. SEARS AND YOURSELF, YOU TALKED ABOUT P.E.O.s IN YOUR EMAILS LEADING UP TO THE CONTRACT AND SAID ‘WE DON’T WANT IT.’

A: WE DIDN’T WANT THE FULL PACKAGE P.E.O.

Q: IN FACT, YOU DIDN’T WANT — YOU WANTED TO MAINTAIN CERTAIN CONTROLS AND CERTAIN CONTROLS ---

A: ABSOLUTELY.

Q: OVER CONTRACTS AND EMPLOYEES, WHICH TAKES IT OUT OF THE REALM OF A P.E.O.?

A: ABSOLUTELY.”); Trial Tr. 11/3/17 at p. 445, l. 5 – 12

(“Q: AND I THINK YOUR TESTIMONY HAS BEEN IN THIS EMAIL IS THIS IS WHERE YOU START UNBUNDLING THE — LETTING SCOTT HANSON KNOW THAT YOU WANT TO START UNBUNDLING THE P.E.O. YOU DON’T WANT THE FULL SERVICE P.E.O. SITUATION.

A: THAT’S TRUE.

S.C. Code Ann. § 40-68-70 (requiring licensee in a PEO arrangement to take control of client company employees, payroll functions, and so forth).

In negotiating for something less than a PEO arrangement, moreover, these sophisticated business parties executed the Contract which makes clear that:

“this agreement constitutes the entire understanding and agreement between the parties hereto...this agreement may be modified or amended only by a written modification or amendment signed by both parties.” (GIC APA 43 pp. 762-771 ¶20).

The contract also has a supremacy clause which states

“[t]his agreement supersedes all previous Agreements or understandings between the parties hereto, and all other such Agreements or understandings, whether oral or written, shall become null and void as of the date of the execution.” (GIC APA 43 pp. 762-771 ¶22).

To this end, the undersigned notes the Contract fails to contain any provision referencing a professional employer organization or warranting in any way that CSSG is a PEO. (Trial Tr. 11/3/17 at p. 233, l. 3 – 24; Trial Tr. 11/3/17 at p. 234, l.11 – 25; Trial Tr. 11/3/17 at p. 235, l.14 – 20; Trial Tr. 11/3/17 at p. 235, l.14 – 20.) For all the reasons above, reformation of contract is not warranted.

4. Section 40-68-10(7) of the South Carolina Code of Laws Regulating Professional Employer Organizations Cannot Reform the Contract.

Condustrail also argues that if the Commission does not find reformation by contract appropriate in this matter for the reasons above, then the provisions of section 40-68-10 *et seq.* of the South Carolina Code of Laws (“PEO Statute”) should apply, so that CSSG, is declared by the Commission to be a statutory PEO, and then it or Guarantee, its insurer, would be required to cover Claimant, a non-leased employee, under this statute as well. Chapter 68, however, does not apply here. The provisions and obligations of Chapter 68 apply only to those persons

Q: YOU WANT SOMETHING LESS THAN THAT? A: ABSOLUTELY.”); Trial Tr. 11/3/17 at p. 446, l.11 –

“licensed” as a professional employer organization and their client companies. S.C. Code Ann. 40-68-10(7). A person may be licensed as a PEO only after review and approval of an application for the same submitted to the Department of Consumer Affairs. S.C. Code Ann. § 48-60-30-55. There was no evidence presented at trial that CSSG ever applied for or was approved as a licensed PEO.

The PEO statute and related case law, moreover, do not provide any measure for the Commission to declare CSSG a PEO under the PEO statute, and then apply certain PEO statutory requirements to the parties in this matter. Although the undersigned does not make any such finding, to the extent CSSG represented to Condustrail that it was a PEO, when in fact CSSG was not a licensed PEO, the statute provides for other remedies. S.C. Code Ann. §§ 40-68-150-160 (providing remedial avenues for wrongs caused by someone offering professional employer services without a license). In addition, Condustrail did not rely on such representation when seeking coverage for its employees and specifically rejected a PEO arrangement. Specifically, as discussed above, ample evidence demonstrates that Condustrail negotiated for something other than and less than a PEO arrangement. Condustrail expressly rejected contract terms that would have been required under section 40-68-10 *et seq.* had it been a client company of a professional employer organization. Thus, the Contract negotiated by these sophisticated business entities makes no reference to CSSG as a PEO, that CSSG would serve as something like a PEO, or provide for a PEO arrangement.

For all the reasons above, CSSG is not liable for any losses suffered by Claimant.

I. The Workers Compensation Insurance Policy Between The Guarantee Insurance Company and Countrywide Staffing Solutions, Inc.

1. There is no direct insurance policy between Guaranty Insurance Company (GIC) and Condustrual.

GIC provided workers' compensation insurance to CSSG from June 30, 2015 through June 30, 2016 for properly reported CSSG employees in States and locations approved by GIC under Workers Compensation Insurance Policy Number WCP500069701GIC, with Endorsements dated July 20, 2015 and July 30, 2015 (collectively referred to as "GIC/CSSG Policy").⁴

Only CSSG is insured under the GIC/CSSG Policy, and only properly reported CSSG employees in States and locations approved by GIC were insured under the GIC-CSSG Policy. GIC regularly reviewed CSSG's requests to cover new codes of employees at new or old locations or new or old codes of employees at new locations under the GIC/CSSG Policy and would approve or deny coverage.⁵

Thus, the GIC/CSSG Policy did not cover Condustrual's employees, unless they were made an employee of CSSG through the Contract and then properly reported by CSSG to GIC and approved by GIC for coverage.

⁴ GIC Trial Ex. 7 & APA 51 pp. 796-825 (July 20, 2015 Endorsement deleting multiple employers) & Nov. 4 2017 Trial Tr. (Becky Barnette, GIC's Vice-President of Underwriting and Manager of the PEO Unit), pp. 37-47 (regarding terms of the first endorsement); GIC Ex. ___ & APA 25 pp. 535-567 (July 30, 2015 clarifying and adding locations) & Nov. 4 2017 Trial Tr. Direct of Becky Barnette, GIC's Vice-President of Underwriting and Manager of the PEO Unit, pp. 60-64 (regarding second endorsement updating the locations subject to coverage).

⁵ GIC Ex. 8 & APAs 740-753; November 4, 2017 (Becky Barnette) Trial Tr. at 48-55 (demonstrating that GIC reviewed CSSG's requests to cover new codes of employees at new or old locations or new or old codes of employees at new locations and would approve or deny

2. **CSSG never reported Claimant for coverage under the GIC/CSSG Policy, as Claimant was not an employee of record of CSSG, or among workers in class codes and in locations approved by GIC under the GIC/CSSG Policy.**

The undisputed evidence shows that Condustrail never reported Claimant for coverage under the Contract, and consequentially, CSSG never reported Claimant for coverage under the GIC/CSSG Policy. Claimant too was not among the codes of employees even generally approved for coverage under the Contract or the GIC/CSSG Policy. (Becky Barnette) Trial Tr. November 4, 2017 at pp. 20-28 (describing the use of the N.C.C.I. Scopes Manual for underwriting purposes).

Condustrail argued that it had generally submitted nurses falling under N.C.C.I. class codes 8829 and 8833 for approval under the Contract, and therefore Claimant, a nurse, should also be covered under the Contract and GIC/CSSG Policy. However, the testimony at trial regarding the issue to receive the greatest weight showed that N.C.C.I. class codes 8829 and 8833 apply to nurses working in convalescent or nursing homes and public and private hospitals.⁶ Claimant was a nurse at the Kirkland Correctional Institution at the South Carolina

coverage under the GIC/CSSG Policy as part of its ongoing underwriting process.)

⁶ The testimony of Becky Barnette, GIC's Vice-President for Underwriting and Manager of the PEO Unit, must receive the greatest weight. Her experience and expertise in underwriting workers compensation insurance coverage and understanding of PEO arrangements far outweighs that of any other witness having various roles in the insurance process who testified during trial and attempted to interpret the facts, Contract, or GIC/CSSG Policy at issue. Barnette has been employed in the insurance industry for more than 30 years, specifically working since 2014 as Vice-President of Underwriting and Manager of the PEO Unit for Guarantee Insurance Company, a monologue workers compensation insurance carrier. (Nov. 4, 2017 Trial Tr. at 8-18.) Barnette testified how workers compensation is a specialty coverage that is not underwritten the same way as other lines of coverage. Barnette noted how an underwriter in workers compensation must have a deep knowledge of the classification system for workers, and how to properly investigate and analyze companies' operations. No other witness who testified at trial had anywhere near this depth of experience in underwriting, much less specific knowledge of doing so in the specialize field of workers compensation, or of PEO arrangements which Condustrail suggested provided a theory for coverage in this case. For instance, and

Department of Corrections, however, and properly classified under Code 7720.⁷ The Kirkland Correctional Institution was never submitted by Condustral to CSSG as a location for workers under the Contract or consequently, requested as a location for coverage and approved by GIC under the GIC/CSSG Policy. The Policy and Endorsements do not include Kirkland Correctional Institute or any correctional facility for that matter.⁸ Finally, even Condustral admitted that any time it sought to add a code and location for workers compensation coverage under the Contract, CSSG could have rejected that request under the Contract. (Trial Tr. 4 (Sears) at 65 and 128.)

Becky Barnette, Vice-President of Underwriting, moreover, testified that Claimant would not have been approved for coverage under the GIC/CSSG Policy, even if Condustral had followed its contractual obligations and submitted Claimant for coverage by providing

without needlessly comparing and contrasting every witness who had ties with the insurance industry, Condustral's witness, Charles Edward Lee, Jr. testified as an insurance agent, first licensed in Georgia in 1986, and then received a property and casualty license in South Carolina in 1997, and handled Condustral's workers compensation coverage from 2003-2010. While Lee testified how an insurer would treat a worker who was treated by their insured as a 1099 and later determined to be an insured's employee in a direct insurance relationship, Lee also testified that he did not know what would happen in the PEO or ASO arrangement. He did not have any exposure to that situation or scenario. (Nov. 6, 2017 Trial Transcript 6 at 60.) Other insurance representatives with various roles in the insurance process had similarly limited understanding of the underwriting process for workers compensation insurance policies and/or of PEO and ASO workers compensation insurance arrangements. (See GCI Trial Exs. 10-11 (N.C.C.I. Scopes Manual Codes 8829 and 8833) & November 4, 2017 Trial Tr. (Becky Barnette) at pp. 65-66, 77-78, 127-129 (discussing interpretation of Codes 8829 and 8833, and why they cannot be properly assigned to Claimant for underwriting purposes.)

⁷ (GCI Trial Exs. 12-13 (N.C.C.I. Scopes Manual Codes 7720 and 9410) & November 4, 2017 (Becky Barnette) Trial Tr. at 71-76 (discussing interpretation of Codes 9410 and 7720 and proper classification of Claimant as an employee under Code 770).

⁸ (GIC Trial Ex. 5 & APA 24 pp. 375-534 (the June 30, 2015 Policy); GIC Trial Ex. 7 & APA 51 pp. 796-825 (July 20, 2015 Endorsement deleting multiple employers); GIC Ex. ___ & APA 25 pp. 535-567 (July 30, 2015 clarifying and adding locations); Nov. 4, 2017 Trial Tr. pp. 79-80 (stating that Claimant, her Code Class, and the location of her employment were never submitted

Claimant's proper class code and location of work under the Contract and then CSSG would have submitted Claimant properly for approval under the GIC/CSSG Policy. GIC has never covered any worker at a prison location and would not have done so in this instance either. (Nov. 4, 2017 Trial Tr. (Barnette) at pp. 78-79

Q. AND . . . WHILE YOU'VE BEEN V.P. OF UNDERWRITING FOR . . .
GUARANTEE INSURANCE COMPANY, HAVE YOU EVER
APPROVED A WORKER AT A MAXIMUM LEVEL THREE
SECURITY FACILITY?

A. ABSOLUTELY NOT. . . . WE WOULD NOT WRITE AN ACCOUNT
WHOSE EXPOSURE WAS A CORRECTIONAL FACILITY." . . .

Q. ANY CORRECTIONAL FACILITY?

A. ANY CORRECTIONAL FACILITY.

Q. MAXIMUM SECURITY LEVEL THREE OR NOT?

A. CORRECT. [Nov. 4, 2017 Trial Tr. (Barnette) at pp. 93].

3. **The GIC/CSSG Policy does not provide any indirect method for coverage, nor does any statute provide for the same.**

Finally, the GIC/CSSG Policy does not provide any indirect method for coverage, nor does any statute provide for the same. (*See supra* discussion of Reformation of Contract and application of Section 40-68-10 et seq. of the South Carolina Code of Laws; *see also* November 4, 2017 (Becky Barnette) Trial Tr. at 80-81 (reiterating time and time again that the GIC/CSSG policy only insured CSSG employees, and Claimant, whether under the GIC/CSSG Policy or a

to GIC for review and approv

PEO arrangement, was not a leased employee of CSSG).⁹ Therefore, for all the reasons provided above, Claimant was not and cannot be covered under the GIC/CSSG Policy, and GIC is not liable for any losses suffered by Claimant.

J. Transfer of Liability to the South Carolina Uninsured Employers' Fund

Section 42-1-415 states that transfer of liability may be made to the South Carolina Uninsured Employers' Fund (herein after referred to as SCUEF) when the contractor or owner collects documentation of insurance at the time that the contractor is engaged to perform work.

A contract to provide nursing staff was entered into between Medustrial and SCDC on or about September 11, 2008. (APA 254-259) There is no evidence in the record that a Certificate of Insurance from Medustrial was requested or provided to SCDC at this time. Our Supreme

1).

⁹ The Commissioner cannot ignore either that GIC had issued in the past a high deductible workers compensation insurance policy to Condustrual as its insured, and thus Condustrual was well-aware of how to make itself a direct "insured." What is more, when Condustrual was audited by GIC pursuant to this past policy, GIC discovered that Condustrual had hundreds of 1099 workers. (GIC Trial Ex. 14 (Audit Worksheet) & November 4, 2017 (Becky Barnette) Trial Tr. at 86-92 (noting Condustrual had a direct policy with Guarantee in the past, and the audit reveal hundreds of 1099 employees). The audit records show, however, that GIC deducted this 1099 payroll exposure, Condustrual having classified the 1099 exposure as "OCIP" or an "owner-controlled insurance program," and indicating that these employees were insured by the South Carolina Department of Corrections, among other governmental agencies, and noting that the board of directors at Condustrual represented these governmental agencies do not provide certificates of insurance. (GIC Trial Ex. 14 (Audit Worksheet) & November 4, 2017 (Becky Barnette) Trial Tr. at 92-100, 116-117; *see also* CSSG Trial Ex. 5 ACORD Standard Commercial Insurance Applications and Form 130 & November 4, 2017 (Becky Barnette) Trial Tr. at 104-109 (expressing the importance of honesty in insurance application process for underwriting and noting that Condustrual did not represent that it had any 1099 employees or any 1099 employees working under class code 7720 for purposes of applying for insurance)

Court found in Hardee v. McDowell, 381 S.C. 445, 673 S.E2d 813 (2009) that the express language of the statute in the phrase “engaged to perform work” means each time that a subcontractor is actually hired to perform work. On September 11, 2008 SCDC did not verify coverage of insurance of Medustrial as required by Section 42-1-415. Further, there is no verification of insurance in 2008.

The terms of the contract provided for a yearly renewal. SCDC did not verify coverage on each renewal. The initial term of the agreement was for one (1) year, and that at the conclusion of each one year term, the Agreement will automatically renew for one year unless notice of intent not to renew was provided. If the renewal terms of the Agreement are considered separate dates of hire the record is devoid of evidence that SCDC sought or received proof of insurance on any of the actual renewal dates. There is not a certificate of insurance for September 11, 2009.

The next renewal period is September 11, 2010. A certificate of insurance was issued on April 30, 2010. However, there is no evidence as to when this certificate was obtained. Even if it was obtained on April 30, 2010, it could not apply to the contract renewal date of September 11, 2010. Hopper v. Terry Hunt Construction, 383 S.C. 310, 680 S.E.2d 1 (2009). The contract renewed for the years from 2011 through the date of accident. If the dates of renewal are considered new dates of hire, then SCDC did not have a certificate of insurance for these dates.

SCDC and Accident Fund argue that April 30, 2010 certificate of insurance should be considered proof of insurance from April 30, 2010 forward due to the language of the certificate. Assuming that the certificate was obtained on April 30, 2010, the certificate lists the insured as AMS Staff Leasing l/c/f: Condustrail, Inc. The contract of SCDC is with Medustrial. Although, Medustrial is a trade name for Condustrail, there is no indication that SCDC knew of Condustrail

in 2010. If the certificate was received in 2010, they could not rely on it as proof of coverage for Medustrial.

Even if the certificate of insurance was obtained at the hiring and had the party known to SCDC, Medustrial, was listed, SCDC could not rely on the certificate on its face. Although, there is language about the certificate being good for as long as the account being in good standing, it is clear that the proof of policy period as only for April 1, 2010 to April 1, 2011. The additional certificates of insurance in evidence were obtained after the date of accident.

Based on the record as a whole, including testimony of Tommy Burgess, which I find to be credible and the dates reflected on the certificates, I find that liability of this claim cannot be transferred to the SC Uninsured Employers' Fund per Section 42-1-415.

K. Transfer of Liability upstream to the South Carolina Department of Corrections

As I find that Claimant was an employee of Condustrail at the time of her accident, I find that they are primarily responsible for the provision of medical treatment and payment of compensation to Claimant pursuant to the South Carolina Workers' Compensation Act as a result of her September 5, 2015 work accident. However, for the reasons set forth above, I find that Condustrail failed to maintain workers' compensation insurance covering Claimant at the time of the accident. As I also find that Defendant SCDC was a statutory employer of Claimant on the date of injury and that liability cannot properly be transferred to the UEF pursuant to S.C. Code Ann. §42-1-415, I find that liability under the South Carolina Workers' Compensation Act for injuries sustained by Claimant as a result of her September 5, 2015 work accident transfers upstream to the SCDC and its carrier SAF pursuant to S.C. Code Ann. §§42-1-400 through 42-1-450. However, Defendants SCDC and SAF retain all rights for indemnification against

Condustral for any and all compensation, including medical and other expenses, paid, or to be paid by Defendants SCDC and SAF set forth in S.C. Code Ann. §42-1-440. Defendants SCDC and SAF are also entitled to pursue any other such right to indemnification or recovery under any statute or other theory of law.

L. Indemnity

CSSG, and derivatively The SC Guaranty Association defending GIC as CSSG's insurer, argue that under the "Indemnity" provision of the Contract and the "Recovery from Others" paragraph of the GIC Policy, Condustral is liable to CSSG and SC Guaranty Association for their attorney's fees, costs, and expenses. Under the statutes and common law that apply to this Worker's Compensation Commission, however, the undersigned finds that it does not have the jurisdiction to decide this particular contractual issue. The Commission only has jurisdiction to determine the issue of coverage in this forum and finds that there are other forums in which CSSG and the SC Guaranty Association can pursue these claims.

CONCLUSIONS OF LAW

1. South Carolina uses a four-factor test to determine whether a worker is an employee or an independent contractor. All four factors are weighed equally to determine whether the putative employer possesses the right of control – which is the lynchpin of the analysis. The factors are: 1) direct evidence of the right or exercise of control; 2) furnishing of equipment; 3) right to fire; and 4) method of payment. Wilkinson ex rel. Wilkinson v. Palmetto

State Transp. Co., 382 S.C. 295, 676 S.E.2d 700 (2009). In the instant case, the factors preponderate in favor of status as an employee.

2. Claimant sustained an injury by accident arising out of and in the course of her employment on September 5, 2015, within the meaning of S.C. Code Ann. § 42-1-160 (2007).

3. Claimant is entitled to additional medical treatment necessary to lessen the period of disability. S.C. Code Ann. § 42-15-60 (2005); Dodge v. Bruccoli, Clark, and Layman, Inc., 518 S.E.2d 593 (S.C. 1999); Dykes v. Daniel Constr. Co., 202 S.E.2d 646 (S.C. 1974). When the employee has not reached maximum medical improvement, medical care to treat injuries related to the injury by accident tends to lessen the period of disability. Additional medical care after reaching maximum medical improvement must be provided if it tends to lessen the period of disability.

4. During any period of disability resulting from the injury, the employer, at his own option, may continue to furnish or cause to be furnished, free of charge to the employee, and the employee shall accept, an attending physician and any medical care or treatment that is considered necessary by the attending physician, unless otherwise ordered by the commission for good cause shown. S.C. Code Ann. § 42-15-60 (2007).

5. The employer's representative shall provide and pay for medical care while a claimant is receiving or entitled to receive temporary compensation benefits. Reg. 67-509. Medical, surgical, hospital and other treatment which will tend to lessen the period of disability within the judgment of the Commission shall be provided by the employer. For good cause shown, the Commission may order such further medical, surgical, hospital or other treatment as may in the discretion of the Commission be necessary. S.C. Code Ann. § 42-15-60 (2007). The Commission has discretion to designate the authorized treating physician and require the employer's

representative to pay for causally related treatment. Id.; Martin v. Rapid Plumbing, 369 S.C. 278, 631 S.E.2d 547 (Ct.App.2006).

6. Disability is defined 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.” 25A S.C. Reg. 67-502 (1997). Claimant was disabled within the meaning of the Act from September 6, 2015 until September 30, 2016.

7. Condustrail failed to acquire workers compensation coverage for Claimant under its Contract with Countrywide Staffing Solutions, Inc., and reformation of contract is not warranted under the common law or any statutory law. Therefore, Countrywide Staffing Solutions, Inc. is not liable for any losses suffered by Claimant.

8. Condustrail was not an insured under the GIC/CSSG Policy. CSSG never reported Claimant for coverage under the GIC/CSSG Policy. Claimant was not an employee of record of CSSG, nor among the workers in class codes and locations approved by GIC under the GIC/CSSG Policy. Therefore, the Guaranty Insurance Company is not liable for any losses suffered by Claimant.

AWARD

IT IS HEREBY ORDERED that liability 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;

IT FURTHER ORDERED that the liable Defendant shall pay for past causally related medical evaluation and treatment and shall provide Claimant causally related medical treatment for so long as such treatment will tend to lessen Claimant’s disability;

IT IS FURTHER ORDERED that the liable Defendant shall immediately and without

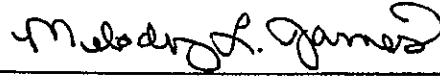
delay authorize and pay for all medical and surgical treatment prescribed or recommended by the authorized treating physician related to Claimant's work-related injuries, including prescriptions, testing, physical therapy and all other treatment including treatment rendered by other providers to whom Claimant is referred by the authorized treating physician. Treatment shall be provided until the authorized treating physicians opine Claimant has reached maximum medical improvement and thereafter so long as such post-MMI treatment tends to lessen Claimant's period of disability. Treatment shall include such modalities considered necessary by the authorized treating physician;

IT IS FURTHER ORDERED that the liable Defendant shall provide a psychologist, psychiatrist, an orthopaedic surgeon and other appropriate physicians who are ready, willing and able to provide treatment consistent with the findings in this Order. The liable party shall "furnish or cause to be furnished, free of charge to the employee, and the employee shall accept, an attending physician and any medical care or treatment that is considered necessary by the attending physician." S.C. Code Ann. § 42-15-60 (2017). Should the liable party fail to designate attending physicians within 30 days of this order, the undersigned will designate the providers pursuant to Section 42-17-30 and 42-15-60.

IT IS FURTHER ORDERED that the temporary total disability from September 6, 2015 until September 30, 2015 should be provided to Claimant at the compensation rate of \$753.94. Payment of temporary total disability from September 30, 2015 until the date of hearing (July 24, 2017) is denied.

IT IS FURTHER ORDERED that nothing in this Order shall prevent or inhibit any employer, carrier or agency from seeking reimbursement or indemnification from any other employer, carrier or agency in a civil case, except to the extent the parties are bound by the findings and conclusions in this order;

IT IS FURTHER ORDERED that no hearing costs or penalties are assessed;
AND IT IS SO ORDERED.

A handwritten signature in black ink, reading "Melody L. James". The signature is written in a cursive style with a horizontal line underneath it.

Commissioner Melody L. James

CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above entitled action upon all parties to this cause by sending an electronic copy hereof by electronic mail addressed to the attorney or attorneys for said parties or by depositing a copy hereof, postage paid, in the United States certified mail addressed to any unrepresented party.
July 31, 2020

By: Tamara Morris, Administrative Assistant to Commissioner James

APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO.: 1514359

Rachel J. Turner CLAIMANT

v.

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

Appellate Panel Review Hearing
held electronically via the Zoom
application on November 10, 2020, per notices
timely and properly served upon
all parties of interest.

Appellate Panel Decision and Order

filed, April 6, 2021

APPEARANCES:

CLAIMANT/APPELLANT represented by Stephen B.
Samuels, Esquire, of Samuels Law Firm, LLC.

DEFENDANT/APPELLANT Medustrial Healthcare
Staffing Service and Condustrail, Inc., represented
by George D. Gallagher, Esquire of Speed, Seta,
Martin, Trivett & Stubley, LLC and T. Jeff
Goodwyn, Esquire, of the Goodwyn Law Firm, LLC.

DEFENDANT/APPELLANT The South Carolina
Property and Casualty Insurance Guaranty
Association on behalf of Guarantee Insurance
Company represented by Beth Richardson, Esquire

(coverage), and Grady L. Beard, Esquire (merits), both of Robinson Gray Stepp & Laffitte, LLC.

DEFENDANT/RESPONDENT Countrywide Staffing Solutions Group, Inc., represented by James P. Newman, Jr., Esquire (merits), of Howser, Newman & Besley, LLC, and Gregory M. Alford, Esquire (coverage).

DEFENDANT/APPELLANT South Carolina Department of Corrections and State Accident Fund represented by Erin Farthing, Esquire.

DEFENDANT/RESPONDENT South Carolina Uninsured Employer's Fund represented by Lisa C. Glover, Esquire.

STATEMENT OF THE CASE

Claimant, Defendant Condustrail, Defendant Guarantee Insurance Company, Defendant South Carolina Department of Corrections, and Defendant State Accident Fund appealed the Decision and Order of Commissioner Melody L. James (the Single Commissioner) filed July 31, 2020. The Single Commissioner heard the matter over the course of several days beginning on July 24, 2017, and concluding on November 6, 2017. The parties' arguments relative to the appeals of the Single Commissioner's Order are as follows:

Claimant

Claimant contends the Single Commissioner erred on multiple grounds in denying temporary total disability compensation after September 30, 2015. Claimant notes the Single Commissioner found she was physically unable to return to work as a nurse and was specifically written out of work for her psychological overlay through September 30, 2015. She further contends the medical evidence shows she never recovered from her psychological injury such that she was continuously unable to return to work in any capacity. She notes the psychiatric treatment records consistently state she cannot work due to the assault: "Due to incident 9/5/15, patient has not worked since that date." As such, the evidence shows Claimant has been disabled by her doctors since she was assaulted on September 5, 2015.

Claimant further contends that the putative offer of light duty was neither bona fide nor could Turner have accepted it. It is undisputed that Turner was incapable of accepting any offer on September 24, 2015 when the alleged offer of employment was made. Even when Turner tried to contact Condustrail after that date, they refused to take her calls all the while insisting she was not their employee. 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." [Tr I, page 340, lines 1-

9]. As Condustrial never renewed the offer nor even accepted communication from Turner, even if she had been capable of accepting at some later point, there was no way for her to do so nor was there a current offer.

Claimant argues that as the conditions to suspend or terminate Temporary Total Disability (TTD) under Section 42-9-260 were never met after September 30, 2015, Turner is legally entitled to a running award of TTD.

Claimant argues that the single Commissioner erred in holding she was legally barred by the Burnette case from awarding TTD after September 30, 2015.

Defendant Condustrial

Condustrial contends the Single Commissioner erred in refusing to find Claimant is an independent contractor and not entitled to benefits under the Act. Further, Condustrial contends that if the Appellate Panel concludes Claimant is found to be an employee, then her AWW should be based on earnings after deduction of business expenses in accordance with *Stephen v. Avins Construction*, 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996).

Further, Condustrial contends that if Claimant is adjudicated to be Condustrial's employee instead of an independent contractor, then she would be covered *ab initio* as an "assigned employee," "Selected Staffing/Employee," or co-employee via its service agreement with Countrywide. Guarantee Insurance Company as the carrier for Countrywide on this date of loss would then be responsible for providing coverage for the claim. Guarantee Insurance Company's remedy for having to cover a previously unclassified employee under its policy would then be to audit its coverage of Countrywide and assess additional premium to cover the risk assumed by their insured via the Commission's determination. In turn, Countrywide's recourse against Condustrial would be an action to recover the additional premium assessed against it by Guarantee

Insurance Company under the indemnification provision of its service agreement with Condustrual.

Condustrual contends that if Condustrual is deemed to be Claimant's employer for purposes of the Act, and the service agreement with Countrywide is somehow not implicated, then Condustrual is left "uninsured" relative to Claimant's employment. Under that scenario, Condustrual argues that Countrywide is a *de facto* professional employment organization (PEO) subject to all conditions and responsibilities imposed by S.C. Code § 40-68-10 et seq. Guarantee Insurance Company would still be vicariously liable for the claim by operation of S.C. Code §40-68-70 (C) and S.C. Code §40-68-120(A)(7). According to Condustrual, those statutes impose liability for benefits under the Act on the carrier for a PEO when a non-assigned employee of the PEO's client company is injured and the client company has no other coverage. Condustrual claims that if Condustrual indeed failed to secure and maintain worker's compensation coverage, then liability still defaults to Countrywide and Guarantee Insurance Company.

Defendant Guarantee and Defendant Countrywide

Defendant Guarantee contends the Single Commissioner erred in finding and concluding (1) all four factors of the test used by South Carolina to determine whether a worker is an employee or an independent contractor preponderate in favor of Claimant having the status of employee and concluding Claimant was an employee; (2) the primary method of calculating aww should be employed, such that the AWW is \$1,130.86 and the compensation rate is \$753.94; and (3) Claimant developed posttraumatic stress disorder as a direct result of the assault and surrounding injuries. Defendant Guarantee further contends the Single Commissioner erred in finding and concluding Claimant was disabled within the meaning of the Act from September 6, 2015, until September 30, 2016. Guarantee argues that to the extent the Appellate Panel concludes Claimant was an employee, the denial of benefits after September 30, 2015, was proper.

Defendant Guarantee further argues that to the extent Claimant is an employee rather than an independent contractor, Condustrial was an uninsured employer relative to Claimant's employment and failed to acquire workers compensation coverage for Claimant under the Condustrial/Countrywide Agreement. Guarantee asks the Appellate Panel to affirm the Single Commissioner's Decision and Order relating to the Contract Labor Services Agreement between Condustrial and Countrywide and the workers compensation insurance policy between Guarantee and Countrywide. Specifically, Guarantee asks the Appellate Panel to affirm the Single Commissioner's Decision and Order that: (1) Countrywide is not liable for any losses because Condustrial failed to acquire workers compensation coverage for Claimant under the Condustrial/Countrywide Agreement, and reformation of contract is not warranted under common or statutory law; and (2) Guarantee is not liable for any losses suffered by Claimant because Condustrial was not an insured under the Policy; Claimant was never an employee of record of Countrywide; and even if Claimant had been an employee of record of Countrywide, Claimant was not among the workers in class codes and locations approved by Guarantee under the Policy. Countrywide joined Guarantee in its arguments.

Defendants Department of Corrections and SC State Accident Fund

SCDC and SAF contend the Single Commissioner properly found that Claimant was not entitled to TTD benefits from the date of injury, and this decision should be upheld.

SCDC and SAF contend the Single Commissioner properly found that Claimant was not a direct employee of SCDC. Further, SCDC and SAF contend any liability they may have with regard to this matter is dependent upon and secondary to Condustrial's liability for this claim as the Claimant's direct employer. In the event the Appellate Panel finds that Claimant is an independent contractor, or that Condustrial had workers' compensation insurance covering

Claimant at the time of her accident, SCDC and SAF's liability for this claim would necessarily cease.

SCDC and SAF contend that the Single Commissioner erred in concluding that (1) Claimant's AWW is \$1,130.86 and her CR is \$753.94 when such finding is unsupported by law, and is unfair to Claimant's employer in violation of S.C. Code Ann. §42-1-40; (2) Claimant was disabled from September 6, 2015, until September 30, 2016, and is entitled to TTD from September 6, 2015, until September 30, 2015, at the CR of \$753.94; and (3) Claimant is unable to physically work as a nurse as such a finding is not supported by the evidence, especially in light of the fact that Claimant has not been found to be at maximum medical improvement.

Defendant SC Uninsured Employers' Fund

As a respondent, South Carolina Uninsured Employers' Fund (SCUEF) contends the Single Commissioner did not err in finding as fact and concluding as a matter of law that liability should not be transferred to the SCUEF.

Per Decision and Order dated July 31, 2020, the Single Commissioner issued the following Findings of Fact and Conclusions of Law:

SINGLE COMMISSIONER'S FINDINGS OF FACT

A. Background:

1. Claimant Rachel Turner is 44 years old. She has three children aged 20, 21 and 24.
 2. Turner has a high school diploma from Horizon High School in California and a nursing degree from Pacific Coast College. She holds an LPN.
-
3. Turner moved to South Carolina after receiving her LPN.
 4. Turner has worked as a nurse for numerous nursing agencies including Medical Express, Medical Staffing Network, MedAmerica and Condustral (Medustrial).

B. Employee versus Independent Contractor with Medustrial/Condustrial.

1. This matter is a determination of the Claimant's status and relationship with Condustrial (Medustrial).

2. Collateral Estoppel

a. Condustrial contends Turner is estopped from claiming employee status as that issue has previously been decided in favor of Condustrial in an administrative hearing before the South Carolina Department of Employment and Workforce. Claimant contends she is not estopped because: (1) orders of DEW have no preclusive effect in proceedings before the Commission; and (2) she was not a party nor in privity to any party to the DEW hearing, such that she cannot be bound by the DEW order.

b. In Shelton v. Oscar Mayer Foods Corp., 325 S.C. 248, 254, 481 S.E.2d 706, 709 (1997), the South Carolina Supreme Court held that the factual findings of the employment security commission (now DEW) are not preclusive in a subsequent action for wrongful discharge. The Court reasoned giving preclusive effect to informal unemployment proceedings would make them "become lengthy and more detailed, and will no longer be suited to the prompt resolution of unemployment compensation claims." Accordingly, the Court held "because application of the doctrine of collateral estoppel would frustrate the purposes of the [DEW], findings of fact made during an [DEW] hearing will not be given preclusive effect in any subsequent litigation between the employer and employee." Id. I therefore conclude that the DEW order has no preclusive effect in this case.

c. As further grounds for finding no preclusive effect, there is no privity of the parties, which is required for estoppel. Only a party to a prior action or one in privity with the party can be precluded from relitigating an issue on the basis of offensive collateral estoppel. Carrigg v. Cannon,

347 S.C. 75, 552 S.E.2d 767 (Ct. App. 2001). One not a party to a prior action can be precluded from litigating an issue only if he is in privity with a party to the prior action against whom an adverse finding is made. Privity deals with a person's relationship to the subject matter. Having an interest in the same question or in providing or disproving the same set of facts does not establish privity. Even if one whose interest is almost identical to that of a party, but who does not claim through him, is not in privity with that person. Due process prohibits estopping litigants who never had a chance to present their evidence and arguments on a claim, despite other adjudications of the same issue that stand squarely against their position. Wade v. Berkeley County, 330 S.C. 311, 317, 498 S.E.2d 684, 687 (Ct.App.1998) ("A party may assert nonmutual collateral estoppel to prevent relitigation of a previously litigated issue unless the party sought to be precluded did not have a fair and full opportunity to litigate the issue in the first proceeding, or unless other circumstances justify providing the party an opportunity to relitigate the issue."). In the instant case, I find there is no privity of the parties. Turner was unaware of the DEW proceeding; could not have participated; and cannot reasonably expect that her interests would be decided in that hearing. Applying offensive collateral estoppel would violate Claimant's due process rights, such that the motion to give the unrelated DEW order preclusive effect is denied. The facts as they actually occurred in this matter may not mirror the facts/model presented to DEW, as a basis for its decision.

3. General Law and Analysis.

a. Jurisdiction

An Employment relationship is required for jurisdiction of the Commission and application of the Act. The burden of proving the relationship of employer and employee is upon the claimant, and this proof must be made by the greater weight of the evidence. South Carolina's policy is to resolve jurisdictional doubts in favor of the including of employers and employees under the Act.

See, e.g., Sellers v. Tech Serv., Inc., 803 S.E.2d 731 (Ct. App. 2017).

Condustrial is subject to the Act as it is undisputed that, including its tradespeople, it regularly employs four or more people within the state.

b. Test for Employment Relationship.

South Carolina uses a four-factor test to determine whether a worker is an employee or an independent contractor. All four factors are weighed equally to determine whether the putative employer possesses the right of control—which is the lynchpin of the analysis. The factors are: 1) direct evidence of the right or exercise of control; 2) furnishing of equipment; 3) right to fire; and 4) method of payment. Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 676 S.E.2d 700 (2009). The test is not the actual control exercised, but whether there exists the right and authority to control and direct the undertaking. In the instant case, all four factors preponderate in favor of status as an employee. The Supreme Court has previously ruled that a nurse anesthetist in a similar employment arrangement was an employee. See Shatto v. McLeod Reg'l Med. Ctr., 406 S.C. 470, 753 S.E.2d 416 (2013).

c. Application of the four-factor test for employment between Turner and Condustrial.

The factors predominate in favor of an employment relationship. I therefore conclude that Turner was an employee of Condustrial on September 5, 2015.

d. Direct Evidence of the Right to Control.

This factor shows Turner is an employee. There are numerous documents—some of which state she is an employee; some of which state she is an independent contractor. It is uncontroverted

that when Turner was given the package of documents at the time of her initial engagement she was told that the package was her employment package, and that the one document she read and filled out was an employment application. [Tr. 1]. Turner repeatedly testified “I don’t remember all the

documents. I just signed whatever they gave me to sign.” [Tr. 1, page 138, lines 20-21]. Turner further testified repeatedly that “I didn’t read any of the documents. I signed where it said to sign.” [Tr. 1, page 209, lines 20-21]. While there are other documents to the contrary, I find that the great weight of the documents weigh strongly toward an employment relationship.

Condustrail, in particular, relies on a LICENSED PROFESSIONAL CONTRACTOR AGREEMENT executed by Turner on February 8, 2012 and October 9, 2014. At the outset, I note that such a written document is not dispositive, but merely evidence of the intent of the parties. As our supreme court noted in Wilkinson, “These arrangements must be carefully scrutinized to ensure that the actual relationship between the [employer] and the purported independent contractor truly reflects the parties’ stated agreement. We are sensitive to the unequal bargaining power that may exist between the [employer and putative employee].” Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 676 S.E.2d 700 (2009). See also S.C. Code Ann. § 42-1-620 (2007) (“No agreement by an employee to waive his rights to compensation under this title shall be valid.”). Moreover, Condustrail did not strictly enforce the Agreement. Notably, Turner was not required to provide her own professional liability coverage, such coverage being provided by Condustrail. In many other aspects, Condustrail treated Turner as an employee.

While the LICENSED PROFESSIONAL CONTRACTOR AGREEMENT supports the argument that Turner was an independent contractor, the record contains many documents and practices indicating that Turner was considered an employee. The Defendant, Medustrial, argues that these were mistakes by a “blue collar” worker. Mistake or not, it occurred in 2013 at the time of engagement, and in 2014 when the company did its yearly update.

Two other agreements signed by some of the parties to this case strongly indicate an employment relationship. Condustrail contracted with the Department of Corrections to provide

employees rather than independent contractors. Condustral specifically contracted that “Contractor shall provide workers’ compensation coverage for Contractor’s *employees* who are assigned to SCDC.” [Claimant’s Exhibit G]. The fact Condustral represented to SCDC that the nurses were employees covered by workers’ compensation insurance is evidence favoring an employment relationship. See Sellers v. Tech Serv., Inc., 803 S.E.2d 731, 421 S.C. 30 (Ct.App.2017) (Commission properly considered fact that “In obtaining permits with the City for the job on which Sellers was injured, Tech Service represented that no subcontractors or independent contractors would be involved.”). Indeed, the contract between SCDC and Condustral is particularly important because Condustral contracted to provide employees and that workers’ compensation insurance would be provided for the employees.

While Condustral represented to SCDC that the nurses were covered by workers’ compensation insurance, Condustral represented to its former workers’ compensation insurer (Guarantee) that nurses assigned to SCDC were covered by the State of South Carolina, such that the nurse payroll (in excess of two-million dollars) would not be included in the premium¹.

A key document is an APPLICATION FORM WAIVER signed by Turner on October 9, 2014. This document states the applicant agrees that no act can “change in any respect the employment-at-will relationship between [Condustral] and the undersigned” The form further states “I further understand that my employment with the Company shall be probationary for a period of ninety (90) days and . . . my employment relationship with the Company is terminable at will for any reason by either party.” [Claimant’s Exhibit U]. Condustral’s president confirmed on cross-

¹ Condustral’s primary line of business was providing skilled tradespeople to the construction industry. Condustral considered these workers to be employees (along with other nurses assigned to private employers) which were included in the payroll audit for its workers’ compensation premium determination. Medustrial was created as a separate division or trade name to provide nursing.

agreement, which he did not do in Turner's case. The APPLICATION FORM WAIVER unambiguously describes an at-will employment relationship.

Other documents signed by Turner weigh strongly towards an employment relationship. When she was first hired, Turner filled out an *Employment Application* and a *Form I-9, Employment Eligibility Verification*. [Claimant's Exhibits H and I]. She completed a *Form W-4, Employee's Withholding Allowance Certificate*. [Claimant's Exhibit O]. She also signed a document stating:

I am orienting at DMH through Medustrial Healthcare. I am an employee of Condustrual, Inc. I will work my first forty hours through Medustrial and if I want more hours it is my responsibility to notify my employer. I will also notify my employer of the agency I will do over forty hours with before doing so. [Claimant's Exhibit P].

Turner signed a CONDUSTRIAL FAIR CREDIT REPORTING ACT DISCLOSURE AND AUTHORIZATION authorizing Condustrual to obtain a "consumer report" or an "investigative consumer report" from a "consumer reporting agency" when: 1) considering your application for employment, 2) making a decision to offer you employment, 3) deciding whether to continue your employment (if you are hired), or 4) making other employment-related decisions directly affecting you." [Claimant's Exhibit J].

A written substance abuse policy indicated that the "Employee is to keep this page." [Claimant's APA page 265].

The documents signed by Turner and testimony of the witnesses strongly show that Condustrual and SCDC had "the right and authority to control and direct the particular work or undertaking." Young v. Warr, 252 S.C. 179, 189, 165 S.E.2d 797, 802 (1969).

In the specific area of workers' compensation documents, Turner was given an Accident/Injuries Procedure sheet. [Claimant's APA page 266]. This document presents procedures for an injury to be followed by an injured "employee." (Please note that this document is captioned

AMS Staffing. This is a PEO or staffing group that Condustral previously used. However, the record establishes that these are the documents presented by Condustral at the time of engaging Turner's services). Also, Condustral presented and had Turner fill out a Post-Offer-of-Employment Form. [Claimant's APA page 268]. This would be applicable to an employer's application to the Second Injury Fund (no longer in existence), or possible defenses in a workers' compensation matter.

Nurse Sidney testified that the nurses were required by Medustrial and SCDC to wear a uniform, scrubs, closed-in shoes, and socks or stockings. They had to cover any piercings, earrings or studs. Jewelry had to be a wedding ring and watch. Hair had to be neatly in place. [Tr. 8 at 35-36].

Although there was flexibility with whether a nurse took a shift or not, once the shift was filled the nurses were required to work. This was not on a daily or even weekly basis. The shifts were set a month in advance. [Testimony of Nurse Sidney, Tr. 8 at 52-53]. If the nurse was out sick, the contract stated that nurses were required to find their own replacement. However, in practice, the testimony showed that Claimant never found her own replacement, but Condustral replaced her absence like any other employee. Condustral contends one of the differences in an employee versus an independent contractor is the flexibility in taking shifts. However, it is noted in the *Terms of Employment* that hourly pay may change based on duties performed and/or assignments, and further that "the decision to accept that pay and assignment will be yours." [Claimant's APA page 272]. (This is one of the documents Condustral contends is a document given to Turner by mistake that belongs to an employee package and not with an independent contractor package). Furthermore, a flexible schedule is hardly inconsistent with an employee/employer relationship as many hourly jobs offer flexible schedules. The fact there is a written schedule with specific shifts which the

nurses are required to work is evidence showing the nurses are employees.

On a day to day basis, there was no difference between nurses employed by SCDC directly and those placed at SCDC by Condustral and MedFirst. SCDC required nurses to wear specific uniforms; carry specific identification badges; and park in employee parking. LPN's were directly under the control of the nursing supervisor (charge nurse or an RN) as to where they worked; what hours they worked; which patients they treated; how they charted the care they provided; and myriad other daily tasks. "The right to control does not require the dictation of the thinking and manner of performing the work. It is enough if the employer has the right to direct the person by whom the services are to be performed, the time, place, degree, and amount of said services." Nelson v. Yellow Cab Co., 343 S.C. 102, 110, 538 S.E.2d 276, 280 (Ct.App.2000), *overruled on other grounds by Wilkinson*, 382 S.C. at 300 n. 3, 676 S.E.2d at 702 n. 3.

The direct evidence of a right to control overwhelmingly indicates an employee/employment relationship between Turner and Condustral/Medustrial.

e. Furnishing of Equipment.

Turner was not furnished any equipment by Medustrial. However, this was essentially the same with the W-2 nurses also employed by Medustrial. Tony Durham indicated that some safety equipment was provided to the W-2 nurses, but there was no testimony indicating what the safety equipment would be. The physician's offices or nursing homes where the W-2 nurses were placed provided equipment. Also, because of security concerns, the nurses placed at the Department of Corrections could not bring in nursing supplies. The items/equipment were provided by the Department of Corrections. Essentially, the nurses assigned to SCDC provide their skill and labor. [Nurse G, Transcript 1, page 77]. Due to the unique circumstances/facts of this case, this factor is somewhat neutral. Items could never have been provided by Medustrial because of the limitations

of the Department of Corrections. Consideration was also given to the supreme court's pronouncement in Lewis that "Because the Club, and not Lewis, bore the risk of the capital investment in the equipment used by Lewis to perform her work, we find this factor weighs in favor of an employee relationship." Lewis v. L.B. Dynasty, 411 S.C. 637, 770 S.E.2d 393 (2015).

Although Claimant contends the fact SCDC provided Turner "with everything she needed to work, including medical equipment [and] hospital supplies" as in Shatto, I find this factor to be somewhat neutral because Claimant's primary contention is that Condustral was the direct employer.

On a checklist beside the line entitled malpractice insurance, not applicable (n/a) is indicated, and Medustrial provided the malpractice insurance for the Claimant and 1099 nurses.

f. Right to Fire.

The evidence shows Condustral retained the right to fire its nurses. Turner was presented and executed a *Facility and Client Requirement* documents in 2013 that indicated that failure to comply with the requirements would prevent her from working as an "employee" until such time as the non-compliant issue had been resolved. [Claimant's APA page 271]. Turner was presented with a *Terms of Employment* document that she and the office manager signed. [Claimant's APA page 272]. This document indicates a number of offenses that can result in disciplinary action, including termination."

In 2014, Turner and the office manager signed a document entitled *Attendance Policy* that states that a violation of a no show/no show policy could result in disciplinary actions up to "termination of employment." [Claimant's APA page 275]. An *Application Form Waiver* signed in 2014 indicated that the relationship was an "employment at will" relationship, and that misrepresentations in the application is call for cause for "dismissal." [Claimant's APA page 282].

This factor strongly preponderates for a finding that Turner is an employee.

g. Method of Payment

Payment of a time basis is a strong indication of the status of the employment, while payment on a completed project basis is indicative of independent contractor status. Shatto. In this matter, Turner was not paid by the job, but was paid by the hour. Also, Turner and other nurses were paid overtime at time and a half. [Testimony of Turner; Testimony of Tony Durham; Testimony of Nurse Sidney]. In addition to regular hours and overtime hours, Turner was paid for "other hours." [Claimant's APA pages 230-232 (the definition of *other hours* was not established in the record.)]. Also, Turner was paid by Medustrial for some training time at the Department of Corrections. Medustrial paid for Turner's orientation class with the Department of Mental Health. [Turner Tr. Page 1, 147]. Although Turner received a 1099 from Condustral, she was presented with a W-4 to sign in 2013. [Claimant's APA page 273]. There was no evidence Turner negotiated her hourly rate of pay. Turner testified she was paid "Twenty-two dollars an hour. I started at twenty-one, but they raised me up, saying that I was a good employee, so they gave me a raise to twenty-two dollars an hour." [Turner Tr. 1, page 157, lines 6-11].

In Shatto, the Supreme Court held the method of payment favored the independent contractor relationship. The distinction here is that Shatto was paid by her agency but was seeking to be found an employee of the hospital where she was placed. As such, the Court found payments made to Shatto by the agency did not favor an employment relationship with the hospital. Here, Turner contends she is the direct employee of Condustral. This case is distinguishable from Shatto for that reason.

The Weekly Time Sheets were required to be filled out and signed by the "employee." [Claimant's APA pages 284-287]. The hourly wages paid to Turner by Condustral favor an

employment relationship.

C. Statutory Employment with the Department of Corrections.

While I find that Turner was a direct employee of Condustral, I further conclude Turner is a statutory employee of the Department of Corrections. I further conclude the Department of Corrections has primary liability for this case as they are an insured employer, whereas Condustral is an uninsured employer subject to the Act.

The legislature created the category of "statutory employer" to prevent employers from evading workers' compensation liability by subcontracting their work to smaller employers who were not subject to the Act.

The statute provides:

When any person, in this section ... referred to as "owner," undertakes to perform or execute any work which is part of his trade, business or occupation and contracts with any other person (in this section . . . referred to as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him. S.C. Code Ann. § 42-1-400 (2004).

Our courts apply three tests, only one of which need be met: (1) is the activity an important part of the owner's business or trade; (2) is the activity a necessary, essential, and integral part of the owner's business; or (3) has the activity previously been performed by the owner's employees? Glass v. Dow Chemical Co., 325 S.C. 198, 482 S.E.2d 49 (1997). "[T]he guidepost is whether or not that which is being done is or is not a part of the general trade, business or occupation of the owner." Hopkins v. Darlington Veneer Co., 208 S.C. 307, 311, 38 S.E.2d 4, 6 (1946).

Turner worked within the correctional institute as a nurse providing medical care to inmates. She worked alongside nurses who were direct employees of SCDC. Provision of medical care

plainly meets the test that the work be “a necessary, essential, and integral part of the owner's business.” Glass v. Dow Chemical Co., 325 S.C. 198, 482 S.E.2d 49 (1997). Additionally, SCDC directly employed nurses who were performing identical activities to those performed by the Medustrial nurses. Having found Turner an employee and not an independent contractor, I therefore find Turner is a statutory employee of the South Carolina Department of Corrections.

D. Average Weekly Wage and Compensation Rate.

1. The parties assert contrary positions on the Average Weekly Wage.

2. Claimant contends her average weekly wage should be based on her actual wages paid over the preceding 52 weeks, as this is the primary method set forth in § 42-1-40. Using this method, her average weekly wage would be \$1,130.86 resulting in a compensation rate of \$753.94.

3. The Defendants contend this method would be unfair, arguing for various alternative methods, most particularly calculating the average weekly wage based on Turner's net income after taxes. Defendants argue that she benefitted from deducting various expenses because she was paid on a 1099 rather than a W2. Defendants rely on Stephen v. Avins Constr. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996) for the proposition that “a subcontractor's compensation rate should be determined based on his net taxable income”

Claimant contends this method should not be used because she has proven she is an employee rather than an independent contractor. She contends her situation is different than an independent contractor or business owner who elects to come under the Act.

Using net income, the average weekly wage would be \$333.29 per week resulting in a compensation rate of \$222.20.

4. Consideration was also given to various other methods including an average weekly wage based on an SCDC nurse and on paying an average weekly wage based on an analysis of

Claimant's tax returns considering some but not all her deductions.

5. I conclude the primary method of calculating average weekly wage should be employed, such that I find the average weekly wage is \$1,130.86 and the compensation rate is \$753.94.

a. The relevant language in 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 as reported on the Department of Employment and Workforce's Employer Contribution Reports divided by fifty-two or by the actual number of weeks for which wages were paid, whichever is less.

When for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

S.C. Code Ann. § 42-140 (2007).

The statute requires use of the preceding fifty-two weeks of wages unless exceptional reasons exist which would make this method unfair either to the employer or employee. "The commission must use this method unless 'the employment, prior to the injury, extended over a period of less than fifty-two weeks,' or unless 'for exceptional reasons' it would be unfair to do so. . . . the commission should make factual findings of these two predicate conditions." Pilgrim v. Eaton, 391 S.C. 38, 703 S.E.2d 241 (Ct. App. 2010). "The overriding goal of the Workers' Compensation Act "is to compensate workers for reductions in their earning power caused by work-related injuries" Stephenson v. Rice Servs., Inc., 323 S.C. 113, 473 S.E.2d 699 (1996).

b. Turner produced fifty-two weeks of wage records covering the third quarter of 2014

through the second quarter of 2015. She provided sufficient evidence to meet her burden under the primary method. I therefore find it is practicable to use the primary method. I further find, as discussed below, that there are no exceptional reasons making use of this method unfair to the Defendants. Indeed, I find use of any other method would be unfair to Claimant.

Our appellate courts have considered various scenarios where exceptional reasons exist to depart from the primary method. The common thread to these decisions is that there are some reason why historical wages used in the wage calculation was unfair. Average weekly wage must account for increases in the rate of pay; in a difference in hours worked due to seasonal or work flow variations; for seasonal or short term employment which artificially inflate the employee's annual earning calculations; and for a situation where a very young employee with catastrophic injuries had not yet begun a full-time career². None of these circumstances apply here. There is no exceptional reason to depart from the primary method, particularly as the wage records in evidence cover a full fifty-two weeks, are not disputed as to accuracy, and can reasonably be inferred to be indicative of Turner's future earnings with Condustral had she not suffered her injuries.

c. Consideration was given to the various Defendants' arguments that Turner's average weekly wage should be based on her net taxable income. Defendants rely on Stephen v. Avins

² See, e.g. Booth v. Midland Trane Heating and Air Conditioning, 379 S.E.2d 730, 298 S.C. 251 (Ct. App. 1989)(merit increase in pay rate was an exceptional circumstance; Elliott v. South Carolina Department of Transportation, 362 S.C. 234, 607 S.E.2d 90 (Ct. App. 2004)(pre-injury salary increase should be considered in calculating average weekly wage); Brunson v. Wal-Mart Stores, Inc., 344 S.C. 107, 542 S.E.2d 732 (Ct. App. 2001)("grossly unfair to Wal-Mart to require payments based on [employee's] dual employment status since he did not intend to work both jobs after the holidays."); Bennett v. Gary Smith Builders, 271 S.C. 94, 98, 245 S.E.2d 129, 131 (1978)(reversing the lower court's calculation of claimant's average weekly wage as a full-time, year-round employee "as grossly unfair to the employer" since it would require the employer to pay almost twice what the employee, who only worked three to four months out of the year, actually earned); Pugh v. Piedmont Mech. & Zurich Ins., 396 S.C. 31, 719 S.E.2d 676 (Ct. App. 2011)(unfair to use limited period of wages following return to work from previous injury because the "natural variance in available work in this industry makes capturing the ebb and flow of work in a seventeen-week period difficult."); Sellers v. Pinedale Residential Center, 564 S.E.2d 694, 350 S.C. 183 (Ct. App. 2002)(exceptional circumstances applied to support "determination that [high school student who had not yet begun his career] most probably would have been earning and was thus entitled to a compensation rate of an electrician were it not for his spinal cord injury").

Const. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996). The claimant in Stephens was “self-employed as a subcontractor . . . , however, Avins Construction Company deducted a percentage for workers’ compensation insurance and, therefore, he was their statutory employee.” Stephens contended his average weekly wage should be based on his gross income; Avins contended it should be based on his after-tax income as shown on his tax returns. Noting the “statute does not specify whether ‘wages’ refers to net or gross earnings of a business owner operating as a subcontractor,” the Court of Appeals held the average weekly wage should be “based upon his tax returns as a self-employed subcontractor.” Id.

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 Condustrual 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.

The case law on this issue supports the conclusion that a putative independent contractor later determined to be an employee is to be paid based on actual gross earnings. There are no cases holding an employee’s average weekly wage is based on after-tax earnings.

In Paschal, a case virtually identical to this one, the Court of Appeals affirmed the Commission’s determination that the average weekly wage for a misclassified independent

contractor found to be an employee was to be based on the wages reported by the employer on the Form 20. Paschal worked as a “repo man” repossessing automobiles. Paschal was paid on a 1099 and deducted expenses on his tax return. Paschal’s 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.” The Court of Appeals 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, 380 S.C. 419 (Ct.App. 2008)(*quotation in original*). As the Court explicitly rejected the identical argument made here by the Defendants, Paschal controls the result in this case. The Commission is required to use wages paid from the employer to the employee as the determinative evidence of average weekly wage.

Other cases support this approach. In Lewis, the Supreme Court was faced with determining the average weekly wage for an exotic dancer who worked for tips, kept no wage records, and filed no tax returns. Her employer had misclassified her as an independent contractor; a determination reversed by the Supreme Court. The only evidence was the testimony of the dancer/employee and a coworker about how much each earned each day in tips as an exotic dancer. The Commission held the average weekly wage was the statutory minimum of \$75.00 based on the lack of documentary evidence. The Supreme Court reversed and remanded because “the commission’s finding that Lewis presented ‘no evidence whatsoever’ as to the amount of money she earned is plainly wrong.” Lewis v. L.B. Dynasty, Inc., 799 S.E.2d 304, 419 S.C. 515 (2017). Lewis is significant for its focus on the evidence of gross earnings and absence of instruction for the Commission to consider after-tax earnings on remand.

In Mozie, the claimant “was engaged in the logging business as a producer and was working exclusively for Frazier Pulpwood.” The Commission was faced with three different sets of evidence

from which to determine the average weekly wage: (1) Form 1099 showing earnings of \$19,129.83; (2) unsigned tax returns introduced "in an attempt to show low annual incomes in those years after deductions for business expenses;" and (3) "statements of Frazier Pulpwood with handwritten calculations showing Mozie earned well in excess of the \$19,129.83" Mozie v. Frazier Pulpwood, 378 S.E.2d 61, 298 S.C. 34 (Ct. App. 1989). The Commission based the average weekly wage on the handwritten calculations, rejecting the employer's attempt to use tax deductions to show a lower annual income. The Court of Appeals affirmed, holding the Commission's determination complied with the evidence and § 42-1-40.

Consideration was also given to the Craft case decided by our sister state of North Carolina. In Craft, the employee was paid a fixed price for each job, from which he deducted expenses on his taxes. The Court held "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." The Court affirmed the commission's finding that it "would be unjust and unfair to treat plaintiff employee as a subcontractor." Craft v. Bill Clark Const. Co., 474 S.E.2d 808 (N.C. App. 1996).

Although they present somewhat different facts than Pascal and the instant case, Craft, Lewis and Mozie are consistent that the correct method is to follow the statute and rely on gross wages.

I also find it would be unjust and unfair to treat Turner as a subcontractor when she is in fact an employee of Condustrual. A review of her earnings for the relevant four quarters totals more than \$58,000. Her wages are the result of working over 2,700 hours. The determination of an average weekly wage of \$333.29, as requested by the Defendants, would result in the Claimant's effective hourly rate being \$6.40 an hour. This would not be consistent with the earning capacity of an LPN, as indicated in the record. (This would also be inconsistent with Mr. Durham's

testimony in regard to pricing and payment of actual LPNs.)

It is therefore concluded that the average weekly wage in this case is to be based on gross wage records using the primary method set forth in the statute. This results in an average weekly wage of \$1,130.86 and a compensation rate is \$753.94.

E. Accident and Injuries.

1. Turner and another nurse were held hostage by two inmates in the infirmary at Broad River Correctional Center for approximately six hours on September 5, 2015. During this time the inmates physically assaulted Turner. I find Turner proved she suffered an injury by accident arising out of and in the course of her employment during the assault and its aftermath.

2. As to her injuries, Turner testified: "My neck hurt, my back, my right shoulder, my right elbow, and I had some blurred vision in my right eye. My left leg feels like it goes out from under me from time to time. But mostly my back, my neck, my shoulder, and my elbow as far as my physical injuries are concerned." [Turner Tr. 1, page 168, line 18-page 169, line 4].

3. Treatment records from Dr. Hess show Turner sustained injuries to her right elbow, right shoulder, neck and back.

4. An evaluation by Dr. Daniel Westerkam showed multiple injuries including the right elbow, right shoulder and mid-thoracic spine. Dr. Westerkam also diagnosed posttraumatic stress disorder as a direct result or aggravation of the assault on September 5, 2015.

5. Based on the testimony and medical evidence, I find 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.

6. Although not necessary to the decision, I further find Turner was exposed to unusual and extraordinary stress on her job which directly resulted in her psychological injuries.

F. Medical Treatment.

1. Based on the testimony and medical evidence, I find Turner is not at maximum medical improvement.

2. Additional treatment would tend to lessen her period of disability. She is entitled to causally related treatment until she reaches MMI and thereafter so long as additional treatment tends to lessen her period of disability. Dr. Westerkam issues his opinion as to recommended treatment. He specifically recommended an MRI, EMG and NCS of her right shoulder and arm, after which she is to receive physical therapy, injections or surgery, as well as other modalities. He also opines that she needs ongoing counseling and treatment for PTSD, including a psychologist for counseling on a weekly basis and a psychiatrist for medication management.

3. I do not find Dr. Westerkam able to provide these necessary modalities. Additionally, the specific treatment and modalities should be determined by the physicians that will be currently treating the Claimant. I therefore instruct the liable party to identify and provide physicians and other providers who are ready, willing and able to treatment. The liable party shall "furnish or cause to be furnished, free of charge to the employee, and the employee shall accept, an attending physician and any medical care or treatment that is considered necessary by the attending physician." S.C. Code Ann. § 42-15-60 (2017). Should the liable party fail to designate attending physicians within 30 days of this order, the undersigned will designate the providers pursuant to Section 42-17-30 and 42-15-60.

G. Temporary Disability Compensation.

1. The parties assert contrary positions on payment of temporary total disability.

2. Claimant contends she is entitled to temporary total disability compensation from the date of the accident and continuing on a running award. Claimant contends that her injuries—

particularly her psychological injuries— render her disabled within the meaning of the Act. Claimant further contends that the putative offer of light duty was not a bona fide offer of employment, but rather a cynical attempt by Condustrial to minimize liability should she be ultimately determined to be an employee. She contends she has never been able to return to employment and could not have accepted such an offer.

3. Condustrial, joined by the other Defendants, contends Turner was offered employment suitable to her capacity which she willfully declined, thus barring her from receipt of temporary compensation. Condustrial further contends Turner presented no medical proof of disability, such that regardless of whether suitable employment was offered, Turner is not disabled.

4. Under the Workers' Compensation Act, a claimant 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. § 42-1-120 (2007).

5. The analysis requires the Commission to first determine whether Turner is disabled. The second step is to determine if Condustrial offered employment suitable to her capacity, and if so, whether Turner refused to accept suitable employment.

6. In terms of work restrictions assigned by medical providers for her physical injuries, Turner was treated at the Palmetto Health Richland emergency room. She was treated for the physical assault but given no specific work restrictions. [Claimant's APA pages 1-13].

7. As part of her application to the Office of Victim's Assistance, her family doctor signed a SOVA *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." Most importantly, "Patient will be totally unable to work from 09/16/2015 through 09/30/2015." [Claimant's APA page 291].

8. 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. (There is an additional SOVA form (Mental Health Counselor's Report) dated December 11, 2015 that does not address work status. Claimant's APA page 294. The visit note and this form are further addressed below.)

9. Turner was placed on specific work restrictions on October 20, 2015, when she saw Dr. Hess. Dr. Hess "limit[ed] her lifting to less than 10-20 pounds for approximately six weeks." [Claimant's APA page 25].

10. The Claimant saw Dr. Westerkam on September 5, 2017 for an independent medical evaluation. Dr. Westerkam "recommend[ed] that she not lift any more than 10 pounds with the right arm and that she avoid all overhead work with the right arm." He also recommended "that she not do any bending, stooping, or crawling." [Claimant's APA pages 215A-215C].

11. 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. [Turner Tr. 1, page 172, lines 18-23].

12. Records from the Claimant's psychological treatment indicate in the reporting of symptoms that the Claimant had not returned to work. 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. On November 23, 2015, Dr. Berg (Palmetto) authored a note discharging the Claimant and stating that the Claimant was psychiatrically stable. (Claimant's APA 54)

13. The Claimant was also treated by Lexington County Mental Health from November 12, 2015 until May 2, 2017. There are other references in the psychological records of Lexington Mental Health noting that the Claimant was seeking disability. However, the records do not contain an actual opinion of a medical provider. In the December 11, 2015 treatment record, the Claimant was asked if she just didn't feel like going back to work by the therapist, Mandy Burgett. (Claimant's APA page 94) (Mandy Burgett is the therapist that filled out the SOVA form (Mental Health Counselor's Report) dated December 11, 2015 that does not address work status. Claimant's APA page 294.)

14. As mentioned above, the Claimant saw Dr. Westerkam on May 18, 2017. (Claimant's APA 215B) Dr. Westerkam not only concluded that the Claimant had physical injuries, but he also opined that the Claimant sustained posttraumatic stress disorder as a direct result or aggravation of the assault.

Dr. Westerkam stated his opinions as to the Claimant's work restrictions and treatment. He issued work limitations for the Claimant's physical injuries, and recommended treatment modalities. He provided his opinion as to the Claimant's post-traumatic stress condition, the required treatment for her psychological condition, but did not issue any work restrictions related to the Claimant's mental injuries.

15. 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. (Claimant's APA page 291). 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 on November 25, 2015. Dr. Westerkam does not place any restrictions on the Claimant's psychological ability/disability to work. 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 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. Burnette v. City of Greenville, 401 S.C. 417, 737 S.E.2d 200.

16. Condustral presented Turner with a letter at her home on September 24, 2015. (Condustral APA page 142) extending Claimant an offer to work in the office performing light duty work assisting with minor filing and paperwork needed. The offer allowed Claimant to work in a facility with no prisoners and for Claimant to set her own schedule. The offer was within the restrictions issued by Dr. Hess and Dr. Westerkam. Claimant did not accept the offer. (Hrg. Tr. P. 245, l. 24- P. 247, l. 21).

17. The statute 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). Pollack v. Southern Wine & Spirits of America, 405 S.C. 9, 747 S.E.2d 430 (2013)

18. The award of disability is denied from September 30, 2015 through the date of the

hearing. This opinion does not purport to deny benefits beyond the date of the hearing, as the Commission would not have knowledge of whether the Claimant has or has not been issued work restrictions applicable to periods after the date of hearing.

19. As Turner is not at MMI, a finding of permanent disability is not ripe for determination at this time.

H. The Contract Labor Services Agreement between Condustrail and Countrywide Staffing Solutions, Inc.

1. A valid, binding and enforceable contract existed between Condustrail and CSSG.

Condustrail and CSSG are both sophisticated business entities who negotiated and executed a Contract Labor Services Agreement (“Contract”). Neither party argued that a contract did not exist. The record before this Court shows that Condustrail failed to acquire workers compensation coverage for Claimant under its Contract with CSSG, nor did it acquire coverage for Claimant from any other source. Condustrail seeks to modify the contract to provide coverage. For the reasons set forth below, Condustrail is not entitled to any remedy from the Commission.

The Contract provided:

“CSSG will perform the following with respect to Selected Staffing/Employees performing services for Client based on timely, accurate, and complete information and payment provided by Client: . . . provide . . . workers’ compensation benefits . . . and handle . . . workers’ compensation claims involving Selected Staffing/Employees.” (APA 43 ¶ 1 & 1.c.)

The “Selected Staffing/Employees” covered under the Contract were those “furnish[ed] and/or provide[d]” by Condustrail “to perform the type of work described on Exhibit B under [Condustrail]’s supervision at the locations described on Exhibit B.” (*Id.* ¶ 1.a.).

- 2. Claimant is not a “Selected Staffing Employee” as contemplated in the Contract because Condustrail did not to submit Claimant to be included as a Selected Staffing/Employee. Therefore, neither CSSG nor CSSG’s insurance carrier have any liability to Claimant.**

The testimony of Tom Sears, Condustral's General Counsel, confirms that Condustral had to provide to CSSG the National Council on Compensation Insurance (NCCI) codes used to classify types of businesses for workers compensation insurance and locations of these businesses to CSSG and that CSSG had to agree to accept to be contractually bound to provide workers compensation coverage for those businesses at those locations. (Trial Tr. 4 at 309.). Condustral submits no evidence to show even an attempt to submit Claimant as a "Selected Staffing/Employee," until well after the claim had been submitted.

The record in its entirety demonstrates that Condustral, as part of a business strategy, never intended to submit Claimant (or other 1099 employees) to be included as "Selected Staffing Employees." The Contract provides in pertinent part:

"Client shall make any and all strategic, operational and other business-related decisions regarding its business. Such decisions and related outcomes shall exclusively be the responsibility of Client and CSSG shall bear no responsibility or liability for any actions or inactions by Client" (APA 43 ¶ 2.a.)

For employees that Condustral wanted to put within the ambit of the Contract, Condustral was required to "submit timely, complete, and accurate payroll information" which was "not misleading." (*Id.* ¶ 2.c.)

The record is clear that Condustral never submitted Claimant to CSSG for workers compensation coverage under the contract. Condustral never reported to CSSG (a) Claimant's payroll information (or any 1099 workers' payroll information for that matter) and (b) that of any of its 1099 workers were staffed at the Kirkland Correctional Institution. (GIC-APAs-27-28 pp. 568-641 (Condustral Payroll for August and September 2015) & GIC APA 32 pp. 735-737 (List of locations provided by Condustral to Countrywide).)

Sear's testimony, likewise, affirms that Condustral never intended for Claimant to be

covered by the contract with CSSG. According to Sears:

Q. So any understanding or thing you might have told them about Medustrial, if its not in this agreement, its not a part of the deal?

A. When we met with Mr. Hansen, We told him about Medustrial and said "But They're 1099's so we are not asking you for insurance for 1099's."

(Trial Tr. Page 311.) In addition, the list of locations Condustrial provided to CSSG never included the Kirkland Correctional Institution. (GIC APA 32 pp. 735-737 (List of locations provided by Condustrial to Countrywide).) The testimony of Condustrial's President, Tony Durham, as well as Sears, confirmed that Condustrial never submitted any prison facility location to CSSG for workers compensation insurance coverage for any individual under the Contract. (Sears Trial Tr. 4 at p. 315; Sears Depo II at p. 182; Durham Trial Tr. 6 at p. 264.) Under the plain and unambiguous terms of the Contract, CSSG cannot be liable for any employee Condustrial failed to report to it in a timely manner, or those for which it failed to identify the location at which an employee would be working.

Condustrial argues that under the Contract a "new hire" would be covered by the Contract even before the newly employed individual was reported to CSSG, and therefore it should not matter that it did not report Claimant in this instance. There is no support for that argument in the plain language of the contract. In addition, Claimant was not a "new hire." She had been in Condustrial's employ for many years. Finally, Sears testimony as set forth above makes it clear that the parties never intended for the "1099's" to be a part of the Contract.

Condustrial also argues that Claimant was already covered under the Contract because the NCCI Code classifying other nursing-type workers were provided workers compensation coverage under the Contract. However, Sears also testified that Condustrial failed to submit Claimant's

name, payroll information and the Kirkland Correctional Institution as a location in which Claimant's type of business would work. In addition, as discussed in further detail below, Claimant's class code, that is, one for workers in a prison facility, was never submitted or covered under the Contract. Rather, Condustrail had submitted for coverage nursing-type workers in class codes that worked in private hospitals and nursing homes, for example. Indeed, the credible and reliable evidence in the record demonstrates that Claimant's class code and location were never submitted to CSSG for coverage.

3. Reformation of the Contract is not appropriate because the record demonstrates that no mutual mistake of fact was present at the time the Contract was formed.

Condustrail attempts to argue that when the parties were negotiating the Contract, CSSG misrepresented itself as a Professional Employment Organization (PEO), even though it was not licensed as one. Because of this, Condustrail argues that the Contract should be reformed to provide for workers compensation coverage for Claimant as if CSSG were a PEO. Condustrail makes these arguments in an attempt to retroactively provide coverage for Claimant. However, these arguments, have no merit and are not supported but rather contradicted by the testimony of the parties, the Contract, and applicable law.

A reformation remedy is utilized to conform writings to the actual agreement of the parties. *Crosby v. Protective Life Ins. Co.*, 293 S.C. 203, 359 S.E.2d 298 (Ct. App. 1987). "[R]eformation is adjudged because the instrument, by reason of mistake or fraud, does not embody the true agreement of the parties." *S. Realty & Constr. Co. v. Bryan*, 290 S.C. 302, 350 S.E.2d 194 (Ct.App. 1986) (quoting 66 Am.Jur.2d Reformation of Instruments Section 6 (1973)). "A contract may be reformed on the ground of mistake when the mistake is mutual and consists [of] the omission or insertion of some material element affecting the subject matter or the terms and stipulations of the

contract, inconsistent with those of the parol agreement which necessarily preceded it.” *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 747 S.E.2d 178 (2013).

The existence of a mutual mistake must be shown by clear and convincing evidence before equity will reform a contract. *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 747 S.E.2d 178 (2013) “Reformation is not available for the purpose of making a new and different contract for the parties but is confined to establishment of the actual agreement; thus, a court of equity cannot, and should not, undertake to make a new contract between the parties by reformation.” *56 Leinbach Investors, LLC v. Magnolia Paradigm, Inc.*, 411 S.C. 466, 769 S.E.2d 242 (Ct. App. 2014).

Condustrial admits that it was well-aware the Contract with CSSG set forth an arrangement different from and less than that provided by a PEO. Condustrial testified that during initial discussions between it and CSSG regarding coverage for Condustrial’s workers, CSSG representatives indicated that either it or one of its other business entities was a licensed PEO. Sears states, however, that “[t]he intent was for [CSSG] to act more like an A.S.O.; it wasn’t a true P.E.O, because they didn’t take over Condustrial’s employees.” (Trial Tr. 4 at 291). Durham likewise testified that Condustrial was not willing to do a PEO arrangement at the time and wanted to be able to pick services. (Trial Tr. 6 at 89; 280; 445). Durham testified that a PEO was a full-service package, but Condustrial wanted something less than that, something less expensive, where it could unbundle the package and just pick certain pieces out. (Trial Tr. 6 at 226). Condustrial only wanted a piece of a PEO package. (Trial Tr. 6 at 227.) Indeed, had Condustrial contracted with a licensed PEO, the PEO statute would have required Condustrial to agree to certain contractual terms that it explicitly rejected when negotiating the terms of the Contract.³

³ Trial Tr. 11/3/17 at p. 243, l. 13 – 22 (“Q: WHAT YOU WANTED WASN’T A P.E.O. YOU TOOK OUT THE ASSIGNMENT PROVISION. A: WE DIDN’T WANT THE FULL SERVICE OF A P.E.O.”);

Despite its argument before the Commission, therefore, Condustrial rejected terms which would have been part of a PEO arrangement. That is, Condustrial did not want CSSG to have control over its employees, to be the employer of record, or to take over payroll functions. Cf. S.C. Code Ann. § 40-68-70 (requiring licensee in a PEO arrangement to take control of client company employees, payroll functions, and so forth).

In negotiating for something less than a PEO arrangement, moreover, these sophisticated business parties executed the Contract which makes clear that:

"this agreement constitutes the entire understanding and agreement between the parties hereto...this agreement may be modified or amended only by a written modification or amendment signed by both parties." (GIC APA 43 pp. 762-771 ¶20).

The contract also has a supremacy clause which states

"[t]his agreement supersedes all previous Agreements or understandings between the parties hereto, and all other such Agreements or understandings, whether oral or written, shall become null and void as of the date of the execution." (GIC APA 43 pp. 762-771 ¶22).

Trial Tr. 11/3/17 at p. 244, l. 22 – p. 246, l. 10 (Q: DOES AN ASSIGNMENT OF EMPLOYEES HAVE ANYTHING TO DO WITH A P.E.O.? A: IT HAS THEM BEING THE EMPLOYER OF RECORD IN MOST CASES. Q: WHERE YOU ASSIGN THEM, RIGHT? A: WHERE YOU WOULD MAKE THEM THE EMPLOYER OF RECORD, PERIOD. Q: OKAY. AND Y'ALL WEREN'T GOING TO DO THAT? A: WE WEREN'T GOING TO DO THAT.");

Trial Tr. 11/3/17 at p. 249, l. 7 - 23 ("Q: ALL RIGHT. WELL, LET'S TALK ABOUT WHAT YOU AGREED TO. YOU DIDN'T AGREE TO A P.E.O., DID YOU? A: NOT A FULL FLEDGED P.E.O., I DID NOT.");

Trial Tr. 11/3/17 at p. 280, l. 1 – 25 ("Q: BUT MR. SEARS AND YOURSELF, YOU TALKED ABOUT P.E.O.s IN YOUR EMAILS LEADING UP TO THE CONTRACT AND SAID 'WE DON'T WANT IT.' A: WE DIDN'T WANT THE FULL PACKAGE P.E.O. Q: IN FACT, YOU DIDN'T WANT – YOU WANTED TO MAINTAIN CERTAIN CONTROLS AND CERTAIN CONTROLS --- A: ABSOLUTELY. Q: OVER CONTRACTS AND EMPLOYEES, WHICH TAKES IT OUT OF THE REALM OF A P.E.O.? A: ABSOLUTELY.");

Trial Tr. 11/3/17 at p. 445, l. 5 – 12 ("Q: AND I THINK YOUR TESTIMONY HAS BEEN IN THIS EMAIL IS THIS IS WHERE YOU START UNBUNDLING THE – LETTING SCOTT HANSON KNOW THAT YOU WANT TO START UNBUNDLING THE P.E.O. YOU DON'T WANT THE FULL SERVICE P.E.O. SITUATION. A: THAT'S TRUE. Q: YOU WANT SOMETHING LESS THAN THAT? A: ABSOLUTELY."); Trial Tr. 11/3/17 at p. 446, l. 11

To this end, the undersigned notes the Contract fails to contain any provision referencing a professional employer organization or warranting in any way that CSSG is a PEO. (Trial Tr. 11/3/17 at p. 233, l. 3 – 24; Trial Tr. 11/3/17 at p. 234, l. 11 – 25; Trial Tr. 11/3/17 at p. 235, l. 14 – 20; Trial Tr. 11/3/17 at p. 235, l. 14 – 20.) For all the reasons above, reformation of contract is not warranted.

4. Section 40-68-10(7) of the South Carolina Code of Laws Regulating Professional Employer Organizations Cannot Reform the Contract.

Condustrail also argues that if the Commission does not find reformation by contract appropriate in this matter for the reasons above, then the provisions of section 40-68-10 *et seq.* of the South Carolina Code of Laws (“PEO Statute”) should apply, so that CSSG, is declared by the Commission to be a statutory PEO, and then it or Guarantee, its insurer, would be required to cover Claimant, a non-leased employee, under this statute as well. Chapter 68, however, does not apply here. The provisions and obligations of Chapter 68 apply only to those persons “licensed” as a professional employer organization and their client companies. S.C. Code Ann. 40-68-10(7). A person may be licensed as a PEO only after review and approval of an application for the same submitted to the Department of Consumer Affairs. S.C. Code Ann. § 48-60-30-55. There was no evidence presented at trial that CSSG ever applied for or was approved as a licensed PEO.

The PEO statute and related case law, moreover, do not provide any measure for the Commission to declare CSSG a PEO under the PEO statute, and then apply certain PEO statutory requirements to the parties in this matter. Although the undersigned does not make any such finding, to the extent CSSG represented to Condustrail that it was a PEO, when in fact CSSG was not a licensed PEO, the statute provides for other remedies. S.C. Code Ann. §§ 40-68-150-160 (providing remedial avenues for wrongs caused by someone offering professional employer services without a license). In addition, Condustrail did not rely on such representation when

seeking coverage for its employees and specifically rejected a PEO arrangement. Specifically, as discussed above, ample evidence demonstrates that Condustrial negotiated for something other than and less than a PEO arrangement. Condustrial expressly rejected contract terms that would have been required under section 40-68-10 *et seq.* had it been a client company of a professional employer organization. Thus, the Contract negotiated by these sophisticated business entities makes no reference to CSSG as a PEO, that CSSG would serve as something like a PEO, or provide for a PEO arrangement.

For all the reasons above, CSSG is not liable for any losses suffered by Claimant.

I. The Workers Compensation Insurance Policy Between The Guarantee Insurance Company and Countrywide Staffing Solutions, Inc.

1. There is no direct insurance policy between Guaranty Insurance Company (GIC) and Condustrial.

GIC provided workers' compensation insurance to CSSG from June 30, 2015 through June 30, 2016 for properly reported CSSG employees in States and locations approved by GIC under Workers Compensation Insurance Policy Number WCP500069701GIC, with Endorsements dated July 20, 2015 and July 30, 2015 (collectively referred to as "GIC/CSSG Policy").⁴

Only CSSG is insured under the GIC/CSSG Policy, and only properly reported CSSG employees in States and locations approved by GIC were insured under the GIC-CSSG Policy. GIC regularly reviewed CSSG's requests to cover new codes of employees at new or old locations or new or old codes of employees at new locations under the GIC/CSSG Policy and would approve or deny coverage.⁵

⁴ GIC Trial Ex. 7 & APA 51 pp. 796-825 (July 20, 2015 Endorsement deleting multiple employers) & Nov. 4 2017 Trial Tr. (Becky Barnette, GIC's Vice-President of Underwriting and Manager of the PEO Unit), pp. 37-47 (regarding terms of the first endorsement); GIC Ex. ___ & APA 25 pp. 535-567 (July 30, 2015 clarifying and adding locations) & Nov. 4 2017 Trial Tr. Direct of Becky Barnette, GIC's Vice-President of Underwriting and Manager of the PEO Unit, pp. 60-64 (regarding second endorsement updating the locations subject to coverage).

⁵ GIC Ex. 8 & APAs 740-753; November 4, 2017 (Becky Barnette) Trial Tr. at 48-55 (demonstrating that GIC reviewed CSSG's requests to cover new codes of employees at new or old locations or new or old codes of employees

Thus, the GIC/CSSG Policy did not cover Condustral's employees, unless they were made an employee of CSSG through the Contract and then properly reported by CSSG to GIC and approved by GIC for coverage.

- 2. CSSG never reported Claimant for coverage under the GIC/CSSG Policy, as Claimant was not an employee of record of CSSG, or among workers in class codes and in locations approved by GIC under the GIC/CSSG Policy.**

The undisputed evidence shows that Condustral never reported Claimant for coverage under the Contract, and consequentially, CSSG never reported Claimant for coverage under the GIC/CSSG Policy. Claimant too was not among the codes of employees even generally approved for coverage under the Contract or the GIC/CSSG Policy. (Becky Barnette) Trial Tr. November 4, 2017 at pp. 20-28 (describing the use of the N.C.C.I. Scopes Manual for underwriting purposes).

Condustral argued that it had generally submitted nurses falling under N.C.C.I. class codes 8829 and 8833 for approval under the Contract, and therefore Claimant, a nurse, should also be covered under the Contract and GIC/CSSG Policy. However, the testimony at trial regarding the issue to receive the greatest weight showed that N.C.C.I. class codes 8829 and 8833 apply to nurses working in convalescent or nursing homes and public and private hospitals.⁶ Claimant was a nurse

at new locations and would approve or deny coverage under the GIC/CSSG Policy as part of its ongoing underwriting process.)

⁶ The testimony of Becky Barnette, GIC's Vice-President for Underwriting and Manager of the PEO Unit, must receive the greatest weight. Her experience and expertise in underwriting workers compensation insurance coverage and understanding of PEO arrangements far outweighs that of any other witness having various roles in the insurance process who testified during trial and attempted to interpret the facts, Contract, or GIC/CSSG Policy at issue. Barnette has been employed in the insurance industry for more than 30 years, specifically working since 2014 as Vice-President of Underwriting and Manager of the PEO Unit for Guarantee Insurance Company, a monologue workers compensation insurance carrier. (Nov. 4, 2017 Trial Tr. at 8-18.) Barnette testified how workers compensation is a specialty coverage that is not underwritten the same way as other lines of coverage. Barnette noted how an underwriter in workers compensation must have a deep knowledge of the classification system for workers, and how to properly investigate and analyze companies' operations. No other witness who testified at trial had anywhere near this depth of experience in underwriting, much less specific knowledge of doing so in the specialize field of workers compensation, or of PEO arrangements which Condustral suggested provided a theory for coverage in this case. For instance, and without needlessly comparing and contrasting every witness who had ties with the insurance industry, Condustral's witness, Charles Edward Lee, Jr. testified as an insurance agent, first licensed in Georgia in 1986, and then received a property and casualty license in South Carolina in 1997, and handled Condustral's workers compensation coverage from 2003-2010. While Lee testified how an insurer would treat a worker who was treated by their insured as a 1099 and later determined to be an insured's employee in a direct insurance relationship, Lee also

at the Kirkland Correctional Institution at the South Carolina Department of Corrections, however, and properly classified under Code 7720.⁷ The Kirkland Correctional Institution was never submitted by Condustrual to CSSG as a location for workers under the Contract or consequently, requested as a location for coverage and approved by GIC under the GIC/CSSG Policy. The Policy and Endorsements do not include Kirkland Correctional Institute or any correctional facility for that matter.⁸ Finally, even Condustrual admitted that any time it sought to add a code and location for workers compensation coverage under the Contract, CSSG could have rejected that request under the Contract. (Trial Tr. 4 (Sears) at 65 and 128.)

Becky Barnette, Vice-President of Underwriting, moreover, testified that Claimant would not have been approved for coverage under the GIC/CSSG Policy, even if Condustrual had followed its contractual obligations and submitted Claimant for coverage by providing Claimant's proper class code and location of work under the Contract and then CSSG would have submitted Claimant properly for approval under the GIC/CSSG Policy. GIC has never covered any worker at a prison location and would not have done so in this instance either. (Nov. 4, 2017 Trial Tr. (Barnette) at pp. 78-79

Q. AND . . . WHILE YOU'VE BEEN V.P. OF UNDERWRITING FOR . . . GUARANTEE INSURANCE COMPANY, HAVE YOU EVER APPROVED A

testified that he did not know what would happen in the PEO or ASO arrangement. He did not have any exposure to that situation or scenario. (Nov. 6, 2017 Trial Transcript 6 at 60.) Other insurance representatives with various roles in the insurance process had similarly limited understanding of the underwriting process for workers compensation insurance policies and/or of PEO and ASO workers compensation insurance arrangements. (See GCI Trial Exs. 10-11 (N.C.C.I. Scopes Manual Codes 8829 and 8833) & November 4, 2017 Trial Tr. (Becky Barnette) at pp. 65-66, 77-78, 127-129 (discussing interpretation of Codes 8829 and 8833, and why they cannot be properly assigned to Claimant for underwriting purposes.)

⁷ (GCI Trial Exs. 12-13 (N.C.C.I. Scopes Manual Codes 7720 and 9410) & November 4, 2017 (Becky Barnette) Trial Tr. at 71-76 (discussing interpretation of Codes 9410 and 7720 and proper classification of Claimant as an employee under Code 770).

⁸ (GIC Trial Ex. 5 & APA 24 pp. 375-534 (the June 30, 2015 Policy); GIC Trial Ex. 7 & APA 51 pp. 796-825 (July 20, 2015 Endorsement deleting multiple employers); GIC Ex. ___ & APA 25 pp. 535-567 (July 30, 2015 clarifying and adding locations); Nov. 4, 2017 Trial Tr. pp. 79-80 (stating that Claimant, her Code Class, and the location of her employment were never submitted to GIC for review and approv[a]l).

WORKER AT A MAXIMUM LEVEL THREE SECURITY FACILITY?

A. ABSOLUTELY NOT. . . . WE WOULD NOT WRITE AN ACCOUNT WHOSE EXPOSURE WAS A CORRECTIONAL FACILITY." . . .

Q. ANY CORRECTIONAL FACILITY?

A. ANY CORRECTIONAL FACILITY.

Q. MAXIMUM SECURITY LEVEL THREE OR NOT?

A. CORRECT. [Nov. 4, 2017 Trial Tr. (Barnette) at pp. 93].

3. The GIC/CSSG Policy does not provide any indirect method for coverage, nor does any statute provide for the same.

Finally, the GIC/CSSG Policy does not provide any indirect method for coverage, nor does any statute provide for the same. (*See supra* discussion of Reformation of Contract and application of Section 40-68-10 et seq. of the South Carolina Code of Laws; *see also* November 4, 2017 (Becky Barnette) Trial Tr. at 80-81 (reiterating time and time again that the GIC/CSSG policy only insured CSSG employees, and Claimant, whether under the GIC/CSSG Policy or a PEO arrangement, was not a leased employee of CSSG).)⁹ Therefore, for all the reasons provided above, Claimant was not and cannot be covered under the GIC/CSSG Policy, and GIC is not liable for any losses suffered by Claimant.

⁹ The Commissioner cannot ignore either that GIC had issued in the past a high deductible workers compensation insurance policy to Condustral as its insured, and thus Condustral was well-aware of how to make itself a direct "insured." What is more, when Condustral was audited by GIC pursuant to this past policy, GIC discovered that Condustral had hundreds of 1099 workers. (GIC Trial Ex. 14 (Audit Worksheet) & November 4, 2017 (Becky Barnette) Trial Tr. at 86-92 (noting Condustral had a direct policy with Guarantee in the past, and the audit reveal hundreds of 1099 employees). The audit records show, however, that GIC deducted this 1099 payroll exposure, Condustral having classified the 1099 exposure as "OCIP" or an "owner-controlled insurance program," and indicating that these employees were insured by the South Carolina Department of Corrections, among other governmental agencies, and noting that the board of directors at Condustral represented these governmental agencies do not provide certificates of insurance. (GIC Trial Ex. 14 (Audit Worksheet) & November 4, 2017 (Becky Barnette) Trial Tr. at 92-100, 116-117; *see also* CSSG Trial Ex. 5 ACORD Standard Commercial Insurance Applications and Form 130 & November 4, 2017 (Becky Barnette) Trial Tr. at 104-109 (expressing the importance of honesty in insurance application process for underwriting and noting that Condustral did not represent that it had any 1099 employees or any 1099 employees working under class code 7720 for purposes of applying for insurance)

J. Transfer of Liability to the South Carolina Uninsured Employers' Fund.

Section 42-1-415 states that transfer of liability may be made to the South Carolina Uninsured Employers' Fund (herein after referred to as SCUEF) when the contractor or owner collects documentation of insurance at the time that the contractor is engaged to perform work.

A contract to provide nursing staff was entered into between Medustrial and SCDC on or about September 11, 2008. (APA 254-259) There is no evidence in the record that a Certificate of Insurance from Medustrial was requested or provided to SCDC at this time. Our Supreme Court found in Hardee v. McDowell, 381 S.C. 445, 673 S.E2d 813 (2009) that the express language of the statute in the phrase "engaged to perform work" means each time that a subcontractor is actually hired to perform work. On September 11, 2008 SCDC did not verify coverage of insurance of Medustrial as required by Section 42-1-415. Further, there is no verification of insurance in 2008.

The terms of the contract provided for a yearly renewal. SCDC did not verify coverage on each renewal. The initial term of the agreement was for one (1) year, and that at the conclusion of each one year term, the Agreement will automatically renew for one year unless notice of intent not to renew was provided. If the renewal terms of the Agreement are considered separate dates of hire the record is devoid of evidence that SCDC sought or received proof of insurance on any of the actual renewal dates. There is not a certificate of insurance for September 11, 2009.

The next renewal period is September 11, 2010. A certificate of insurance was issued on April 30, 2010. However, there is no evidence as to when this certificate was obtained. Even if it was obtained on April 30, 2010, it could not apply to the contract renewal date of September 11, 2010. Hopper v. Terry Hunt Construction, 383 S.C. 310, 680 S.E.2d 1 (2009). The contract

renewed for the years from 2011 through the date of accident. If the dates of renewal are considered new dates of hire, then SCDC did not have a certificate of insurance for these dates.

SCDC and Accident Fund argue that April 30, 2010 certificate of insurance should be considered proof of insurance from April 30, 2010 forward due to the language of the certificate. Assuming that the certificate was obtained on April 30, 2010, the certificate lists the insured as AMS Staff Leasing l/c/f: Condustrail, Inc. The contract of SCDC is with Medustrial. Although, Medustrial is a trade name for Condustrail, there is no indication that SCDC knew of Condustrail in 2010. If the certificate was received in 2010, they could not rely on it as proof of coverage for Medustrial.

Even if the certificate of insurance was obtained at the hiring and had the party known to SCDC, Medustrial, was listed, SCDC could not rely on the certificate on its face. Although, there is language about the certificate being good for as long as the account being in good standing, it is clear that the proof of policy period is only for April 1, 2010 to April 1, 2011. The additional certificates of insurance in evidence were obtained after the date of accident.

Based on the record as a whole, including testimony of Tommy Burgess, which I find to be credible and the dates reflected on the certificates, I find that liability of this claim cannot be transferred to the SC Uninsured Employers' Fund per Section 42-1-415.

K. Transfer of Liability upstream to the South Carolina Department of Corrections.

As I find that Claimant was an employee of Condustrail at the time of her accident, I find that they are primarily responsible for the provision of medical treatment and payment of compensation to Claimant pursuant to the South Carolina Workers' Compensation Act as a result of her September 5, 2015 work accident. However, for the reasons set forth above, I find that Condustrail failed to maintain workers' compensation insurance covering Claimant at the time of

the accident. As I also find that Defendant SCDC was a statutory employer of Claimant on the date of injury and that liability cannot properly be transferred to the UEF pursuant to S.C. Code Ann. §42-1-415, I find that liability under the South Carolina Workers' Compensation Act for injuries sustained by Claimant as a result of her September 5, 2015 work accident transfers upstream to the SCDC and its carrier SAF pursuant to S.C. Code Ann. §§42-1-400 through 42-1-450. However, Defendants SCDC and SAF retain all rights for indemnification against Condustrual for any and all compensation, including medical and other expenses, paid, or to be paid by Defendants SCDC and SAF set forth in S.C. Code Ann. §42-1-440. Defendants SCDC and SAF are also entitled to pursue any other such right to indemnification or recovery under any statute or other theory of law.

L. Indemnity

CSSG, and derivatively The SC Guaranty Association defending GIC as CSSG's insurer, argue that under the "Indemnity" provision of the Contract and the "Recovery from Others" paragraph of the GIC Policy, Condustrual is liable to CSSG and SC Guaranty Association for their attorney's fees, costs, and expenses. Under the statutes and common law that apply to this Worker's Compensation Commission, however, the undersigned finds that it does not have the jurisdiction to decide this particular contractual issue. The Commission only has jurisdiction to determine the issue of coverage in this forum and finds that there are other forums in which CSSG and the SC Guaranty Association can pursue these claims.

SINGLE COMMISSIONER'S CONCLUSIONS OF LAW

1. South Carolina uses a four-factor test to determine whether a worker is an employee or an independent contractor. All four factors are weighed equally to determine whether the putative employer possesses the right of control—which is the lynchpin of the analysis. The

factors are: 1) direct evidence of the right or exercise of control; 2) furnishing of equipment; 3) right to fire; and 4) method of payment. Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 676 S.E.2d 700 (2009). In the instant case, the factors preponderate in favor of status as an employee.

2. Claimant sustained an injury by accident arising out of and in the course of her employment on September 5, 2015, within the meaning of S.C. Code Ann. § 42-1-160 (2007).

3. Claimant is entitled to additional medical treatment necessary to lessen the period of disability. S.C. Code Ann. § 42-15-60 (2005); Dodge v. Bruccoli, Clark, and Layman, Inc., 518 S.E.2d 593 (S.C. 1999); Dykes v. Daniel Constr. Co., 202 S.E.2d 646 (S.C. 1974). When the employee has not reached maximum medical improvement, medical care to treat injuries related to the injury by accident tends to lessen the period of disability. Additional medical care after reaching maximum medical improvement must be provided if it tends to lessen the period of disability.

4. During any period of disability resulting from the injury, the employer, at his own option, may continue to furnish or cause to be furnished, free of charge to the employee, and the employee shall accept, an attending physician and any medical care or treatment that is considered necessary by the attending physician, unless otherwise ordered by the commission for good cause shown. S.C. Code Ann. § 42-15-60 (2007).

5. The employer's representative shall provide and pay for medical care while a claimant is receiving or entitled to receive temporary compensation benefits. Reg. 67-509. Medical, surgical, hospital and other treatment which will tend to lessen the period of disability within the judgment of the Commission shall be provided by the employer. For good cause shown, the Commission may order such further medical, surgical, hospital or other treatment as may in the discretion of the Commission be necessary. S.C. Code Ann. § 42-15-60 (2007). The Commission has discretion to

designate the authorized treating physician and require the employer's representative to pay for causally related treatment. Id.; Martin v. Rapid Plumbing, 369 S.C. 278, 631 S.E.2d 547 (Ct. App. 2006).

6. Disability is defined 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." 25A S.C. Reg. 67-502 (1997). Claimant was disabled within the meaning of the Act from September 6, 2015 until September 30, 2016.

7. Condustrial failed to acquire workers compensation coverage for Claimant under its Contract with Countrywide Staffing Solutions, Inc., and reformation of contract is not warranted under the common law or any statutory law. Therefore, Countrywide Staffing Solutions, Inc. is not liable for any losses suffered by Claimant.

8. Condustrial was not an insured under the GIC/CSSG Policy. CSSG never reported Claimant for coverage under the GIC/CSSG Policy. Claimant was not an employee of record of CSSG, nor among the workers in class codes and locations approved by GIC under the GIC/CSSG Policy. Therefore, the Guaranty Insurance Company is not liable for any losses suffered by Claimant.

ORDER OF THE APPELLATE PANEL

In an appellate review, the Appellate Panel shall, pursuant to S.C. Code Ann. § 42-17-50, review the award, weigh the evidence as presented before the Single Commissioner, and, if good grounds be shown, make its own Findings of Fact and reach its own Conclusions of Law consistent with or inconsistent with those of the Single Commissioner.

After careful review and consideration of all the evidence presented to the Single Commissioner including the live testimony, the APA submissions, any exhibits, the Commission

file, any proffered evidence, the parties' appellate and respondent briefs, and oral argument before us, the Appellate Panel rules as follows:

1. It is the decision of the Appellate Panel, by unanimous vote, that all of the Single Commissioner's Findings of Fact and Conclusions of Law are correct as stated, except for the findings and conclusions in Section D related to Claimant's Average Weekly Wage and Compensation Rate. In accordance with the Supreme Court's opinion in Fox v. Newberry Cnty Memorial Hosp., 319 S.C. 278, 461 S.E.2d 392 (1995), the Single Commissioner's Findings of Fact and Conclusions of Law, except for the findings and conclusions in Section D related to AWW and CR, are hereby **AFFIRMED AND ADOPTED** by the Appellate Panel as if repeated verbatim herein.

2. The Appellate Panel **REVERSES** the Single Commissioner's Findings of Fact and Conclusion of Law regarding the Average Weekly Wage/Compensation Rate in Section D of the Single Commissioner's Order cited in its entirety above. The Appellate Panel finds and concludes the correct Average Weekly Wage is \$762.21 and the Compensation Rate is \$508.17. The goal of wage calculation for compensation purposes is to fairly approximate the actual earnings the injured party would be earning but for the injury. See Sellers v. Pinedale Residential Center, 350 S.C. 183, 564 S.E.694 (Ct. App. 2002). In this case, 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.

The Panel specifically rejects the arbitrary framing of this issue by the parties because neither methodology fairly approximates Claimant's actual earnings, which is the ultimate goal of

wage calculation for compensation purposes. Instead, the Panel has employed an analysis of Claimant's income tax returns to discern and approximate her "actual earnings" in accordance with South Carolina law. In Avins supra, the Court noted the unequivocal rule in South Carolina that mileage deductions should NOT be included in wage calculations. See also Wright v. Wright, 306 S.C. 331, 411 S.E.2d 829 (Ct. App. 1991) (mileage deductions taken on his federal income tax returns are not includable as income for calculation of benefits). The Court also cited favorably a case from North Carolina holding that expenses incurred in producing revenue should be excluded from earnings. See Baldwin v. Piedmont Woodyards, 58 N.C. App. 602, 293 S.E.2d 814 (N.C. Ct. App. 1982). Applying these principles, the Panel can extrapolate Claimant's "earnings" from her 2014 Schedule C by excluding mileage deductions and expenses unequivocally incurred to generate the gross payments.

Claimant's 2014 Schedule C reflects gross income/revenue of \$56,180.00. Claimant deducted \$11,020.00 for mileage and vehicle deductions, which per the aforementioned case law clearly cannot be included as earnings. That leaves revised net earnings of \$45,160.00. Claimant's Schedule C also deducts numerous other business expenses, some of which may or may not have been directly incurred, or only partially incurred, to generate her gross income. However, some of Claimant's deductions, including—\$2840.00 for insurance, \$900.00 for contract labor, \$220.00 for continuing education requirements, and \$1565.00 for nursing uniforms—were clearly only incurred as a result of her occupation as an LPN and to produce her income/revenue. This yields unequivocal net earnings of \$39,635.00, which divided by 52 weeks = an AWW of \$762.21 and a CR of \$508.17.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Decision and Order of the Single Commissioner is **AFFIRMED IN PART AND REVERSED IN PART!**

The South Carolina Court of Appeals

Rachel J. Turner, Employee, Appellant-Respondent,

v.

**Medustrial Healthcare Staffing Service and Condustrual,
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 Condustrual, Inc. f/k/a Medustrial Healthcare
Staffing Service, Employer, is the Respondent-Appellant.**

Appellate Case No. 2021-000633

ORDER

Appellant-Respondent's motion for partial remand to the Workers' Compensation Commission to submit additional and newly discovered evidence pursuant to S.C. Code Ann. Reg. 67-707(A) is granted. Counsel for Appellant-Respondent is ordered to file the motion with the Commission within twenty days of the date of this order and provide an update to the clerk of this court every thirty days thereafter. This appeal will be held in abeyance pending the Commission's resolution of this matter.



FOR THE COURT

Columbia, South Carolina

cc:

Stephen Benjamin Samuels, Esquire

George D. Gallagher, Esquire

Beth B. Richardson, Esquire

Grady Larry Beard, Esquire

James Paul Newman, Jr., Esquire

Erin Farrell Farthing, Esquire

Lisa C. Glover, Esquire

FILED
Sep 02 2021

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
JUDICIAL CONFERENCE DECISION AND ORDER

Rachel Turner v SC Department of Corrections

SCWCC: 1514359

Commissioner: James

Panel: Beck, Campbell, McCaskill

This matter was heard before the South Carolina Workers' Compensation Full Commission in Judicial Conference on a **Motion to Submit Additional and Newly Discovered Evidence**. The Commissioners considered the matter and ordered the matter handled in the following manner:

IT IS, THEREFORE, ORDERED the pending appeal of the Administrative Order of the Commission is hereby;
_____ Dismissed as Interlocutory. _____ Set for Oral Argument.

IT IS, THEREFORE, ORDERED the pending motion be, and hereby is;
_____ Granted. ☒ Denied. _____ Dismissed _____ Preserved for hearing

BEFORE THE;
_____ Hearing Comm. _____ Jurisdictional Comm. _____ Full Commission.

IT IS, THEREFORE, ORDERED this matter be, and hereby is; remanded to take such action and enter an Order consistent with the Court's directive.

_____ Remand to Panel as indicated below.
_____ Barden _____ James _____ Taylor
_____ Beck _____ Campbell _____ Wilkerson
_____ McCaskill

_____ Remand for Order consistent with the Order of the Court.
_____ Remand to the Hearing Commissioner.
_____ Remand to the Jurisdictional Commissioner.
_____ Other: _____

_____ Remand: _____ Panel Oral Argument. _____ En Banc Oral Argument.

AND IT IS SO ORDERED.


T. Scott Beck, Chair
For the Commission

Columbia, South Carolina

9/26/2021 Date

CONCURRING:

Commissioner T. Scott Beck
Commissioner Susan S. Barden
Commissioner Melody James
Commissioner Aisha Taylor
Commissioner Avery Wilkerson
Commissioner Michael Campbell
Commissioner Gene McCaskill

NOT PARTICIPATING:

☒
☒
☒
☒

DISSENTING:

CERTIFICATE OF SERVICE

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

This 20th day of September, 2021.

By: Valerie D. Deller
SCWCC Judicial Department



Claimant's Name: RACHEL J. TURNER SSN: _____ Employer's Name: MEDUSTRIAL HEALTHCARE STAFFING SERVICE
Address: 135 VILLAS COURT, APT: A Address: 810 DUTCH SQUARE BLVD, STE: 119
City: WEST COLUMBIA State: SC Zip: 29170 City: COLUMBIA State: SC Zip: 29210
Home Phone: (707) 803-1963 Work Phone: 1220 Insurance Carrier: UNKNOWN
Preparer's Name: LAKESHA JEFFRIES, ESQUIRE Law Firm: JEFFRIES LAW FIRM, LLC Preparer's Phone #: (803) 531 - 6300
UNABLE TO LOCATE

A claim for workers' compensation benefits is made based on the following grounds:

Date of Injury or Illness: 09/05/2015

☒ Injury ☐ Illness ☐ Repetitive Trauma ☐ Occupational Disease ☐ Physical Brain Injury ☐ Concurrent Jurisdiction

1. The claimant sustained an injury to HEAD, BACK, PTSD, RIGHT ARM & RIGHT ELBOW on SEPTEMBER 5, 2015, in RICHLAND county, state of SOUTH CAROLINA.

2. Body part(s) affected are: HEAD, BACK, PTSD, RIGHT ARM & RIGHT ELBOW.

Briefly describe how the accident occurred. CLAIMANT WAS ASSAULTED AND HELD HOSTAGE BY TWO INMATES FOR SEVERAL HOURS.

3. Both the claimant and the employer were subject to the South Carolina Workers' Compensation Act at the time of injury.
4. The relationship of employer and employee existed at the time of injury.
5. At the time of the injury the claimant was performing services arising out of and in the course of employment.
6. Notice of the accidental injury was given to the Employer on 09/05/2015 in the following manner:
CLAIMANT REPORTED INJURY TO SUPERVISOR.

7. Due to injury, the claimant is in need of (check one):

☒ (a) medical examination and treatment for: HEAD, BACK, PTSD, RIGHT ARM & RIGHT ELBOW.

☒ (b) additional medical examination and treatment for: SEE 7 (A).

8. Due to injury, the claimant requests temporary total disability benefits because of lost compensable time from work and wages for the period of:
09/05/2015 - FORWARD.

9. Due to the injury, the Claimant has permanent disability of the following nature and extent (check one):

☒ (1) General Disability: ☐ Total ☒ Partial ☒ (2) Specific Disability: ☐ Total ☒ Partial ☐ (3) Wage Loss

- 9a. ☐ A determination of permanent disability is premature at this time.

- ☐ 10. Due to the injury, the Claimant has a serious bodily disfigurement consisting of:
N/A

- 10a. At the time of the injury, the Claimant was paid weekly wages of \$180, and demands accounting of days worked and wages earned as provided by law.

- 10b. Give names and addresses of all employers for whom the Claimant has worked since the date of the accident:
MEDUSTRIAL HEALTHCARE STAFFING SERVICE, 810 DUTCH SQUARE BLVD, SUITE: 119, COLUMBIA, SC 29210

11. Further grounds or unusual aspects of claim:
N/A

- 11a. List names and addresses of all physicians or other medical specialists who have seen or treated the Claimant as a result of the accident:
PALMETTO HEALTH RICHLAND, 5 MEDICAL PARK DR., COLUMBIA, SC 29203; SPRINGDALE FAMILY PRACTICE, 3316 PLATT SPRINGS RD., WEST COLUMBIA, SC 29170; CHIROPRACTIC LIFESTYLES, 2230 AIRPORT BLVD., WEST COLUMBIA, SC 29170.

- 11b. To the best of your knowledge, did you have any prior permanent disability? _____
If yes, describe: _____

12. Appropriate benefits as provided by the Act for the above grounds and other relief as the Workers' Compensation Commission may direct as just and proper.

- ☒ 13a. I am filing a claim. I am not requesting a hearing at this time.

14. Estimated time needed for hearing: N/A

- ☐ 13b. I am requesting a hearing. A \$25 fee is required.

☐ Mediation

- ☐ a. Mediation is requested to be ordered pursuant to Reg. 67-1801 B.
☐ b. Mediation is required pursuant to Reg. 67-1802.
☐ c. Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.
☐ d. Mediation has been conducted by a duly qualified mediator and resulted in an impasse.

Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to SCWCC, CLAIM DEPT. & MEDUSTRIAL HEALTHCARE STAFFING SERVICE.

Address: SCWCC, CLAIMS DEPT., PO BOX 1715, COLUMBIA, SC 29202-1715 AND 810 DUTCH SQUARE BLVD., SUITE: 119, COLUMBIA, SC 29210, on the 1ST day of OCTOBER, 2015, by: ☒ first class postage ☐ certified mail ☐ personal service.

I verify the contents of this form are accurate and true to the best of my knowledge.

L. Jeffries
Preparer's Signature

Jeffries
Attorney
Title

jeffries@jeffrieslawsc.com
Email

OCTOBER 1, 2015
Date

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
Rachel J. Turner,)
Employee,)
vs.)
SC Department of Corrections –)
Kirkland, Medustrial Healthcare)
Staffing Services, Condustrual, Inc.,)
and/or Countrywide Staffing)
Solutions Group, Inc.,)
Employer(s),)
and)
State Accident Fund, South Carolina)
Property and Casualty Insurance)
Guaranty Association on behalf of)
the Guarantee Insurance Company,)
and/or SC Workers' Compensation)
Uninsured Employers' Fund,)
Carrier,)
Defendants.)

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION
COMMISSION

WCC FILE NO: 1514359

**APPELLANT CONDUSTRUAL'S
FULL COMMISSION BRIEF**

STATEMENT OF THE CASE

I. Background and Facts

This matter stems from alleged physical and mental injuries Claimant sustained on September 5, 2015 while working as a licensed professional nurse (LPN) at the Kirkland Correctional Institution on Broad River Road in Columbia, South Carolina. ("Kirkland"). Specifically, Claimant was taken hostage and assaulted by inmates in the infirmary. At the time in

The former may go to the employer's state of mind, while the latter is only relevant for purposes of the parties in privity and their respective contractual obligations under the agreement in question. In short, Condustral was not "holding" Claimant out as an employee via its agreement with SCDC like the employer in Sellers was.

Finally, Claimant's interpretation of the agreement between SCDC and Condustral is erroneous anyway. Claimant asserts the agreement exclusively requires Condustral to assign employee nurses of Condustral to work at SCDC. The agreement states Condustral will "provide qualified nursing professionals" to SCDC under the "terms and conditions of this Agreement." The contract does not state that Condustral cannot or will not assign independent contractor nurses to SCDC. As such, Condustral is free to assign employee nurses and/or independent contractor nurses. The agreement provides that "RN's, LPN's, assigned to SCDC by Contractor are employees of Contractor and not SCDC." The use of "are" in this context, instead of "must be" or "shall be," is significant because SCDC is clearly more concerned about deflecting liability arising out of an employment relationship with SCDC than the nature of the relationship between Condustral and its nurses. This is evidenced by the subsequent language in that paragraph regarding Condustral's responsibility for wage payment issues, working conditions, payroll tax withholdings, other administrative functions, unemployment insurance, and, of course, workers compensation coverage.

The contract further provides that Condustral "shall provide workers compensation insurance coverage for Contractor's employees who are assigned to SCDC." Again, this is not a prohibition against assignment of independent contractor nurses; this provision only means that any employee nurses assigned to SCDC will be covered under the workers compensation laws. Indeed, Condustral's provision of independent contractor nurses also alleviates SCDC's concerns because

an independent contractor would not even be subject to the workers compensation laws. The absence of any term or condition mandating that nurses assigned to SCDC shall be under the direction or control of Condustrial is further proof that the contract permits Condustrial's use of independent contractor nurses. Again, SCDC's manifest concern is employment and worker's compensation liability, which is obviated by the assignment of an independent contractor nurse. Finally, regardless of the intent of SCDC and Condustrial when it was executed in 2008, the subsequent course of performance between the parties in the seven-year interim leading up to Claimant's accident ratifies Condustrial's provision of independent contractor nurses. SCDC could have objected to the arrangement but instead acquiesced. The notion that SCDC thought Condustrial's nurses is undercut by the fact SCDC never requested certificates of insurance from Condustrial proving the purported nurses were covered under the Act. The reason for this failure is obvious- they believed the contract nurses were independent contractors not subject to the Act. To assert otherwise at this point is not credible. For these reasons, the Commissioner's reliance upon, and interpretation of, the SCDC/Condustrial agreement was erroneous.

For all these reasons, the Hearing Commissioner's finding that Claimant was an employee under the Act must be **REVERSED**. The Full Commission should enter its own finding that Claimant was an independent contractor based on the preponderance of the evidence in the case. Her claim for compensation and medical benefits should be **DENIED** accordingly.

II. Claimant's AWW and compensation should not be based solely on gross payments received when she incurred substantial business expenses to generate her income.

The Hearing Commissioner found that Claimant's AWW and compensation are \$1130.86 and \$753.94, respectively. This calculation is based on Claimant's gross payments received in the four quarters prior to the quarter in which she was injured, specifically, the third and fourth quarters of

STATE OF SOUTH CAROLINA
BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 1514359

Rachel J. Turner,)
)
Claimant,)
)
vs.)
)
Condustrual, Inc. d/b/a Medustrial,)
)
Employer,)
)
and)
)
Countrywide Staffing Solutions Group,)
Inc.; South Carolina Property and Casualty)
Insurance Guaranty Association on behalf)
of Guarantee Insurance Company; The)
State Accident Fund; South Carolina)
Workers' Compensation Uninsured)
Employers' Fund,)
)
Carrier(s) and/or the Defendants.)
_____)

**APPELLANT SOUTH CAROLINA
PROPERTY AND CASUALTY
INSURANCE GUARANTY
ASSOCIATION ON BEHALF OF
GUARANTEE INSURANCE
COMPANY'S FULL COMMISSION
BRIEF**

STATEMENT OF THE CASE

This is an appeal by South Carolina Property and Casualty Insurance Guaranty Association on behalf of Guarantee Insurance Company ("Guarantee") from the Decision and Order of Commissioner Melody L. James ("the Single Commissioner"), filed on July 31, 2020. This brief is submitted in support of Guarantee's appeal.

This claim was before the South Carolina Workers' Compensation Commission pursuant to Claimant's Form 50 and the defendants' Form 51s in response. The Single Commissioner held a hearing over multiple days beginning on July 24, 2017 and concluding on November 6, 2017. Three years later, the Single Commissioner issued the July 21, 2020 Decision and Order, finding

among other things not the subject of this appeal, that all four factors of the four-factor test to determine whether a worker is an employee or independent contractor preponderate in favor of Claimant's status as an employee, Claimant developed posttraumatic stress disorder ("PTSD") as a direct result of the assault and surrounding injuries and needs ongoing treatment for PTSD, Claimant was disabled within the meaning of the Act from September 6, 2015, until September 30, 2016, and Claimant's AWW is \$1,130.86 and the compensation rate is \$753.94.

STANDARD OF REVIEW

As an appellate body, the Full Commission is given great discretion to review decisions made at the Single Commissioner level and to make its own findings and conclusions. Although it is logical for the Full Commission, which did not have the benefit of observing the witnesses, to give weight to the Single Commissioner's opinion, the Full Commission is empowered to make its own findings of fact and reach its own conclusions of law consistent or inconsistent with those of the Single Commissioner. *McGuffin v. Schlumberger-Sangamo*, 307 S.C. 184, 414 S.E.2d 162 (1992). "The final determination of witness credibility and the weight to be accorded evidence is left to the Full Commission." *Id.* at 186, 414 S.E.2d at 163. Accordingly, the Full Commission is the ultimate finder of fact and is not bound by the Single Commissioner's Findings of Fact. *Lanford v. Clinton Cotton Mills*, 204 S.C. 423, 30 S.E.2d 36 (1944); *Linnen v. Beaufort Co. Sheriff's Dep't*, 305 S.C. 341, 408 S.E.2d 248 (Ct. App. 1991). This Defendant requests that the Full Commission now exercise its discretion in reviewing the evidence presented at the hearing to provide an independent decision as to whether the underlying award, and specifically the issues raised on appeal, are supported by the greater weight of evidence or the law of South Carolina.

This Defendant submits that the Single Commissioner made numerous errors of law which must be reversed by the Full Commission. The ten grounds for Defendant Guarantee's appeal are

set forth in detail in this Defendant's Form 30 Notice of Appeal to the Full Commission. In summary, Guarantee requests that the Full Commission reverse certain portions of the Decision and Order of the Single Commissioner because the Single Commissioner erred in finding and concluding (1) all four factors of the test used by South Carolina to determine whether a worker is an employee or an independent contractor preponderate in favor of Claimant having the status of employee and concluding Claimant was an employee; (2) the primary method of calculating average weekly wage ("AWW") should be employed, such that the AWW is \$1,130.86 and the compensation rate is \$753.94; (3) Claimant developed PTSD as a direct result of the assault and surrounding injuries; and (4) Claimant was disabled within the meaning of the Act from September 6, 2015, until September 30, 2016.

ARGUMENT

I. THE SINGLE COMMISSIONER ERRED IN FINDING AND CONCLUDING ALL FOUR FACTORS OF THE TEST USED BY SOUTH CAROLINA TO DETERMINE WHETHER A WORKER IS AN EMPLOYEE OR AN INDEPENDENT CONTRACTOR PREPONDERATE IN FAVOR OF CLAIMANT HAVING THE STATUS OF EMPLOYEE AND CONCLUDING CLAIMANT WAS AN EMPLOYEE.

"Under settled law, the determination of whether a claimant is an employee or independent contractor focuses on the issue of control, specifically whether the purported employer had the right to control the claimant in the performance of his work." *Ferguson v. New Hampshire Ins. Co.*, 412 S.C. 203, 212, 771 S.E.2d 851, 856 (Ct. App. 2015) (quoting *Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 676 S.E.2d 700 (2009)). "In evaluating the right of control, the Court examines four factors which serve as a means of analyzing the work relationship as a whole: (1) direct evidence of the right or exercise of control; (2) furnishing of equipment; (3) method of payment; (4) right to fire." *Id.* "[T]he common law factors—right or exercise of control, method of payment, furnishing of equipment and right to fire—should be evaluated in an

evenhanded manner in determining whether the questioned relationship is one of employment or independent contractor.” *Wilkinson*, 382 S.C. 295, 676 S.E.2d 700.

Despite the overwhelming evidence to the contrary, the Single Commissioner found that Claimant was an employee of Condustral/Medustrial.¹ However, the greater weight of the evidence supports a finding that Claimant, in fact, was an independent contractor, and the Single Commissioner erred in so finding claimant to be an employee.

A. The direct evidence of the right or exercise of control factor favors finding Claimant to be an independent contractor.

The Single Commissioner erred in finding the direct evidence of right to control overwhelmingly indicates an employee/employment relationship between Claimant and Condustral/Medustrial. As an initial matter, this case is distinguishable from *Shatto v. McLeod Reg'l Med. Ctr.*, 406 S.C. 470, 753 S.E.2d 416 (2013). Unlike the claimant in *Shatto*, here, Claimant attempted to use the requirements of the facility where she performed her nursing duties, South Carolina Department of Corrections (“SCDC”), as a conduit to make the placement agency, Condustral/Medustrial, her employer.² However, that is not how South Carolina law operates. In *Shatto*, the Court analyzed whether the hospital where the nurse performed her nursing duties—not the staffing agency—was the claimant’s employer. Here, Claimant admitted that she never sought to be an employee SCDC. Yet, the Single Commissioner erroneously used requirements of SCDC as justification to find that Condustral exercised control over Claimant’s work, which is simply contrary to the documents and testimony in the record. Moreover, the requirements of SCDC, even if somehow imputed to Condustral/Medustrial, do not rise to the level of control

¹ The various witnesses use “Condustral” and “Medustrial” interchangeably throughout the hearing testimony.

² See generally Claimant’s cross-examination of Tony Durham and Tom Sears.

required under South Carolina law.

i. **Condustral/Medustrial's brokerage model with regard to Claimant is inapposite to a finding of control by the company.**

The testimony and documentation in evidence preponderates in finding Claimant was not an employee of Condustral because Condustral did not exercise sufficient control over Claimant to create an employment relationship. Courts across the country, including North Carolina, have had the opportunity to determine whether similar nursing brokerages were employers and created an employment relationship with the nurses they placed at various facilities. Those courts agree that the nursing brokerage in those arrangements were not employers. "Because South Carolina adopted large portions of the North Carolina Workers' Compensation legislation, we rely on North Carolina precedent in Workers' Compensation cases." *Stephen v. Avins Const. Co.*, 324 S.C. 334, 340, 478 S.E.2d 74, 77 (Ct. App. 1996).

In *Rhoney v. Fele*, 134 N.C. App. 614, 618-19, 518 S.E.2d 536, 540 (1999), the Court of Appeals of North Carolina reviewed its state's workers' compensation precedent and determined that a nurse in a similar nursing brokerage was an independent contractor and not an employee of the staffing company, Nursefinders. The Court reasoned that the following factors support a finding that the nurse was an independent contractor: (1) as a registered nurse, he was engaged in an independent profession; (2) the nurse could and did provide nursing services through other placement services; (3) the nurse exercised his duties and responsibilities as a nurse at the hospital, free from supervision by Nursefinders; (4) the nurse's work through Nursefinders was sporadic rather than regular; (5) the nurse was able to accept or reject a job assignment offered by Nursefinders; and (6) Nursefinders did not provide the nurse with valuable equipment. As to control, the Court stated

These factors demonstrate that while Nursefinders exercised control over extraneous aspects of [the nurse]'s work, such as the dates and times when work was offered and collection of his salary, Nursefinders exercised no control over [the nurse]'s nursing, the function for which hospitals sought him. To the contrary, [the nurse] was a free agent who could and did maintain similar arrangements with other suppliers of medical personnel, and who could and did accept or reject work offered to him through Nursefinders, as suited him. Conversely, Nursefinders could not compel [the nurse] to take any particular assignment. Once [the nurse] accepted work proposed by Nursefinders, [the nurse] was not under any control by Nursefinders while working. Apparently the relationship could be terminated at will by either party at any time. Thus, Nursefinders' role was similar to that of a broker or other middleman. We therefore agree with the trial court that, as a matter of law, Nursefinders exercised insufficient control to create an employee-employer relationship between the nurse and Nursefinders.

Id. at 619, 518 S.E.2d at 540-41.

In *Health Care Assocs., Inc. v. Oklahoma Employment Sec. Comm'n*, 2001 OK 50, ¶¶ 2-3, 26 P.3d 112, 113 (2001), Health Care Associates, Inc. ("HCA") was a nurse placement agency that appealed a decision of the Employment Security Commission assessing unemployment taxes against it. HCA considered the nurses to be independent contractors, rather than employees, and paid no unemployment taxes. *Id.* HCA placed nurses on a part-time or temporary basis at hospitals and nursing homes. *Id.* It required nurses to be licensed, but otherwise exerted no supervisory control over them. *Id.* HCA did not provide benefits, insurance, healthcare, vacation pay, retirement, uniforms, or equipment. *Id.* The individual nurses were responsible for continuing professional education and professional licenses. *Id.* Each nurse contracted separately with HCA. *Id.* None of the nurses were required to accept any assignment to a particular facility and could work as little or as much as they chose. *Id.* The healthcare facility where the nurse was placed gave all instructions concerning nursing duties based on the facility's internal policies and procedures. *Id.* Further, none of the HCA owners or staff had any nursing qualifications or

expertise in nursing. *Id.* Based upon these facts, the Supreme Court of Oklahoma determined HCA's relationship with the nurses lacked direction and control sufficient for an employment relationship. *Id.* at ¶ 10, 26 P.3d at 115. The Court held “[t]he freedom from control by HCA along with the fact that the nurses worked in an independently established profession demonstrates that HCA is a broker of the services of individual contractors.” *Id.*

Likewise, in *Trauma Nurses, Inc. v. Bd. of Review, New Jersey Dep't of Labor*, 242 N.J. Super. 135, 144-45, 576 A.2d 285, 290 (App. Div. 1990), Trauma Nurses, Inc. (“TNI”) was a nurse placement agency that appealed the determination of the Board of Review of New Jersey Department of Labor that a claimant was an employee of the agency. *Id.* The Superior Court of New Jersey found the claimant nurse was an independent contractor of the nursing broker. *Id.* The Court found the following factors to be determinative in concluding the nurse was an independent contractor who was not eligible for benefits: (1) the nurses chose on a monthly basis the hospitals and shifts they wished to work and could work as little or as much as they wished; (2) the nurses were free to work elsewhere, they could utilize the services of other brokers or seek work independently, they could decline work offered by TNI and choose to work elsewhere; (3) the nurses were not obliged to comply with any rules, practices or procedures set by TNI in performing their professional duties, instead, they were required to comply with the rules of the particular institution in which they were placed; (4) TNI did not issue any instructions or require nurses to report to its offices; (5) TNI exercised no supervisory responsibility over the nurses, instead, the nurses were supervised by their supervisors at the particular hospitals where they were placed; (6) TNI offered no training to nurses, instead, the nurses were obliged to continue their education on their own and at their own expense; (7) TNI did not furnish any supplies, equipment or uniforms to its nurses; and (8) TNI did not provide nurses with any fringe benefits, such as sick

pay, vacations, pensions or bonuses and the nurses were responsible for their insurance coverage. *Id.*

Similarly, in *Contract Mgmt. Servs., Inc. of Texas v. State ex rel. Dep't of Labor, Office of Employment Sec.*, the Court held a nurse was an independent contractor and not an employee of a nursing placement agency, CMSI-TX. 745 So. 2d 194, 199 (La. Ct. App. 1999). When analyzing control, the Court held CMSI-TX did not control the nurse's performance of her nursing services. *Id.* Instead, the facility where the nurse was placed controlled this performance and therefore the element of control was not met to establish an employment status. *Id.* The Court determined that although the placement agency paid her an hourly rate based on reports received from the nurse and the hospital where she was placed, could reduce her rate of pay for attendance violations, and could evict her from housing if she was discharged for cause or she quit before the end of her contract, "these elements of control held by CMSI-TX with respect to [the nurse] are not indicia of control or direction over the performance of the services that [the nurse] was providing under the contract—nursing services." *Id.*; see also *HRP of Tennessee, Inc. v. State, Dep't of Employment Sec.*, No. E2005-01176-COA-R3CV, 2006 WL 1763673, at *1 (Tenn. Ct. App. June 28, 2006) (holding that nurses in a similar nurse registry business were independent contractors).

Here, like the brokerages in *Rhoney, Health Care Assocs., Trauma Nurses, Inc., Contract Mgmt. Servs.*, and *HRP of Tennessee*, the overwhelming evidence in the record demonstrates Condustrail did not consider Claimant to be an employee, never treated her as an employee, and did not exercise control over Claimant. See, e.g., **Condustrail APA p. 42-47** (Condustrail's completed "Questionnaire for the Purpose of Determining the Employment Relationship of Workers by Request of S.C. Employment Security Commission" asserting that the nurses similar to Claimant were independent contractors and that the Employment Security Commission had

found Condustrial “to properly use I.C.s in this way by SCDEW several times in the past”).

Tom Sears, General Counsel and Vice President of Administrative Services with Condustrial, explained that the company operated on a brokerage model with respect to the nurses supplied to SCDC. He stated Claimant and other similarly situated nurses were independent contractors under the brokerage model. **Oct. 12, 2017 Hearing H.T. 175.** He testified that Claimant operated as an independent contractor during the entire time that she worked with Condustrial. **October 13, 2017 hearing p. 240.**

Sears explained that Condustrial received confirmation from the South Carolina Department of Employment and Workforce that those nurses were properly classified and were in fact true independent contractors with Condustrial. **Oct. 12, 2017 Hearing H.T. 203.** He stated that had the nurses been classified as employees, Condustrial would have taken out taxes from their payroll and offered them insurance and other standard employee benefits. **H.T. 175 Oct. 12, 2017 Hearing; October 13, 2017 hearing p. 236-37.** He explained Claimant’s own testimony regarding her tax deductions while working with Condustrial clearly indicated she was an independent contractor. **H.T. 177 Oct. 12, 2017 Hearing.** Moreover, months before the incident leading to this claim, Claimant contacted Sears regarding an issue related to overtime pay. **H.T. 179-80 Oct. 12, 2017 Hearing.** During that conversation with Claimant, Sears discussed with Claimant her status as an independent contractor and the fact that she was not an employee. **H.T. 181.** Per Sears, Claimant did not question her status as an independent contractor at that time or at any time before the incident. **H.T. 181, 186 Oct. 12, 2017 Hearing.**

Sears explained that Condustrial had a written independent contractor agreement with Claimant that she signed in 2013 and 2014. **H.T. 205 Oct. 12, 2017 Hearing.** Pursuant to the independent contractor relationship, the company did not control her work, guarantee her a set

number of hours or minimum amount of pay, provide equipment or uniforms, or pay for continued education or licensures or any other normal employment benefit that a person who is employed would get. **P. 267-71 Oct. 12, 2017 Hearing.** Condustrial did not provide her any supplies or materials or reimburse her for the performance of her services. **H.T. 205-207 Oct. 12, 2017 Hearing.**

Sears further testified that Condustrial did not provide training or instruction on the way her work was to be performed. **H.T. 205 Oct. 12, 2017 Hearing.** Condustrial did not have onsite supervisors at SCDC. **H.T. 129, October 13, 2017 Hearing.** Claimant was not required to follow a routine established by Condustrial and she did not report to Condustrial to perform her work. **H.T. 205-207 Oct. 12, 2017 Hearing.** Condustrial could not change the methods Claimant used and the company did not require that Claimant be supervised or controlled in the performance of her services. **H.T. 205 Oct. 12, 2017 Hearing.**

Condustrial did not allow Claimant any type of drawing account or advances against pay. **H.T. 205-207 Oct. 12, 2017 Hearing.** She was not eligible for any pensions, bonuses, paid vacations or sick leave through Condustrial. **H.T. 207-08 Oct. 12, 2017 Hearing; October 13, 2017 hearing p. 238-39.** The company did not carry any workers' compensation insurance for Claimant and did not deduct any social security or federal taxes from her pay. **H.T. 207-08 Oct. 12, 2017 Hearing; October 13, 2017 hearing p. 236-39.**

Sears explained that Claimant was able to work for other nursing agencies and was not prohibited from competing with Condustrial. **H.T. 209 Oct. 12, 2017 Hearing.** In fact, as an independent contractor, she was encouraged to go work for other agencies. **October 13, 2017 hearing p. 238.** He explained that Claimant received all the benefits and flexibility that came with the independent contractor relationship—she could take off when she wanted, negotiate her rate

of pay, accept jobs with other agencies and in fact was encouraged to do so, choose her own shifts, refuse shifts, have no taxes withheld from her pay, and was able to deduct business expenses from her taxes. **October 13, 2017 p. 239-42, 268, 271, 274.**

Similarly to Sears, Tony Durham, the Owner/President of Condustrual, explained that Durham inherited the healthcare staffing business model and the SCDC client from Palmetto Healthcare Staffing. **H.T. 12-15.** Durham was unfamiliar with healthcare staffing when he inherited the company. Further, no one on his staff had any nursing qualifications or expertise in nursing. At that time, his company employed hundreds of construction workers as employees. The construction workers were full-time employees who completed all of the standard employment documents. **H.T. 7-9.** They received health benefits and other employee benefits. **H.T. 9.** Durham explained that by contrast, the independent contractor nurses who worked at SCDC did not want to become employees of Medustrial and the company never considered them to be employees. **H.T. 17-19; Condustrual's APA p. 149-53** (Condustrual's completion of an IRS questionnaire to determine that the nurses were independent contractors).

Durham testified that he would have preferred for the nurses to be employees, but those nurses insisted on remaining independent contractors because they did not want to take on the responsibilities of becoming employees. **H.T. 19-22, 27-28, 39-40.** They wanted the option to have dual employment, did not want assignments restricted to certain areas, and preferred negotiating their pay and selecting their shifts. **H.T. 19-22, 28, 40-41.** They could "come and go at they please." **H.T. 22.**

Like Sears, Durham explained that had the nurses been employees of Condustrual, they would have received health insurance, vacation pay, drug cards, and many other employment benefits. **H.T. 40.** However, the trade off would have been that their pay would have been non-

negotiable, they would have had taxes withdrawn from their checks, and they could not decline assignments—the nurses did not want those requirements. **H.T. 41, 158, 182.** He explained that he made less money with the nurses being independent contractors and it resulted in more “hassle” from him as the business owner. **H.T. 42-43.** He stated three of the nurses in the same group as Claimant filed unemployment claims and the Department of Employment and Workforce (“SCDEW”) issued an opinion ruling those nurses were independent contractors. **H.T. 32-37; Condustrual’s ABA Ex. 36-40** (written determination from SCDEW finding the nurses similarly situated to Claimant were independent contractors). He completed the IRS questionnaire and checked with his attorneys who drafted the Independent Contractor Agreement and who closed the deal with Palmetto Healthcare Staffing to verify that these nurses were correctly classified as independent contractors. **H.T. 30-31, 38.**

When Durham first took over the company, he inherited the independent contractor nurse model and during the erratic purchase process, Medustrial inherited the forms from the prior business owner. **H.T. 12-15, 48.** The company operated under the agreements the prior owners had in place. He explained the “Personnel Services Agreement” the company had with SCDC. **H.T. 49.** The Single Commissioner erroneously concluded that this agreement between SCDC and Condustrual is evidence that Claimant is an employee of Condustrual. Durham testified that he was personally involved in the negotiations of the contract. **H.T. 50.** He explained that the beginning of the agreement states, “WHEREAS, SCDC desires to engage the service of contractor to provide medical staffing personnel as an independent contractor. WHEREAS, contractor desires to provide medical staffing personnel as an independent contractor under the terms and conditions set out in the agreement.” **H.T. 51; Claimant’s APAs p. 254.**

Durham believed the agreement showed Condustral/Medustrial intended to send independent contractors and SCDC intended to receive independent contractors to do the work. Although the agreement referenced “employees,” it also referenced “contract nurses.” **APA p. 255.** Durham testified that he had an issue with the reference to “employee” in the agreement with SCDC, but he continued on with the agreement because the form was the “exact same contract” that had been provided from the former company and “they all knew it was independent contractors.” **H.T. 51-52, 71-72, 74, 150.** He testified that he confirmed with SCDC that they knew the nurses were independent contractors. **H.T. 51-52, 71-72, 74, 150, 180.** Furthermore, despite the language in the contract between SCDC and Medustrial, Tommy Burgess, with Admin Support Services for Health Services at SCDC, explained that Claimant would not have known the contents of that contract. **H.T. 70 Oct. 12, 2017 Hearing.** Furthermore, as discussed more fully below, other management level SCDC employees testified that they knew Claimant was a contract nurse with SCDC.

Like Sears, Durham explained that Condustral did not have the right to control how Claimant did her work. **H.T. 129.** The company did not provide any supplies or materials to help the nurses do their work. **H.T. 130.** It did not have the right to fire the nurses. **H.T. 130.** It did not provide training to the nurses. **H.T. 165.** He testified that no person from Condustral ever visited SCDC to see what the contract nurses did or how they performed their work. **H.T. 129-30, 172.** Whereas, for his construction workers who were employees, the company went out to the manufacturing sites where they worked to review their production and performance. **H.T. 167.**

Consistent with Sears and Durham’s testimony, several other witnesses testified regarding

the independent contractor relationship. Justin Gudvangen³ was the Nurse Administrator with the SCDC. H.T. 96. Nurse Gudvangen was familiar with the independent contract relationship with Medustrial because his career path with SCDC began as an independent contractor with Medustrial. H.T. 60. He testified that he understood that he was a 1099 independent contractor when he worked with Medustrial. H.T. 85. Further, he stated Medustrial never misled him to believe that he was covered by workers' compensation while he was an independent contractor with the company. H.T. 85. He testified that SCDC had employee nurses and contract nurses and in 2015, 70% of SCDC's nursing shifts were covered by contract staff. H.T. 62, 96. Nurse Gudvangen testified that Claimant was classified as a contract nurse placed at SCDC. H.T. 96.

Despite the Single Commissioner's finding that "[o]n a day to day basis, there was no difference between nurses employed by SCDC directly and those placed at SCDC by Condustral and MedFirst" (Or. 36), Nurse Gudvangen testified about the numerous differences between the employee nurses and contract nurses placed at SCDC by Condustral. First, Nurse Gudvangen testified that SCDC did not have control over Claimant's or any contract nurse's schedule. As part of his job duties, he set the schedules for all the nurses at SCDC. He explained that the scheduling process for the employee nurses was different than for the contract nurses. H.T. 95. The employee nurses *were required* to work on a rotating schedule and as the supervisor, Gudvangen could make the employee nurse work any particular shift, and if the employee nurse refused, it would be considered insubordination. H.T. 97. The employee nurses were expected to appear for the shifts for which they were scheduled, but "[i]f it's a contract person, they can cancel it within a certain time limit window." H.T. 67.

³ The Single Commissioner referred to Nurse Gudvangen as "Nurse G." See Nov. 6, 2017 H.T. 14-15.

By contrast to the employee nurses, the contract nurses provided their availability of the shifts they could work. Gudvangen had to set the schedule around the contract nurse's availability, and the contract nurse "basically picked their own schedule." H.T. 88. SCDC had no control over the contract nurse's availability. H.T. 89. Further, although the employee nurses were required to request leave, the contract nurses did not. H.T. 91, 106-07. The contract nurses, like Claimant, were not required to work any shift. H.T. 89. According to Gudvangen, the contract nurses "didn't have to work at all" and Gudvangen could not make those contract nurses work a specific shift. H.T. 89, 97. He stated there were occasions when a contract nurse would work one shift and never return to the facility. H.T. 111. He explained that if Claimant decided that she was no longer interested in working for SCDC, she would not need to resign as a contractor, but the employees were required to resign. H.T. 113. Claimant also confirmed that she would not need to resign from SCDC if she no longer wanted to work at the facility, she could simply stop taking shifts. H.T. 321.

Further, Nurse Gudvangen explained that the independent contractor nurses at SCDC were readily distinguishable because the employees of SCDC wore identification badges with blue letters stating "employee," while the contractors' badges stated "temporary" in red letters. H.T. 64, 118. Although the Kirkland SCDC location divided the parking lot into "staff parking" and "visitor parking" and the contract nurses parked in the "staff" lot, Gudvangen believed that it would have been strange to further divide the staff lot into "employee nurse" and "contract nurse." He stated he had worked in several different types of organizations as a nurse and he had never seen a facility designate a specific parking area for contract employees. H.T. 98-99.

Nurse Gudvangen further testified that the contract nurses at SCDC did not receive the same training as the employee nurses. The employee nurses received annual training which

consisted of eight hours of a new employee orientation class, a week of basic training at the training academy, some nursing-specific classes to complete within a year, and training related to hostage situations. **H.T. 90, 92, 103-04.** On the other hand, the contract nurses only received a three-day orientation shift, which was similar to a job shadow. During those three days, SCDC transitioned the independent contractor into doing the job. **H.T. 90, 103-04.** The contract nurses did not receive training related to hostage situations. **H.T. 92.**

Nurse Gudvangen testified SCDC only provided to the contract nurses the supervision necessary for general medical practice and safety. As an LPN, a registered nurse supervised Claimant, which was common in general nursing practice and not specific to SCDC. **H.T. 71.** Gudvangen explained that Claimant had autonomy to perform the job as she wished, and it was a “very light supervision” type of job. **H.T. 89-90.** She worked independently and required little supervision. Regarding SCDC’s guidelines related to hairstyles, visible tattoos, piercings, or other grooming guidelines, Gudvangen believed the guidelines were typical of any medical facility for a nurse. **H.T. 112-113.** All nurses are patted down when entering the facility just as any visitor would be patted down and go through a safety check before entering the prison. **H.T. 99-100.**

Like Nurse Gudvangen, Russell Rush, Director for Occupational Safety and Workers’ Compensation at SCDC, testified that Claimant was a contract nurse with SCDC. **H.T. 75.** He also explained that SCDC had full-time medical staff employed by SCDC and they supplemented the staff with contract nurses, like Claimant, who were not employed by SCDC. **H.T. 75.**

Claimant’s own testimony supports finding she was not a direct employee of Condustral, and by extension, not a statutory employee of SCDC. She admitted she never asked to be an employee of SCDC because the schedule would not be “flexible”, and she preferred a flexible schedule. **H.T. 222, 224-26, 306.** She agreed she could decline shifts if the supervisor at SCDC

asked her to work a certain shift. **H.T. 154.** She admitted she had the flexibility to choose the shifts she wanted to work and decline any shifts she did not want to work. **H.T. 217-19.**

Claimant admitted Medustrial/Condustral did not supervise her work at SCDC or control how she did her work as an LPN. **H.T. 304-305.** She was not required to report to Medustrial before, during, or after any shift on how the shift went that day. **H.T. 232, 239.** She did not have to ask Medustrial/Condustral for vacation, and they never forbid her from taking days off or from working concurrently at a different agency. **H.T. 220-21.** She agreed she could work for more than one agency at any given time period. **H.T. 154.** She understood that Condustral was not taking out taxes and did not provide benefits such as overtime pay. **H.T. 155.** She testified that she supplied her own healthcare insurance. **H.T. 173, 230.** She admitted Medustrial did not provide dental insurance, transportation, mileage reimbursement, vacation pay, sick pay, uniforms, appropriate footwear, nursing scrubs, or retirement plans. **H.T. 227-29.** She admitted that there was nothing on her SCDC badge that identified Medustrial. **H.T. 230.** She admitted that Medustrial did not provide business cards, cell phones, or laptops, nor did the company provide any formal training or pay her nursing license renewal fees. **H.T. 220-31.**

Nurse Sidney's, another LPN who worked through Medustrial, testimony supports finding an employment relationship did not exist between Claimant and Medustrial. **H.T. 24 November 6, 2017 Hearing.** Nurse Sidney testified that she signed the same Independent Contractor Agreement with Medustrial that Claimant signed, and by signing, she understood that she was not eligible for any benefits "like medical, dental, none of those kind of benefits." **H.T. 26-27, 31-32.** She knew she was not eligible for workers' compensation because "the contract stipulated that." **H.T. 27, 47.** She stated being an independent contractor gave her "a lot of flexibility" and that she was able to accept or decline shifts. **H.T. 27.** Over her thirty-two-year career in the nursing

profession, she has worked as an employee and as an independent contractor. **H.T. 40-41.** Based on her experience, she explained the following advantages of working as an independent contractor: (1) flexibility to schedule shifts based on your own availability, (2) availability to work other jobs with other agencies, (3) receiving tax advantages, and (4) the ability to negotiate rates of pay and take different shifts if the rate was higher. **H.T. 41-45.** These are all the advantages Claimant agreed she received.

Nurse Sidney previously worked as a direct employee of SCDC. She stated the relationship when she was a direct employee with SCDC was different from the relationship that she had with them when she worked as an independent contractor through Medustrial. **H.T. 50-51.** Contrary to the Single Commissioner's finding that "a flexible schedule is hardly inconsistent with an employee/employer relationship as many hourly jobs offer flexible schedules," Nurse Sidney testified that the flexibility as an independent contractor was not the same as other part-time jobs she worked. **H.T. 52.** Moreover, Durham testified that he had owned other businesses and the flexibility the independent contractor nurses received was not the same as other part-time positions he managed.

Additionally, Charles Lee, an insurance agent who previously represented Condustral, testified regarding Claimant's independent contractor status. **H.T. 57, November 6, 2017 Hearing.** He testified that the majority of the nurses for Condustral such as Claimant were independent contractors. **H.T. 57-58.** He stated that there was no doubt in his mind that those nurses were contractors because they worked for the nurse registry through Condustral and concurrently for other companies. **H.T. 57-59, 62.**

Accordingly, under the brokerage model, the overwhelming evidence in the record demonstrates Condustral did not exercise control over Claimant.

ii. **Under South Carolina law, Claimant had a duty to read the controlling documents and her claim that she did not read the documents lacks credibility.**

In addition to the above-cited testimony and documents in the record, Claimant executed several documents representing that she agreed to be an independent contractor. The “Licensed Professional Independent Contract Agreement” that Claimant signed in 2013 and again in 2014 stated “No other document, including any agreement between the broker and the client, shall be deemed to modify any terms of this agreement unless expressly stated in writing to do so and signed by both the broker and the independent contractor.” **Claimant’s APA p. 237.** The contract further stated, “The independent contractor represents that the independent contractor has read and understands the terms of this agreement.” **Claimant’s APA p. 237.** The Licensed Professional Independent Contractor Agreement mentioned the term “independent contractor” seventy-eight times in the four-page document.

Along with the contract with Condustral agreeing to proceed as an independent contractor, Claimant signed numerous other documents holding herself out as an independent contractor. The “Facilities Expectations” required signature of the “contractor.” **(APA tab 9, p. 313).** The document included the four hour no call requirement that Claimant, herself, referenced in support of her contention that she was an employee. **(APA p. 313).** Claimant signed as a “contractor” to permit the company to obtain her SLED report. **(APA 10 for Countrywide p. 314).** In February 2013 and October 2014, she signed the “Substance Abuse Policy Consent Form” on the line for “contractor name.” **H.T. 208-09.** The document referenced Claimant as a contractor on several occasions. She signed her own 2013 and 2014 tax returns which named her as an “LPN Nursing Contractor.” **H.T. 287; APA p. 333.** Sears also explained that Claimant consented as a “contractor” on several forms and the New Hire/Rehire Checklist classified her as an independent contractor. **H.T. 183-84, 186-87 Oct. 12, 2017 Hearing.**

The Single Commissioner erroneously dismissed the above-mentioned documents by citing to testimony by Claimant that she did not read the documents. Claimant claimed she did not read any of the documents and merely signed any documents she was asked to sign. It is well established under South Carolina law that “a person who can read is bound to read an agreement before signing it.” *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2000) (footnote omitted); *Burwell v. South Carolina Nat’l Bank*, 288 S.C. 34, 39, 340 S.E.2d 786, 789 (1986). Thus, “[a] person who signs a contract or other written document cannot avoid the effect of the document by claiming he did not read it.” *Wachovia Bank v. Blackburn*, 394 S.C. 579, 585, 716 S.E.2d 454, 458 (Ct. App. 2011) (quoting *Regions Bank v. Schmauch*, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003)); *J.B. Colt Co. v. Britt*, 129 S.C. 226, 123 S.E.2d 845, 847 (1924) (“[O]ne cannot avoid a written contract into which he has entered on the ground that he did not attend to its terms, that he did not read the document which he signed, that he supposed it was different in its terms, or that it was a mere form.”).

“A person signing a document is responsible for reading the document and making sure of its contents.” *Wachovia Bank*, 394 S.C. at 585, 716 S.E.2d at 458 (quoting *Regions Bank*, 354 S.C. at 663, 582 S.E.2d at 440). “One who signs a written instrument has the duty to exercise reasonable care to protect himself.” *Id.* The only exception to this rule is that “if the party is ignorant and unwary, his failure to read the document may be excused.” *Regions Bank*, 354 S.C. at 664, 582 S.E.2d at 440 (citing cases). However, South Carolina courts “very strictly construe[] this exception.” *Id.* “In determining whether a party can be classified as ignorant and unwary, an individual’s education, business experience and intelligence are all considered.” *Id.*

A party cannot simply rely on the representations of others as to the contents of a written document, even when that person is in a fiduciary relationship. *See Marion Partners, LLC v.*

Weatherspoon & Voltz, LLP, 716 S.E.2d 29, 31 (N.C. App. 2011) (finding that plaintiff's attorney owed plaintiff a duty to explain the consequences of a document, but holding that "this duty does not relieve [plaintiff] from her own duty to ascertain for herself the contents of the contract she was signing"). Under South Carolina law, "the right to rely upon representations as to the contents of a written instrument must be determined in light of the duty on the part of the representee to use reasonable prudence and diligence under the particular circumstances for his own protection." *Parks v. Morris Homes Corp.*, 245 S.C. 461, 466-67, 141 S.E.2d 129, 132 (1965). "What constitutes reasonable prudence and diligence with respect to reliance upon a representation in a particular case and the degree of fault attributable to such reliance will depend upon the various circumstances involved, such as the form and materiality of the representation, the respective intelligence, experience, age, and mental and physical condition of the parties, the relation and respective knowledge and means of knowledge of the parties, etc." *Id.* at 467, 141 S.E.2d at 132.

Here, Claimant admitted she signed the independent contractor agreements in 2013 and 2014 and several other documents referencing her status as an independent contractor but claimed she did not read any document that referenced her status as an independent contractor. **H.T. 193.** Claimant agreed that no person prevented her from reading the Independent Contractor Agreement and she did not ask any person at Medustrial to explain the agreement or any other document before she voluntarily signed them. **H.T. 189.** She also claimed she did not read her tax returns—which lists her profession as LPN Nursing Contractor—before she signed them. **H.T. 287-88.**

As explained by Sears, and Claimant's own testimony, Claimant is a licensed practical nurse, which required specialized training and education to obtain that degree and licensure. **H.T. 146 Oct. 12, 2017 Hearing; see also Claimant's testimony.** Because Claimant is an LPN who had engaged in many transactions, she was fully capable of reading and understanding the

documents she signed. Indeed, she could have determined the contents of the Independent Contractor Agreement simply by reading the first paragraph. Some of the other documents she signed as an independent contractor were only a few sentences. Claimant cannot now avoid the agreements or claim misrepresentations as to the independent contractor relationship.

Claimant cannot avoid her duty to read and instead deny knowledge of the arrangement under a specious ignorance claim. If Claimant simply read the contract and associated documents, any alleged misunderstanding or misrepresentations would have been identified and addressed. Moreover, Claimant testified that had she read the documents, she would have asked questions regarding her status as an independent contractor. H.T. 312. These were arm's-length transactions involving a written contract, which Claimant had every opportunity to review before, during, and after she executed the contract on two separate occasions.

Moreover, Claimant's testimony regarding failing to read any of the documents lacks credibility. Claimant alleged Condustral misrepresented an employment application to her, but she signed a document that stated, "Independent Contractor Application." H.T. 203, 205-06 Defendants' APA p. 318. She claimed she remembered completing an employment application but alleged she did not recall completing the Licensed Professional Independent Contractor Agreement. H.T. 138. She repeatedly maintained that she "had to" sign the documents because she needed a job, but she admitted that she annually signed the documents without ever looking for different employment. H.T. 208. She claimed she did not even read a one-sentence document for the SLED report, which is simply not believable. H.T. 198-99. Remarkably, she claimed she did not read the *weekly* timesheets she signed that stated "Contractor, Rachel Turner." H.T. 233. She acknowledged she read other lengthy contractual documents in her lifetime, for example, student loan documents, leasing agreements, car loan documents. Yet, she expects the

Commission to believe she did not read a single document that explains she was an independent contractor. **H.T. 197-98.**

Sears acknowledged that a few of Condustral's forms were contradictory. For example, one form stated "1099 Employee." However, he explained that when the business first began operating, the staff consisted of "industrial blue collar" workers and the company mistakenly merged documents from the former owner of the company. **H.T. 184-85 Oct. 12, 2017 Hearing; October 13, 2017 hearing p. 158-59.** He explained that even though some of the forms stated "employee," the majority of the documents Claimant reviewed and signed clearly identified her as an "independent contractor" less than a year before the incident. **October 13, 2017 hearing p. 159, 186, 262-65.**

Like Sears, Durham acknowledged that some of the documents Claimant signed stated "employee" because an employee from the company that he purchased from Palmetto Healthcare Staffing mistakenly gave the documents to Claimant. **H.T. 28-29, 207.** He stated that although Claimant and other nurses similarly situated were independent contractors, when Claimant began working for Medustrial, the operations manager erroneously gave her documents to complete that were unnecessary. **H.T. 29-30.** He explained, however, that Claimant executed the independent contractor agreement and an employee would not have executed that agreement if he or she believed they were an employee. **H.T. 190.**

Although a few of the general documents used the term "employee," as Durham explained, when considered as a whole, an employee would never have signed an independent contractor agreement or the other documents identifying herself as an independent contractor or at least would have asked questions to clear any possible confusion. Furthermore, Claimant admitted that she would have asked questions had she read the documents. If there was any confusion on Claimant's

part, it was her duty, not Condustrual's, to seek clarification. Accordingly, the Single Commissioner erroneously dismissed the above-mentioned documents by citing to testimony by Claimant that she did not read the documents.

When considered as a whole, the overwhelming evidence in the record preponderates in favor of finding that the control factor favors an independent contractor relationship.

B. The evidence of the furnishing equipment factor favors finding Claimant to be an independent contractor.

The Single Commissioner erred in finding this factor to be "somewhat neutral." Sears, Durham, and Claimant's own testimony demonstrate that Condustrual did not provide any equipment to Claimant to perform her nursing duties at SCDC. Durham testified that the company did provide some equipment to its direct employees. The inquiry must end there because as previously stated, Claimant contends—and the Single Commissioner's Order erroneously concluded—Condustrual was her direct employer. Regardless of any equipment SCDC supplied, Claimant admitted SCDC was not her direct employer. *See Collins v. Charlotte*, 400 S.C. 50, 732 S.E.2d 630 (Ct. App. 2012) (holding that whether an entity is a statutory employer requires a different analysis than the employee/independent contractor test).

Even if the Commission considers SCDC's furnishing of equipment as somehow favoring an employer/employee relationship between Claimant and Condustrual, the greater weight of the evidence demonstrates the furnishing of equipment did not favor an employment relationship. Claimant explained that SCDC provided the medical equipment and she provided her own uniform and shoes. She stated she had her own stethoscope, but she did not take it into the facility because they were "limited on supplies [they] could bring in." H.T. 166. Although Claimant testified regarding SCDC's uniform and grooming procedures, Gudvangen explained those policies applied to all nurses for safety reasons. Nurse Gudvangen testified that all nurses at SCDC were required

to provide their own uniform and shoes. H.T. 89, 99. He explained that some nurses also brought in their own stethoscopes. H.T. 76-77. SCDC provided the other medical equipment because of safety concerns related to the potential for the equipment to be used as a weapon. H.T. 76-77, 108.

The fact that SCDC provided certain equipment in order to abide by certain regulatory controls does not change this analysis. See *Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 676 S.E.2d 700 (2009) ("We agree with the Pennsylvania Supreme Court that requiring a worker to comply with the law is not evidence of control by the putative employer."); *Id.* ("[R]estrictions upon a workers' [sic] manner and means of performance that spring from government regulation (rather than company initiatives) do not necessarily support a conclusion of employment status. Indeed, employer efforts to ensure the workers' compliance with government regulations, even when those efforts restrict the manner and means of performance, do not weigh in favor of employee status") (quoting "*Universal Am-Can, Ltd. v. Workers' Comp. Appeal Bd.*, 563 Pa. 480, 762 A.2d 328, 335 (2000))).

This Defendant remains mindful that the Court in *Shatto* provided that to only argue regulatory compliance as a basis for this factor to support a finding of an independent contractor is without merit. However, here, unlike in *Shatto*, and contrary to Claimant's argument, SCDC did not provide "everything that she needed to work" because it did not provide sterile clothing as in *Shatto*, uniforms, or nursing shoes. Furthermore, the furnishing of equipment goes beyond simply having equipment available for regulatory controls. Here, the nurses, visitors, or any other person was not allowed to bring anything into SCDC because of the safety concerns. SCDC is not a hospital, it is a prison where inmates are incarcerated for committing crimes.

C. The evidence of method of payment factor favors finding Claimant to be an independent contractor.

The method of payment was entirely consistent with Claimant's independent contractor status. Sears and Durham testified Condustrual never guaranteed a set pay and Claimant had the ability to negotiate rates of pay when placed at any facility for a shift and the direct employees did not have that option. They both explained Claimant was not eligible for any pensions, bonuses, paid vacations or sick leave through Condustrual and the company did not deduct any social security or federal taxes from her pay. **Sears H.T. 207-08 Oct. 12, 2017 Hearing; October 13, 2017 hearing p. 236-39; Durham H.T. 40-43, 158, 182.** Claimant testified that she understood the difference between a 1099 and a W-4. **H.T. 144.** She understood that under a 1099, no additional taxes were taken out of her paycheck. **H.T. 291.** At the same time, she enjoyed the benefits of an earned income credit and numerous business deductions. **H.T. 293-99.**

Nurse Gudvangen testified that the contract nurses placed at SCDC received different pay than the SCDC employee nurses. SCDC employee nurses qualified for bonuses and raises and received benefits such as health and general benefits, but contract nurses such as Claimant did not. **H.T. 91-92, 106-07, 119; see also Claimant's testimony H.T. 320-21** (Claimant's testimony confirming she was not paid by SCDC, and was not eligible for any raise, bonus, retirement benefits or leave from SCDC). Gudvangen recalled that when an employee position opened up at SCDC, he offered the position to Claimant, who responded "No, I can't do that 'cause y'all don't pay enough." **H.T. 116.**

Accordingly, the evidence here points to an independent contractor relationship. *See id.* Medustrial furnished 1099 forms to Claimant, who in turn routinely filed tax returns as a sole proprietor, specifically an "LPN Nursing Contractor." **Condustrual's APA p. 71, 82, 86.** Claimant's tax returns include forms for her business expenses and self-employment taxes.

Medustrial did not provide Claimant any benefits or withhold taxes from her pay. As expressed in *Wilkinson*, “[t]he method of payment bears no indicia of an employment relationship.” *Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 676 S.E.2d 700 (2009) (finding the method of payment did not support an employment relationship where the company provided the claimant with 1099 tax forms and the claim filed tax returns as a sole proprietor, specifically an “over the road trucke[r]” and included forms for his business expenses and self-employment taxes”).

The Single Commissioner misinterpreted *Shatto*’s holding on this issue. The Court in *Shatto* actually held that the method of payment factor pointed to an independent contractor relationship because like the instant case, the alleged employer did not supply the claimant with insurance, vacation days, sick days, or a retirement plan—“benefits that are available to other employees directly employed by” the alleged employer. Here, Claimant alleged Condustrail was her direct employer. However, the overwhelming evidence in the record demonstrates Condustrail did not supply Claimant with insurance, vacation days, sick days, or a retirement plan—“benefits that are available to other employees directly employed by” Condustrail.

D. The evidence of right to fire factor favors finding Claimant to be an independent contractor.

The Court in *Wilkinson* explained that this factor is the most difficult to evaluate for the following two reasons: (1) unlike the other three factors the parties may never need to confront this issue; and (2) a right of termination, in some form, exists in an independent contractor arrangement. 382 S.C. 295, 676 S.E.2d 700 (2009). “The critical inquiry is the term “fire,” for it embraces the employment relationship.” *Id.*

Durham testified Condustrail did not have the right to fire Claimant. **H.T. 130.** Moreover, the fact that two of Condustrail’s documents provided the right to “termination,” does not change the relationship status to that of an employee. *See id.* (noting that a right of termination, in some

form, exists in an independent contractor arrangement). Nurse Gudvangen testified that although he had the right to fire employee nurses at SCDC, he had *no right to fire* contract nurses such as Claimant. **H.T. 100, 105.** Gudvangen could reprimand employee nurses and those nurses were entitled to a corrective action review meeting in which they could provide supporting documentation. **H.T. 104-105.** The reprimanding authority would then determine the appropriate sanction and include the sanction in the employee's personnel file if the sanction was anything above an informal resolution. *Id.* By contrast, Gudvangen explained that SCDC did not maintain files for Claimant or contract nurses like her, and if he had any issues with Claimant's performance, "her being a contractor, there was no disciplinary measures [he] could take other than inform her agency that [they] had an issue . . . up to the point of [him] requesting her not to come back or that they not send her back" **H.T. 74, 88.** He explained that even if he put the contract nurse on a "do-not-use" list, the contract nurse could immediately go work at a different SCDC location. **H.T. 100-01.** Further, Gudvangen explained he had "no recourse" or reprimand authority if a contract nurse such as Claimant declined a shift. **H.T. 98.**

In *Wilkinson*, the Court determined that the termination of the parties' relationship was controlled by their agreement and, as here, when viewed in the context of the agreement as a whole, leads to a finding of an independent contractor relationship. *Id.* As previously explained in the testimony of numerous witnesses, Claimant could simply decline or refuse shifts and Condustral could choose to send another independent contractor for the job. *See id.; see also Ferguson v. New Hampshire Ins. Co.*, 412 S.C. 203, 213, 771 S.E.2d 851, 857 (Ct. App. 2015) (holding the company did not have the right to fire where the company could choose to use someone other than the claimant for a job, the claimant could also decline or refuse to perform a job, there was no set schedule, and the claimant did not work on a consistent basis); *Rhoney*, 134 N.C. App. at 619, 518

S.E.2d at 540-41 (finding there was no employment relationship where the relationship could be terminated at will by either party at any time).

Accordingly, the preponderance of the evidence favors finding Claimant did not have an employee/employer relationship with Condustral/Medustrial, and conversely SCDC was not her statutory employer. Accordingly, based upon the greater weight of evidence in record, the Single Commissioner erred in finding Claimant was an employee.⁴

⁴ Of note, Claimant has a compelling story and no defendant denies that the incident that led to this claim was an unfortunate event. However, the Commission cannot let passion or sympathy cloud its judgment by overlooking the inconsistencies and outright combativeness in Claimant's own self-serving testimony. When questioned by her own attorney, she calmly answered the questions and reviewed documents. Immediately, as cross-examination began, however, she became combative and asked that the attorney not be able to approach her with the documents. H.T. 186-87. Claimant's testimony contradicted each of her documents and records that were unfavorable to her.

In an apparent attempt to gain the sympathy of the fact-finder, she repeatedly claimed she was destitute and had no money. Yet, she acknowledged that South Carolina Victim's Assistance network gave her \$7,000 and her bills were only \$250 per month. H.T. 243, 250-51. She received food stamps and various companies paid her utility bills. H.T. 251, 253. She received her medication for free through Welvita. H.T. 244. Furthermore, if she did have to pay for medication, the medication was only \$8 per week. She claimed she could not pay the \$8, but at the same time admitted she smoked over two packs of cigarettes per week, which cost the same as purchasing the \$8 medication. She also drank and smoked marijuana, which family and friends would pay for. H.T. 301. Claimant refused assistance from family for her medical or living expenses. Although Claimant alleged that she could not work because she suffered from severe psychological issues, the medical records demonstrate that she became defensive, argumentative, and irritated with various mental health professionals when they would not provide financial assistance. H.T. 265, 270-71; APA p. 81, 83. She told the mental health professionals that the only thing that could help her was financial assistance. *Id.* She also alleged that she did not get assistance with her physical injuries because she could not afford medical treatment; however, she refused to seek treatment at the free medical clinic. APA p. 111; H.T. 277. She admitted that she was not truthful to her healthcare providers when she began treatment in October 2015 at Palmetto Heath Baptist Behavioral Day Treatment. H.T. 259-60, 264. She was discharged from care because of attendance issues. H.T. 260; Claimant's APA p. 78.

Despite Claimant's testimony otherwise, Sears is the person who requested the wellness check in 2015 after the incident because he was concerned that she was not doing well and was not responding to his calls. Sear's Testimony H.T. 191-93 Oct. 12, 2017 Hearing. The purpose of the letter the company sent to Claimant was to let her know they were concerned and were trying

II. THE SINGLE COMMISSIONER ERRED IN FINDING AND CONCLUDING THAT THE PRIMARY METHOD OF CALCULATING AWW SHOULD BE EMPLOYED, SUCH THAT THE AWW IS \$1,130.86 AND THE COMPENSATION RATE IS \$753.94.

The Single Commissioner's finding is not supported by the greater weight of evidence, disregards Claimant's tax filings, ignores the fairness requirement of Section 42-1-40 of the South Carolina Code, and ignores the case law interpreting the statute.

'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 as reported on the Department of Employment and Workforce's Employer Contribution Reports divided by fifty-two or by the actual number of weeks for which wages were paid, whichever is less. . . . *When for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.* Whenever allowances of any character made to an employee in lieu of wages are a specified part of a wage contract they are deemed a part of his earnings.

S.C. Code § 42-1-40 (2015) (emphasis added).

Under South Carolina law, "compensation should be determined based on the employee's net taxable income." *Anderson v. Baptist Medical Center*, 343 S.C. 487, 496, 541 S.E.2d 526, 530

to help her in the best way they could under the circumstances. **H.T. 193-94 Oct. 12, 2017 Hearing.** Claimant never provided any medical documentation indicating she was unable to perform light-duty or sedentary work that Sears offered to her after the incident. **October 13 hearing p. 267.**

Likewise, after the incident in question, Durham called Claimant and offered her a full-time, employee position in his office once she felt better. **Durham's Testimony H.T. 138-40.** Claimant responded, "I don't want that. I just want comp." **H.T. 139.** He politely explained to her that she was not eligible for workers' compensation but that he wanted to help in any way that he could. **H.T. 139.** She declined the offer and insisted on workers' compensation. **H.T. 139-40.**

(2001) (analyzing the definition of AWW pursuant to the Workers' Compensation Act). "Thus, the average weekly wage should be calculated based only on 'the actual sum paid to the employee as his wages, not the totality of payments including reimbursements.'" *Id.* (quoting *Stephen v. Avins Const. Co.*, 324 S.C. 334, 347, 478 S.E.2d 74, 81 (Ct. App. 1996)).

In *Stephen v. Avins Constr. Co.*, our Court of Appeals held that the Commission was correct in computing a claimant's AWW based on net, as opposed to gross, earnings. 324 S.C. at 347, 478 S.E.2d at 75. There, the claimant sustained an injury during the course of his employment as a subcontractor for a construction company. *Id.* The claimant received compensation, and the construction company sought permission to discontinue compensation. *Id.* Following a hearing, the Commission found that the money paid to the claimant did not solely reflect his earnings because it also included the costs of materials, wages that were paid to other employees, and other expenses. *Id.* Accordingly, the Commission granted the construction company's motion to discontinue payment of compensation, concluding that the claimant's AWW should be based upon his tax returns. *Id.* The Court affirmed the Commission's calculation of his AWW, holding that there was substantial evidence in the record to support a finding that the claimant's AWW and compensation rate should be based upon his net earnings because his gross earnings included various business deductions. *Id.* at 347, 478 S.E.2d 81.

The Court explained that "[d]ifficulties are inherent in using gross pay for the purpose of determining the 'earnings of the injured employee.'" The Court stated,

A plethora of business expenses may be encapsulated within the gross pay received. Examples of expenses not included in computing the earnings of a covered person are automobile allowances; mileage expenses; equipment rentals; labor, fuel, repair bills, and insurance; and depreciation of business equipment, interest on business debts, and the purchase price of a saw[.]

Id. at 346, 478 S.E.2d at 80 (citations omitted). The Court then noted that the claimant had deducted numerous business expenses on his income tax form, including car and truck expenses, travel, meals and entertainment, and wages. *Id.* The Court held “the statutory language, ‘earnings of the injured employee,’ means the actual sum paid to the employee as his wages, not the totality of payments including reimbursements. Reimbursements do not equate with the statutory language of ‘earnings.’” *Id.* at 347, 478 S.E.2d at 81.

Our appellate courts have also “held that mileage deductions taken by the employee on his federal income tax form were not includable in the employee's income for purposes of computing workers' compensation benefits.” *Anderson v. Baptist Medical Center*, 343 S.C. 487, 496, 541 S.E.2d 526, 530 (2001) (citing *Wright v. Wright*, 306 S.C. 331, 334, 411 S.E.2d 829, 830-31 (Ct. App. 1991)). Additionally, under South Carolina law, fringe benefits should not be considered in calculating the AWW. *See Anderson*, 343 S.C. at 496, 541 S.E.2d at 530 (holding fringe benefits should not be included in the AWW).

Here, Claimant testified that she understood the difference between a 1099 and a W-4. **H.T. 144.** She understood that under a 1099, no additional taxes were taken out of her paycheck. **H.T. 291.** At the same time, she agreed that she enjoyed the benefits of an earned income credit and numerous business deductions. **H.T. 293-99.** Specifically, Claimant claimed deductions for car and truck expenses, depletion, insurance, legal and professional services, office expenses, renting business property, repairs and maintenance, supplies, taxes and licenses, deductible meals and entertainment, utilities, wages, internet/cable service fees, nursing uniforms and shoes, computer, toner/copier paper/software, and continuing education. **Condustrial APA p. 71-72, 86-87.** Claimant reported those deductions as business expenses on her taxes that she discussed with her tax preparer. **H.T. 293, 342-43.** The tax filings and deductions were documents she got

prepared on her own. These were not documents provided to her by SCDC or Medustrial/Condustral. She held herself out as a contractor on the tax documents. She cannot now claim differently. She admitted that she provided a log to the tax preparer and the tax preparer asked her numerous questions before completing the tax documents. It would be grossly unfair and erroneous under South Carolina law to now calculate Claimant's compensation rate and AWW based on Claimant's gross earnings.

The Single Commissioner erroneously distinguishes this case from *Stephen* by concluding that *Stephen* does not apply because the Single Commissioner concluded Claimant was a putative independent contractor later determined to be an employee. **Ord. 43-44.** This conclusion is unsupported by the law. The Court in *Stephen* held the statutory language of "earnings of the injured *employee*" in the AWW statute does not include the totality of payments including reimbursements. Thus, under *Stephen*, *Anderson*, and *Wright*, the deductions Claimant claimed on her tax returns cannot also be included in her calculation of the AWW.

III. SINGLE COMMISSIONER ERRED IN FINDING AND CONCLUDING CLAIMANT DEVELOPED POSTTRAUMATIC STRESS DISORDER AS A DIRECT RESULT OF THE ASSAULT AND SURROUNDING INJURIES.

The Single Commissioner erred in finding Claimant developed PTSD as a direct result of the incident. The finding appears to rely solely upon an opinion by Dr. Westerkam who is not qualified to render such an opinion. The Decision and Order does not cite to any other medical opinion to support this finding. The Single Commissioner properly noted that Dr. Westerkam diagnosed Claimant with PTSD during his May 18, 2017 visit with Claimant, but failed to take into account the facts that Dr. Westerkam is not a mental health professional and this diagnosis occurred after only a cursory physical examination with the claimant before any psychological testing was done by a mental health professional.

Based upon the records, it appears the only thing done at the May 18, 2017 visit was to conduct a physical evaluation and diagnose her with PTSD. In fact, the Single Commissioner found “[t]he 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” and “Dr. Berg discharged the Claimant as being psychiatrically sound on November 25, 2015.”

Or. 52. A review of the records reveals that there was no examination by any psychologist or psychiatrist, or any other physician other than Dr. Westerkam that concluded that Claimant developed PTSD as a direct result of the assault and surrounding injuries, and the Single Commissioner erred in giving Dr. Westerkam’s records any credence because he is not a mental health professional and his records do nothing to substantiate Claimant’s claim of having PTSD; instead, they simply regurgitate a flawed diagnosis as discussed above.

IV. SINGLE COMMISSIONER ERRED IN FINDING AND CONCLUDING CLAIMANT WAS DISABLED WITHIN THE MEANING OF THE ACT FROM SEPTEMBER 6, 2015, UNTIL SEPTEMBER 30, 2016.

The Single Commissioner found “[t]he 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” (**Or. 52**) and “[t]he award of disability is denied from September 30, 2015 through the date of the hearing.” **Or. 53.** Further, the Single Commissioner ordered the payment of temporary total disability from September 6, 2015, until September 30, 2015, and denied payment of temporary total disability from September 30, 2015, until the date of hearing, July 24, 2017. **Or. 71.**

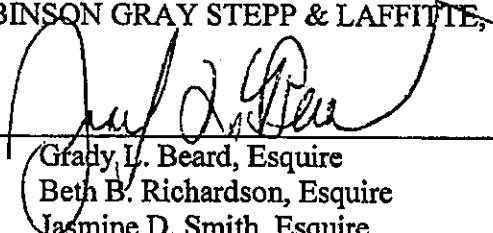
Accordingly, the Single Commissioner’s conclusion that “Claimant was disabled within the meaning of the Act from September 6, 2015 until September 30, 2016” is inconsistent with the findings of fact and award of benefits. It appears to be a scrivener’s error and should be corrected.

See Landry v. Landry Op. No. 27968 (S.C. Sup. Ct. filed May 13, 2020) Shearouse Adv. Sh. No. 19 at 20 (remanding to the lower court for an evidentiary hearing to correct an alleged scrivener's error in the final order).

CONCLUSION

Based upon the foregoing, Defendant Guarantee respectfully requests the Full Commission to reverse the Decision and Order of the Single Commissioner with regard to her findings that all four factors of the four-factor test to determine whether a worker is an employee or independent contractor preponderate in favor of status as an employee; Claimant developed PTSD as a direct result of the assault and surrounding injuries and needs ongoing treatment for PTSD; Claimant was disabled within the meaning of the Act from September 6, 2015, until September 30, 2016; and Claimant's AWW is \$1,130.86 and the compensation rate is \$753.94 by concluding the primary method of calculating AWW should be employed.

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Insurance*

Columbia, South Carolina
October 19, 2020

STATE OF SOUTH CAROLINA
BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO.: 1514359

Rachel J. Turner,	)	
	)	
Claimant,	)	
	)	
vs.	)	
	)	
Condustrual, Inc. d/b/a Medustrial,	)	<u>RESPONDENTS SOUTH CAROLINA</u>
	)	<u>PROPERTY AND CASUALTY</u>
	)	<u>INSURANCE GUARANTY</u>
Employer,	)	<u>ASSOCIATION ON BEHALF OF</u>
	)	<u>GUARANTEE INSURANCE</u>
and	)	<u>COMPANY'S AND COUNTRYWIDE</u>
	)	<u>STAFFING SOLUTIONS GROUP,</u>
Countrywide Staffing Solutions Group, Inc.;	)	<u>INC.'S JOINT FULL COMMISSION</u>
South Carolina Property and Casualty	)	<u>BRIEF</u>
Insurance Guaranty Association on behalf of	)	
Guarantee Insurance Company; The State	)	
Accident Fund; South Carolina Workers'	)	
Compensation Uninsured Employers' Fund,	)	
	)	
Carrier(s) and/or the Defendants.	)	
	)	

STATEMENT OF CASE

The South Carolina Property and Casualty Insurance Guaranty Association on behalf of
Guarantee Insurance Company ("Guarantee")¹ and Countrywide Staffing Solutions Group, Inc.

¹ As the Order states in the Stipulations section, on November 27, 2017, after the hearing in this matter concluded, the Guarantee Insurance Company consented to and was placed into liquidation by the Second Judicial Circuit Court in and for Leon County, Florida. Thereafter, the South Carolina Property and Casualty Insurance Guaranty Association (SC Guaranty Association) has appeared on behalf of Guarantee Insurance Company in this matter. Condustrual suggests on page 5 of its Full Commission Brief that the Guarantee Insurance Company was declared insolvent "at some point after the hearing was reconvened" and that testimony may have been taken in subsequent proceedings with the SC Guaranty Association having stepped in Guarantee's shoes. To be clear, the Single Commissioner got the Stipulations right in the Decision and Order. The Guarantee Insurance Company was present for all the hearing and not placed into liquidation under several weeks after the Hearing's conclusion.

("Countrywide") file this Full Commission Brief in response to the appeal by Defendant/Appellant Condustrual/Medustrial ("Condustrual") from the Decision and Order of Commissioner Melody L. James ("the Single Commissioner") dated July 31, 2020. Guarantee and Countrywide ask the Full Commission to affirm the Single Commissioner's Decision and Order relating to the Contract Labor Services Agreement between Condustrual and Countrywide and ("the Agreement") and the workers compensation insurance policy between Guarantee and Countrywide ("the Policy"). Specifically, Guarantee asks the Full Commission to affirm the Single Commissioner's Decision and Order that:

- (I) Countrywide is not liable for any losses because Condustrual failed to acquire workers compensation coverage for Claimant under the Condustrual/Countrywide Agreement, and reformation of contract is not warranted under common or statutory law; and
- (II) Guarantee is not liable for any losses suffered by Claimant because Condustrual was not an insured under the Policy; Claimant was never an employee of record of Countrywide; and even if Claimant had been an employee of record of Countrywide, Claimant was not among the workers in class codes and locations approved by Guarantee under the Policy.

Condustrual's appeal is a continuation of a years-long business practice of knowingly sidestepping the truth by providing hundreds of nurses it staffed at prison facilities across the State of South Carolina under the pretense that those nurses had workers' compensation insurance, all to make and maximize its profits. As Tony Durham, President of Condustrual stated: "At the end of the day, it all becomes economics, you know."² Under these circumstances, it should be no surprise to Condustrual that they have been caught and that the Commissioner found Claimant is an employee rather than an independent contractor under South Carolina law, and that Condustrual was an uninsured employer relative to Claimant's employment. As discussed in more detail below,

² (Trial Tr. 11/3/2017 at 325.)

Condustrual's appeal has no merit based on the preponderance of the evidence established at the hearing and the legal and equitable principles related thereto.

ARGUMENT

As the Single Commissioner found, "Condustrual and [Countrywide] are both sophisticated business entities who negotiated and executed the Contract Labor Services Agreement" in which Countrywide agreed to provide workers compensation coverage, upon Condustrual's submission of timely, complete, and accurate information, including timely submission of employee class codes and locations, and Countrywide's agreement to cover the same under certain other circumstances.³ (emphasis added).

Condustrual is a staffing company in operation since 2002. In the beginning, Condustrual specialized in staffing workers for construction projects. Then, in 2006, Condustrual bought "Medustrial" a brokerage model that staffed approximately 130 nurses in South Carolina with it a payroll of about 1.4 million dollars. Condustrual classified about 120 of these workers as 1099 workers. At the time of the Claimant's injury, Tony Durham, President of Condustrual, and Tom Sears, General Counsel for Condustrual, served in their roles for the company for over fifteen and nine years respectively. They were both involved in the negotiation of the Agreement with Countrywide, as well as intimately familiar with the company's workers compensation arrangements in the past.⁴

Before executing the Agreement with Countrywide, Condustrual had at different times at least both (1) a high deductible, direct policy of insurance for its employees with Guarantee as well as (2) an agreement with Professional Employment Organization (PEO). Durham testified he was

³ (Order at 53; Guarantee APAs 43 ¶¶ 2.c and 6 & 47—Agreement and Addendum thereto.)

⁴ (Trial Tr. 11/3/2017 at 7, 12 & 127; Trial Tr. 11/12/2017 at 164-65.)

very familiar with all types of insurance and that he chose the Agreement with Countrywide because it was different from and less than a PEO arrangement, more like an Administrative Services Organization (ASO) agreement, as well as less expensive than the alternatives presented to him at the time.⁵ Specifically, unlike other PEO arrangements, the Agreement did not assign Condustral's employees or contracts to Countrywide or allow Countrywide to process Condustral's payroll. It left out other statutory requirements between PEOs and client companies required by statute too. Durham understood that the Agreement was not an insurance policy but only a contract. Durham also admitted that he could have requested modifications to the Agreement, warranting that Countrywide was a PEO or providing professional employment services, or addressing coverage of its 1099 brokerage model, but he did not make those requests.⁶

⁵ (Trial Tr. 11/3/2017 at 325 (did not like the renewal rates quoted by his direct insurer); *id.* at 223-224 (stating in his negotiations with Countrywide he refused to agree to assign Condustral's staffing contracts with other companies to Countrywide, refused to assign Condustral's employees to Countrywide and insisted that Condustral remain the Employer of Record); *id.* (admitting that the assignment of employees to a PEO is often the hallmark of a PEO arrangement); 225 (reading an email dated March 12, 2015 from Tom Sears, General Counsel for Condustral, to Countrywide that "What we had discussed a year ago and again several months ago is entering into a co-employer agreement that would function more like and A.S.O. relationship where [Condustral] can process payroll, handle H.R., and report and send all payroll taxes to you for recording and primarily access you worker's compensation program."); 226 ("I was just going to say a P.E.O. is a full on service you buy as a package, and then when they unbundle it, it becomes and A.S.O Agreement because your picking pieces out of it that you want to do."); 227 (Q. But you weren't looking for a P.E.O. relationship. A. I was looking – Q. You were looking for a piece of one. A. I was looking for a piece of one. . . . I agree with that I was looking for an unbundled arrangement from all of their other duties. I only needed a few.); *see also* Trial Tr. 10/13/17 Testimony of Tom Sears at 291 ("Yes, you know, we also at the time we joined Countrywide because of the kind of—you know, we had 30 days or less to get it done. I mean, really the intent was for them to act more like an A.S.O. It was not a true P.E.O., because they did not take over our employees. It was more of a co-employer situation."); *id.* at 292 (unable to reference any provision in the Agreement indicating that the parties believed Countrywide was a Professional Employer Organization (PEO)); *see also* Guarantee's Exhibit 43 (the Agreement lacks any reference to Professional Employer Organization or PEO).)

⁶ (Trial Tr. 11/3/17 at 272 & 341; *see also id.* at 234 & 238 Testimony from Tony Durham admitting that the Agreement governs Condustral and Countrywide's relationship with one another and that there is no representation or warranty anywhere in the Agreement that "Countrywide Staffing Solutions Group," the entity with which Condustral contracted, is a PEO or a professional employment organization); (Trial Tr. 10/13/17 at 337 Testimony of Tom Sears, General Counsel for Condustral admitting that the Agreement was not a direct policy of insurance.)

Rather, the Agreement is governed by the common law of contracts and, accordingly, the parties' obligations thereunder are subject to the plain language and four corners of the Agreement.⁷ See *Silver v. Abstract Pools & Spas, Inc.*, 376 S.C. 585, 591, 658 S.E.2d 539, 542 (Ct.App.2008) ("In construing and determining the effect of a written contract, the intention of the parties and the meaning are gathered primarily from the contents of the writing itself, or, as otherwise stated, from the four corners of the instrument, and when such contract is clear and unequivocal, its meaning must be determined by its contents alone; and a meaning cannot be given it other than that expressed.").

Finally, what Condustrial did was illegal and unethical. This tribunal should render no aid to it. It is a well-founded policy of law that no person be permitted to acquire a right of action from their own unlawful act and one who participates in an unlawful act cannot recover damages for the consequence of that act. *Jackson v. Bi-Lo Stores, Inc.*, 313 S.C. 272, 437 S.E.2d 168 (S.C. App

⁷ Condustrial argues that the Florida choice of law provision in the Agreement is invalid and South Carolina law should apply because the contract lacks a substantial relationship with Florida. The Full Commission should reject Condustrial's argument as not based in reliable fact or law. First, Countrywide's principal place of business is in Orlando, Florida. Second, the substantial relationship test does not apply to ordinary contracts. Condustrial citations are to South Carolina trust cases relying on the *Restatement (Second) of Conflict of Laws* applicable to *self-settled trusts*. Choice of law applicable in the context of self-settled trusts is peculiar and not the same as choice of law applicable in the context of ordinary contracts negotiated between sophisticated business parties. Cf. *Restatement (Second) of Conflict of Laws* §§ 268-270, with *Restatement (Second) of Conflict of Laws* §§ 187-88. Nonetheless, after a comparison of the common law of contracts under both Florida and South Carolina law, Countrywide has no objection to the Full Commission application of South Carolina law to the Agreement. As applicable to the interpretation of the Agreement in this matter, there are no material differences under South Carolina or Florida law. Cf., e.g., *S.C. Dep't of Transp. v. M & T Enterprises of Mt. Pleasant, LLC*, 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct. App. 2008) ("When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary, and popular sense. Where an agreement is clear and capable of legal construction, the court's only function is to interpret its lawful meaning and the intention of the parties as found within the agreement and give effect to it." (internal citation omitted)), with *Andersen Windows, Inc. v. Hochberg*, 997 So. 2d 1212, 1214 (Fla. Dist. Ct. App. 2008) ("Courts, without dispute, are not authorized to rewrite clear and unambiguous contracts. And where a contract is clear and unambiguous, it must be enforced as written." (internal citation omitted)).

.1993). This rule applies at both law and equity, and whether the cause of action arises in law or in tort. *Id.*

I. The Plain Language of the Agreement Required Condustral to Submit the NCCI Class Codes and the Locations of Employees Subject to the Agreement and There is No Dispute Condustral Failed to Submit Claimant's NCCI Class Code and Location to Countrywide.

The plain language of the contract provided that Countrywide would provide various services, including workers compensation benefits, for "Select Staffing/Employees performing services for [Condustral] based on timely, complete and accurate information and payment provided by [Condustral]."⁸ Section 2.c, furthermore, states that Condustral must "[s]ubmit timely, complete and accurate payroll information (including . . . worker classification code . . . for each Assigned Employee for each applicable payroll period *at least three banking days prior to the date on which payroll is to be issued by CSSG.*"⁹ Thus, if Condustral did not submit timely, complete, and accurate payroll information including worker class codes regarding any employee at least three days prior to the date on which payroll is to be issued by Countrywide, then the employee was not covered by the Agreement.¹⁰ Condustral admits it failed to include Claimant in its payroll.¹¹ Further, to this day, Condustral has never attempted to follow the methods of the Agreement to

⁸ (Guarantee APA 43 ¶ 1.)

⁹ (*Id.* ¶ 2.c.)

¹⁰ (Trial Tr. 11/3/2017 at 256 Testimony of Tony Durham, President of Condustral (agreeing that "Q. . . . no one could ever get into this agreement as an employee until you put them in? A. On a weekly basis, that's correct.")

¹¹ (Trial Tr. 10/13/17 at 305 Testimony of Tom Sears, General Counsel for Condustral, stating: "I would agree that independent contractors under Medustrial were not covered by the Agreement."); *id.* at 351 (stating: "I agree that when we made this contract with Countrywide, we did not intend to include independent contractors.")

submit the Claimant, knowing full well that CSSG had a right to refuse and would refuse an employee at a maximum security prison.

Condustrail instead pretends that it could not have intentionally left a huge gap in its coverage when negotiating this Agreement, setting forth arguments, most of which are presented for the first time on this appeal to the Full Commission, and all of which are without merit. The evidence in the record shows that the gap was in fact intentional and was motivated by simple greed. Just as greed is motivating Condustrail's pursuit of this appeal.

II. The Plain Language of the Agreement Does Not Provide Condustrail Any Flexibility to Bring a Misclassified or Unreported Employee under the Agreement After-The-Fact.

In its first argument, Condustrail tries to mislead the Full Commission by cutting off a sentence before its end, thus distorting its meaning. This is true to form with Condustrail's business practices. For the first time in this litigation, Condustrail argues that provision 2.c of the Agreement gives it the "inherent flexibility in the contract that provides the mechanism whereby an unreported or misclassified employee can be brought under the umbrella of the agreement at *any time*," so long as Condustrail provides "timely, complete and accurate payroll information . . . for each applicable payroll period." (Condustrail's Brief to the Full Commission at 35 (quoting the Agreement).) The Agreement itself, however, shows that Condustrail distorts the meaning of the agreement and puts a period before the sentence's thus omitting the words "*at least three banking days prior to the date on which payroll is to be issued by CSSG.*" Why would Condustrail try to leave those words out? Because, that defeats Condustrail's after the fact fantasy that the Agreement allows it to add any new and injured employee at any time (i.e. after a worker is injured and Condustrail gets caught without coverage).

Further, the next sentence reaffirms: "All information provided by [Condustral] to [Countrywide related to section 2.c] will be complete, accurate and not misleading."¹² Section 2.c, therefore, does not allow Condustral any flexibility to bring under the umbrella of a contract a misclassified or unreported employee after-the-fact. If Condustral's arguments were adopted, there would be no more workers compensation insurance because underwriting would be an open-ended impossible risk analysis.

Further, as the Single Commissioner aptly noted, other provisions of the Agreement speak to Condustral's inability to add unreported or misclassified employees after-the-fact. Section 2.a, which comes before 2.c regarding Condustral's obligation to submit timely, complete, accurate payroll information including worker class codes to Countrywide, states:

[Condustral shall make any and all strategic, operational and other business-related decisions regarding its business. Such decisions and related outcomes shall exclusively be the responsibility of [Condustral] and [Countrywide] shall bear no responsibility or liability for any actions or inactions by [Condustral].¹³

To this end, Sears admitted repeatedly that Condustral made a "business decision to maintain this [1099] brokerage model."¹⁴ Q. "It was your business – your company's business decision to have these 1099 employees out there without workers' compensation insurance." A. "Yes."¹⁵ That admission says it all. Condustral knowingly engaged in a business practice that left high risk workers without insurance, all the while contractually representing to the South Carolina Department of Corrections that the nurses had full coverage. True to form, when Condustral got caught, through misrepresentation and legal fantasy, they seek to avoid responsibility.

¹² (Guarantee APA 43 ¶ 2.c.)

¹³ (*Id.* ¶ 2.a.)

¹⁴ (Trial Tr. 11/13/17 at 312.)

¹⁵ (*Id.* at 313.)

Ample other evidence, some damning, demonstrates that Condustrial's business model purposefully failed to provide workers compensation coverage for its 1099 nurses staffed at prison facilities throughout South Carolina. The 1099 nurse brokerage had a payroll of approximating \$800,000.00 dollars.¹⁶ By classifying them as 1099s, Condustrial avoided being their employer of record necessarily required to pay workers compensation premiums in the assigned risk pool, "the policies of last resort" for the "refuge of the damned," as well as various employment taxes.¹⁷ Condustrial, moreover, took no steps to verify that its 1099 nurses were otherwise insured themselves, even though Condustrial understood that SCDC may have believed it was staffing nurses with workers compensation coverage there.¹⁸

Most damning perhaps, in 2014, Condustrial had a high deductible, direct workers compensation insurance policy with Guarantee. When Guarantee's premium audit revealed the Policy's exposure to these 1099s, including those nurses working in prison facilities, Tom Sears

¹⁶ (Trial Tr. 11/3/17 at 128 Tony Durham stating that the 8829 and 8833 nurse payroll including W-2 and 1099 employees approximated \$1.4 million but estimating that the independent contractors' payroll approach about \$800,000.00.)

¹⁷ (Trial Tr. 11/3/2017 at 308 (Tony Durham admitting his agent stated: "I am not aware of any insurance product that could protect you as brokering 1099ers to the South Carolina Department of Corrections" and that Condustrial ended up after this litigation ensued insuring the 1099 nurses in the assigned risk market)); *id.* at 319 ("Q. . . . you set up the 1099 brokerage structure . . . you operated it, correct? A. That's correct. Q. And you knew you couldn't get comp for it? A. That's correct."); Trial Tr. 11/13/17 at 398-399 (Tom Sears admitting after this litigation ensued Condustrial engaged brokers to find workers compensation insurance for its nurses staffed in prison facilities and ended up with an assigned risk policy); *id.* at 362 (Tom Sears acknowledging that JoAnn Whitaker came back to him stating, "Workers' comp markets, the assigned risk, nor the P.E.O. want to stick their neck out for a large potential exposure for which they receive twelve-fifty. I haven't even gotten into the class code and the location of their work."); *see also* Countrywide Trial Exhibit 3.)

¹⁸ (Trial Tr. 10/13/17 at 321-24; *see also* Trial Tr. 11/3/2017 at 294-295 Testimony of Tony Durham, confirming 2015 email from Tom Sears to insurance broker, Joanne Whitaker, regarding coverage for the 1099 workers staffed at SCDC facilities: "The [SCDC] contract was signed in 2008. There are several provisions that are very ambiguous in light of how we have mutually operated in the last several years. I can explain better on the phone.")

falsely informed Guarantee that the nurses were insured instead by the State of South Carolina, thus keeping these nurses off the Policy, or, perhaps even worse for Condustrial, that Guarantee may have sought to void the coverage for material misrepresentation.¹⁹

Every which way this case presented itself during the hearing, the evidence demonstrated that Condustrial knowingly exercised poor and reckless business judgment, continually and purposefully sidestepping the truth to avoid responsibility for providing workers compensation coverage for the nurses it staffed in prison facilities. Should Claimant be deemed an employee under South Carolina law, Condustrial is rightfully caught in the reckless and callous web of deceit which it weaved,²⁰ and Buyer's Remorse is no excuse. Buyer's remorse does not change the plain language of the Agreement, or that Condustrial did not submit Claimant for coverage under the agreement, or that, in any event, Countrywide did not and would not ever agree to cover Claimant's exposure under Paragraph 6 of the Agreement.

¹⁹ (Trial Tr. 11/4/17 Becky Barnette, Vice-President for Underwriting and Manager of the PEO Unit for The Guarantee Insurance Company at 34 (providing that an insurer has a right to tell an insured it will not cover risks in certain class codes and issue cancellation notices for any material change of risk); *id.* at 146 ("If there is a material misrepresentation made to the underwriting and the insurance company upon soliciting coverages, then the insurance company has the right to seek the ability to void the coverage because it was obtained through misrepresentation."))

²⁰ Notably, both Sears and Durham testified that working as a nurse in a prison facility did not strike them as being particularly risky or more risky than working in a hospital or nursing home. (Trial Tr. 10/13/17 at 386-388; Trial Tr. 11/3/17 at 261-62.) On cross-examination, when presented with Guarantee's Exhibit 1 and 2 regarding the Kirkland Correctional Facility, the correctional institution where Condustrial staffed Claimant, Sears admitted that he did not know there were different security levels applied to different correctional facilities in South Carolina, or that the Kirkland Correctional Facility was a Level Three facility reserved for South Carolina's most violent criminals who exhibit behavioral problems. Sears admitted that he had never done any research on the Kirkland Correctional Facility aside from talking to "personnel over the course of providing independent contractors there." (Trial Tr. 11/13/17 at 378-379; 392-95.)

III. Paragraph 6 in the Agreement further limits Condustrial's ability to seek coverage for Claimant after-the-fact and allows Countrywide to refuse coverage for Claimant under these circumstances at any time.

For argument purposes only, even if there was a provision in the Agreement whereby Condustrial could submit employees after-the-fact for coverage (which there is not), Condustrial admitted that Countrywide could reject an exposure that presented an undue risk of injury or death and Condustrial would have to find coverage for those employees elsewhere.²¹ Paragraph 6 in the Agreement states in pertinent part:

. . . . [Countrywide] shall have the right to cease providing recruited employees to a third party if, in the reasonable opinion of [Countrywide], after consultation with [Condustrial and a reasonable time to cure, [Countrywide] believes that the third party's worksite or any portion thereof or any practice or equipment of the third party present an undue risk of injury or death to Selected Staffing/Employees. . . . Alternatively, [Condustrial] may continue relationship with such third party in its reasonable business discretion if it obtains other insurance coverages for the provision of its Selected Staffing/Employee, apart from those provided under the agreement, and holds [Countrywide] harmless for the provision of any such personnel."²²

²¹ (Trial Tr. 10/13/2017 at 308-09 (Tom Sears admitting he negotiated the Agreement whereby Condustrial would provide compensation codes and locations where employees worked and put that data into Countrywide's system); *id.* at 333-35 (Tom Sears admitting that Section 6 of the agreement required Condustrial to provide the locations of its workers and that Countrywide had the ability to reject specific exposures); *id.* at 352 ("Q. But [Countrywide has] a right of prior approval. You can't just give us anybody. A. The contract does say that, yes."); *id.* at 416-418 ("Q. You have to submit them for payroll, and their class codes and locations have to be approved before [Countrywide] agrees to become a co-employer with Condustrial under the Agreement; is that correct? A. I think in the normal course of business, yes."); Trial Tr. 11/3/2017 at 343-344 (Tony Durham agreeing you have to submit the class code and locations for approval to come under the Agreement).

²² (Guarantee APA 43 ¶ 6.)

Tony Durham confirmed that under this paragraph "if [Condustral] sent [Countrywide] something that was not covered within a code that [Condustral] had on our [Agreement], that they would certainly have the reasonable expectation to say, 'hey, that's not cool. Don't do that.'"²³

Countrywide's carrier, Guarantee, testified that Claimant was a worker in a prison facility under class code 7720, and it had not in the past and would not in the future cover workers at prison facilities.²⁴ Such an exposure presented an unreasonable risk of injury or death.²⁵ And Guarantee would seek cancellation of the Policy based on any misrepresentation in the application for any insured revealing such exposure after-the-fact. Claimant, particularly, was staffed at the Kirkland Correctional Institution, a Level Three Maximum security facility, considered to house some of the most dangerous inmates in South Carolina. Under these circumstances, even if Condustral could seek coverage for Claimant under the Agreement after-the-fact (which it cannot), Countrywide would have to refuse to provide coverage for Claimant under paragraph 6 as such exposure is deemed by it and its insurer as presenting an unreasonable risk of injury or death.

²³ (Trial Tr. 11/3/17 at 263; *see also id.* at 264 ("Q. And Paragraph six says if you would send them a location that they weren't comfortable with or they didn't want to deal with, they could say, 'No.' A. Yeah."))

²⁴ (Guarantee Trial Exhibits 10-13 & Trial Tr. 11/4/2017 at 65-77 (Becky Barnette explaining, as an underwriting expert, in detail how the proper N.C.C.I. classification code for Claimant was 7720, for workers in prisons, not the 8829 or 8833, for workers in nursing homes and hospitals respectively); *id.* at 78-79 (Becky Barnette stating that Guaranty Insurance Company has never insured workers staffed at any prison facility, Maximum Security Level Three or not); *id.* at 100, 108-09 (Becky Barnette stating that Guarantee would seek to void a policy for material misrepresentation made by an insured in failing to reveal a 7720 exposure, explaining that workers in this class code "would create an extreme liability for the company from an underwriting perspective").)

The Agreement expressly contemplates these circumstances. Paragraph 6 requires Condustrial to obtain coverage elsewhere and hold Countrywide harmless for Condustrial's continued provision of any such personnel to a third party. In fact, the parties had already followed the terms of Paragraph 6 in another circumstance. Tony Durham admitted that before execution of the Agreement, Condustrial asked whether Countrywide would cover its U.S.L. & H. exposure. Countrywide said no, and Condustrial obtained separate coverage for these workers. (Trial Tr. at 264-265 (regarding U.S.L. & H coverage). Condustrial knowingly did not obtain coverage for its 1099 nurses, unlike what it did for its U.S.L. & H coverage before Claimant was injured. Those strategic business decisions are solely Condustrial's. Further, under the express terms of the Agreement, Condustrial is obligated to hold Countrywide harmless for such decisions. And where Condustrial did not try to seek coverage ahead of time, then [s]uch decision[] and related outcome[] shall exclusively be the responsibility of [Condustrial] and [Countrywide] shall bear no responsibility or liability for any actions or inactions by [Condustrial]."²⁶ The truth is, Condustrial was charging the SCDC for fully insured staff, and pocketing the profit of not covering those workers, which worked great, until it got caught.

IV. Exhibit B and Condustrial's argument about "Select Staffing/Employees" is much ado about nothing.

Condustrial makes much ado about "Exhibit B" allegedly not being attached to the Agreement and then somehow giving it the ability to add workers to the Agreement at any time. This argument again raised for the first time in this litigation on appeal to the Full Commission is without merit. The alleged failure of the parties to attach Exhibit B to the Agreement does not provide for such right.

²⁶ (Guarantee APA 43 ¶ 2.a.)

As described in section 1.a of the Agreement, Countrywide agreed to provide certain services for "Selected Staffing/Employees performing services for [Condustrial] based on timely accurate, and complete information and payment provided by [Condustrial], including to "furnish or/provide Selected Staffing/Employees to perform the type of work described on Exhibit B under [Condustrial]'s supervision at the locations specified on Exhibit B."²⁷ This is the only time Exhibit B is referred to in the Agreement. Therefore, Exhibit B says nothing about the process by which a "Selected Staffing/Employees" would be covered for workers compensation purposes. As discussed above, and as admitted by Condustrial in its Full Commission Brief, section 2.a dictated who was covered and required Condustrial to provide "timely, complete, and accurate worker class codes for Select Staffing/Employees at least three banking days prior to the date on which payroll was to be issued by Countrywide." (*Id.* ¶ 2.a.)

Exhibit B, according to paragraph 1.a in the Agreement, merely describes the type of work "Select Staffing/Employees,"²⁸ furnished by Countrywide to Condustrial, were going to perform and at what locations. Tom Sears admitted that the Agreement required Condustrial to provide Countrywide a list of National Council on Compensation Insurance (NCCI) codes used to classify Condustrial's workforce and the locations of their work and Exhibit A attached to the Agreement

²⁷(*Id.* 43 ¶ 1.a.)

²⁸ Grasping at straws, Condustrial also argues for the first time in its Full Commission Brief that the definition of "Selected Staffing/Employee" is vague and ambiguous on its face. The alleged ambiguities noted by Condustrial, however, do not raise any question regarding section 2.c, defining Select Staffing/Employees as those employees that Condustrial "[s]ubmitted timely, complete and accurate payroll information (including . . . worker classification code . . .) for each Assigned Employee for each applicable payroll period *at least three banking days prior to the date on which payroll is to be issued by CSSG.*" Therefore, this argument is without merit.

would have been the list that Condustral would have expected to be covered by the Contract in its inception.²⁹

“I am sure this was an initial list. I’m sure as testimony has stated before an as any business this situation, you grow and change, and you go into different states. So, I mean, certainly, this was a beginning list, but one that I think everyone involved knew would be supplemented and could be supplemented.”³⁰

Condustral followed these procedures under the Agreement including providing Countrywide the class codes and the locations of its workers before each payroll period.³¹ Neither Claimant, the class code related to workers in prison facilities, nor the prison facility location was ever included in Condustral’s submissions.³²

V. Countrywide’s knowledge of Condustral’s brokerage business does not alter the terms of the Agreement.

Condustral stresses throughout its brief that Countrywide was aware of its Medustrial brokerage line of business, including approximately 180 nurses, and in fact submitted a few nurses as employees under the Agreement under class codes 8829 and 8833. Condustral argues therefore that Countrywide should be obligated to pick up any exposure related thereto, even if arising after-the-fact, under the Agreement.

As discussed above and in the Single Commissioner’s Decision and Order, however, the plain language of the Agreement does not provide for that kind of after-the-fact coverage. Instead, the Agreement stresses the need for Condustral to provide “timely, complete, and accurate payroll

²⁹ Exhibit A, notably, is not referenced anywhere in the Agreement suggesting that Exhibit B, which is not explicitly attached to the Agreement, may have been a typo and should have been a reference to Exhibit A instead.

³⁰ (Trial Tr. 10/13/17 at 410.)

³¹ (GIC APAs 27-28 pp. 568-641 (Condustral Payroll for August and September 2015) & GIC APA 32 pp. 735-737 (List of locations provided by Condustral to Countrywide excluding reference to any prison facility.)

³² *Id.*

information” and any outcome related to its decision not to submit time, complete, and accurate payroll information is the exclusive responsibility of Condustral, whereby “[Countrywide] shall bear no responsibility or liability for any actions or inactions by [Condustral].”³³ Further, Condustral admits that there is no language in the Agreement to address this after-the-fact situation.³⁴

In executing the Agreement, moreover, Condustral and Countrywide agreed the Agreement “constituted the entire understanding of any of the provision contained in th[e] Agreement” and “may be modified or amended only by a written modification or amendment signed by both parties.”³⁵ Finally, “[t]his Agreement supersedes all previous Agreement or understandings between the parties hereto, and all other such Agreements or understandings, whether oral or written, shall become null and void as of the date of the execution hereof.”³⁶ The Agreement makes it a moot point then what Tony Durham or anyone else told Countrywide or what Countrywide may have told Tony Durham before execution of the Agreement and Addendum.

Finally, even if Durham’s conversations with Countrywide could be considered relevant to application of the Agreement (which it cannot), Condustral never told Countrywide about any worker classified under class code 7720 staffed at the Kirkland Correctional Institution. The few nurses Condustral submitted as employees under the Agreement were in class codes 8829 and 8833 applicable to workers in hospitals and nursing homes. Therefore, Countrywide did not know about Claimant’s exposure before executing the Agreement, and, if and when it did, it would have

³³ (Guarantee APA 43 ¶ 2.a & c.)

³⁴ (Trial Tr. 11/3/2017 Tony Durham admitting the Agreement fails to address this situation or provides for an audit and retroactive coverage.)

³⁵ (Guarantee APA ¶ 20 “Entire Agreement, Amendment”.) In fact, the parties acknowledged the force and effect of Paragraph 20 in executed the Amendment to the Agreement found at Guarantee APA 47.

³⁶ (*Id.* ¶ 20 “Supremacy of the Agreement”.)

rejected coverage for such workers as it did with Condustrial's U.S.F. & H. workers. Workers in prison facilities would have been assign class code 7720 under the NCCI and at the Kirkland Correctional Institution, a Level Three Maximum Security Facility, were uninsurable under the Countrywide's Policy with Guarantee.³⁷ As the Single Commissioner concluded, "the credible and reliable evidence in the record demonstrates that Claimant's class code and location were never submitted to [Countrywide] for coverage."³⁸ "It is logical for the [Full Commission], which did not have the benefit of observing the witnesses, to give weight to the Hearing Commissioner's opinion." *Fishburne v. Ati Systems Intern.*, 681 S.E.2d 595, 384 S.C. 76 (Ct. App. 2009) (quotations omitted).

VI. Countrywide is not a "de facto" Professional Employer Organization (PEO) by which some statutory or common law would then reform the Agreement between the parties to include the requirements set forth in the PEO statute.

Condustrial does not cite to a single case or statute providing the Commission the authority to declare an entity a "de facto" Professional Employer Organization (PEO) under section 68-40-30 et seq. and then bootstrap the professional employer organization statutory laws to it. Further, as set forth above, Condustrial's officers testified that it did not want a PEO. Condustrial should now be barred by estoppel and unclean hands from claiming that it should benefit from a Court coming to its aid and declaring Countrywide as a PEO.

A. The plain language of the agreement and Condustrial's own testimony demonstrate that Countrywide is not a Professional Employer Organization (PEO).

The Agreement definitively provides that it is a "Contract Labor Service Agreement" between Condustrial and Countrywide Payroll and HR Solutions, Inc., also defined as "a contract labor

³⁷ See *supra* notes 19 and 24.

³⁸ (Order at 56.)

service (CLS) entity.” The Agreement makes no reference to Countrywide as a Professional Employer Organization or PEO, or “warranting in any way that [Countrywide] is a PEO.”³⁹ As discussed at length *supra*, moreover, though Countrywide may have initiated conversation with Condustrail regarding back room services pointing out that one of its companies, Countrywide HR, was now a license P.E.O., as the discussions between the parties ensued, Condustrail admits that it did not want a full P.E.O. arrangement, something less, different from, more like an A.S.O. Countrywide agreed and sent Condustrail an Agreement with Countrywide Payroll and HR Solutions, Inc., which is not a licensed PEO, but a contract labor services entity.

The Amendment to the Agreement dated two days before the Agreement’s execution, moreover, removes Countrywide’s ability to provide services required of a PEO under South Carolina statutory law.⁴⁰ That is, Condustrail refused to allow Countrywide to take control over its employees, serve as the employer of record, and perform payroll functions. As the Commissioner aptly noted, to be a Professional Employment Organization, section 40-68-70 requires an organization operating as a PEO under the PEO statutory scheme to provide these specific services. There are terms that are required to be set forth in a contract between a PEO and client company under section 40-58-70 that Condustrail and Countrywide left out.⁴¹ Under these circumstances, Countrywide was not in fact a PEO to the extent that is even a thing under any law in South Carolina. Finally, while Condustrail, the sophisticated business entity, took the position at the hearing that it did not know it was not entering into an Agreement with the Countrywide entity that was a licensed PEO, Condustrail admitted it knew that Countrywide was not a licensed PEO

³⁹ (Decision and Order at 59.)

⁴⁰ (Guarantee APAs 47.)

⁴¹ For example, section 40-68-70(6)(a)-(d) requires a licensee and client company to agree in a contract about four issues that are not present in the Agreement.

before Claimant's injury.⁴² Guarantee, Countrywide's insurer, moreover, understood when issuing the Policy for Countrywide that Countrywide was not a Professional Employer Organization too.⁴³ Under such circumstances, Condustrial should be estopped from arguing now that the Commission should consider Countrywide a "de facto" PEO for purposes of adjudicating this claim.

B. Condustrial has not cited any law or statute providing the Commission the authority to declare Countrywide a "de facto" PEO under these circumstances and then bootstrap the requirements of the PEO statute to reform the parties' Agreement.

Condustrial states that the PEO statute is silent on this issue and therefore does not prevent the Commission from declaring an entity a "de facto" PEO and applying the requirements of the statute to reform the parties' Agreement.⁴⁴ The Full Commission should readily reject this argument, however. Statutes must be strictly construed and narrowly applied under South Carolina law. The Commission cannot expand a statute's reach. When a statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed, and this Court has no right to impose another meaning. *Catawba Indian Tribe of South Carolina v. State*, 372 S.C. 519, 642 S.E. 2d 751, 754 (2007); *see also Vaughn v. Bernhardt*, 345 S.C. 196, 198, 547 S.E. 2d 869, 870 (2001). "[T]he words of the statute must be given their plain and

⁴² Tom Sears stated, "A. We had – We had found out that they had not registered as a P.E.O. in South Carolina, correct? Q. "Before the incident took place? A. "Probably, yes. . . ." (Trial Tr. 10/13/2017 at 292.)

⁴³ (Trial Tr. 11/4/2017 Becky Barnette at 40 ("It is very important to get it right. So, we asked some questions, and so we have policies that are for Countrywide P.E.O. that we've issued . . . and then we had [Countrywide Staffing Solutions Group] for the . . . staffing contract that they had in place . . . "); *id.* at 45 ("It's not a PEO policy. Countrywide is a staffing company, not a PEO.")

⁴⁴ Condustrial's argument that the PEO statute envisions PEOs will exist outside a licensing statute misses the mark. Just because the legislature regulates entities providing PEO type services without a license, including application of criminal penalties, such regulation does not make that entity a "de facto" PEO to which the statutory sections applicable to licensed PEOs also apply without legislative direction to that end too. As the Single Commissioner pointed out, not only was Countrywide not licensed but also Condustrial bargained out of the Agreement Countrywide's provision of certain services that are required of PEOs.

ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." *Mun. Ass'n of S.C. v. AT & T Communications of S. States, Inc.*, 361 S.C. 576, 580, 606 S.E. 2d 468, 470 (2004).⁴⁵

As the Single Commissioner held, the requirements set forth in the PEO statute as to contracts between licensees and client companies only apply to licensees and client companies. Countrywide was not a licensed PEO. Section 40-68-20 specifically states: "A licensee is governed and controlled by this chapter and the regulations adopted by the department." S.C. Code Ann. §§ 40-68-10(7) defines a licensee as "person licensed under this chapter as a professional employer organization to provide professional employer services. Sections 40-68-30-55 address the requirements for licensees. Section 68-40-70 addresses "Requirements of contract between licensee and client company . . . licensee considered employer of assigned employees," and repeatedly reserves the requirements set forth in the statute as being those required by a "licensee and a client company."⁴⁶

⁴⁵ Nor is the Single Commissioner ruling that "an unlicensed business entity engaging in professional employer services is immune from the substantive provisions of the PEO statutes" and "inviting fraud and chicanery to the workers compensation system." (Condustral's Brief to the Full Commission at 44-45). Although not applicable in this case, the PEO statute regulates and deters entities operating as Professional Employment Organizations without a license by providing for criminal penalties for those entities doing so. S.C. Code Ann. §§ 40-68-150. When addressing operation of PEO services without a license, the PEO statute notably does not provide as a method of redress designation of that entity a "de facto" PEO, and then a court of law applying other provisions of the PEO statute to it.

⁴⁶ To recite just a few examples from the section 40-68-70 (2012): "A contract between a licensee and a client company must provide that the licensee: . . . (2) . . . assume responsibility for payment of wages . . . without regard to payments by the client and licensee; (5) retains the right of direction and control over the adoption of employment and safety measures . . . on joint agreement by the client company and licensee; (6) agrees that . . . notice to or acknowledgement of the occurrence of an injury . . . is notice to or knowledge on the party of the licensee and its workers' compensation insurer" and the list goes on.

The common law to which Condustrial cites on page 42 of its brief, moreover, is inapplicable. Those cases concern instances in which a contract is interpreted consistently with an agency relationship existing outside the contract between the parties, a circumstance that is not present here and never argued to the Single Commissioner below. Condustrial and Countrywide are sophisticated, arms-length business entities, not in any agency relationship with one another outside the corners of the contract. Guarantee and Countrywide, moreover, performed a nationwide state and federal law search for cases in which a court found an entity to be a “de facto” PEO, and found no court that has held an entity to be so or, of course, then took the additional step, bootstrapped the requirements applicable to a licensed PEO by statute to the allegedly “de facto” entity.

Finally, equitable principals cannot be of assistance to Condustrial where there is a valid, binding, and enforceable contract between the parties. The Agreement between the parties was clear. Condustrial knew how to submit employees to secure workers compensation insurance under the Agreement. Condustrial made a business decision to classify its nurses, including Claimant, as 1099s and not report Claimant, the class code related to workers in prison facilities, nor the prison facility locations under the Agreement. Condustrial agreed that it would be solely responsible for the outcomes of any of its business decisions under the Agreement and hold Countrywide harmless for any liability arising from its business decisions. Condustrial, finally, chose not to ensure that the 1099 workers it was staffing to prison facilities had insurance through some other method. “The court’s duty is to enforce the contract made by the parties regardless of its wisdom or folly’ No jury—nor any judge—is permitted by law to rewrite a contract to impose liability based on some vague personal sense of what is fair.” *Crenshaw v. Erskine Coll.*, Op. No. 27993

(S.C. Sup. Ct. filed Sept. 9, 2020) (Shearouse Adv. Sh. No. 35 at 25) (quoting *Ellis v. Taylor*, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994)).

For all the reasons stated above, the Full Commission should affirm the Single Commissioner's Decision and Order concluding that reformation of the contract is not warranted under any statutory or common law.

VII. **Guarantee is not liable for any losses suffered by Claimant because Condustrail was not an insured under the Policy; Claimant was never an employee of record of Countrywide; and even if Claimant had been an employee of record of Countrywide, Claimant was not among the workers in class codes and locations approved by Guarantee under the Policy.**

The Single Commissioner ruled that Guarantee is not liable for any losses suffered by Claimant because (1) Condustrail was not an insured under the Policy; (2) Claimant was never an employee of record of Countrywide; and (3) even if Claimant had been an employee of record of Countrywide, Claimant was not among the workers in class codes and locations approved by Guarantee under the Policy.

Condustrail does not dispute the Commissioner's first two findings. Condustrail was not an insured under the Policy and Claimant was never an employee of record of Countrywide. Condustrail argues instead that "GIC argues that [it] is only required to cover risks it agrees to cover at the inception of its policy with its insured, Countrywide." Once again, Condustrail misstates Guarantee's testimony.

Guarantee Insurance Company (GIC) provided workers compensation insurance for Countrywide Staffing Solutions Group, Inc.'s properly reported employees of record in States and at locations approved by GIC. To this end, Becky Barnette, Guarantee's Vice-President for Underwriting and Manager of the PEO Unit, explained in detail that Guarantee Insurance Company (GIC) provided workers' compensation insurance to Countrywide Staffing Solutions

Group, Inc. (CSSG) from June 30, 2015 through June 30, 2016 under Workers Compensation Insurance Policy Number WCP500069701GIC⁴⁷, with Endorsements dated July 20, 2015⁴⁸, and July 30, 2015⁴⁹ (collectively referred to as "GIC/CSSG Policy"). Under the GIC/CSSG Policy, GIC only insured properly reported CSSG employees.⁵⁰ And GIC only insured properly reported CSSG employees in States and locations approved by GIC.⁵¹ "This Policy includes at its effective date the Information Page and all endorsements and schedules listed there."⁵² "You are Insured if you are an employer named in Item 1 of the Information Page."⁵³ "This policy covers all of the workplaces listed in Items 1 & 4 of the Information Page; and it covers all other workplaces listed in Items 3.A States"⁵⁴

Becky Barnette, the underwriter, testified repeatedly the Policy's coverage of employees was ever changing based upon those employees of record Countrywide submitted for coverage in NCCI class code and locations approved by Guarantee. Barnette testified about Countrywide's submission of class codes and locations for coverage and Guarantee's underwriting approval process, providing specific examples of instances where Guarantee rejected a class code in its

⁴⁷ (Guarantee APA 24.)

⁴⁸ (Guarantee APA 51.)

⁴⁹ (Guarantee APA 25.)

⁵⁰ (Guarantee APA 24 Information Page ¶¶ 1, 3.d & 4 (naming CSSG as the "Insured" and including only those other workplaces listed in the schedule of operations or by endorsement), Workers Compensation and Employers Liability Insurance Policy ¶ B (Who is Insured).

⁵¹ (*Id.* Information Page ¶ 1 (naming CSSG as the Insured), ¶ 3.d (including those CSSG workers listed in any endorsement); ¶ 4 (including those CSSG workers listed in the schedule of operations); Workers Compensation and Employers Liability Insurance Policy General Section ¶ A (The Policy), ¶ B (Who is Insured), ¶ D (States), and ¶ E (Locations).

⁵² (*Id.* Workers Compensation and Employers Liability Insurance Policy General Section ¶ A (The Policy).

⁵³ (*Id.* Workers Compensation and Employers Liability Insurance Policy General Section ¶ A (Who is Insured and naming CSSG).

⁵⁴ (*Id.* Workers Compensation and Employers Liability Insurance Policy General Section ¶ E (Locations).)

entirety and also approved of the class code but rejected the location.⁵⁵ Even Tony Durham admitted that his understanding of insurance coverage would allow an insurer to reject new class codes and locations submitted by and insured for coverage under a workers' compensation Policy.⁵⁶

In this case Barnette testified definitively that NCCI class code 7720 was the proper classification for a worker like Claimant who was staffed at a correctional institution. Neither 7720 nor the Kirkland Correctional Institution was ever a class code or location submitted to Guarantee for coverage.⁵⁷ Nor would it have been a risk that Guarantee would have ever insured. Barnette stated:

Q. . . . While you've been V.P. of Underwriting for . . . Guarantee Insurance Company, have you ever approved a worker at a maximum level three security facility? A. Absolutely not. We would not assume – we would not write an account whose exposure was a correctional facility. . . . Q. Any correctional facility? A. Any correctional facility. Q. Maximum Security Level Three or not? A. Correct.⁵⁸

⁵⁵ (Trial Tr. 11/4/2017 at 48-49 & Trial Exhibit 7 (rejecting a particular manufacturing code under the Policy); *id.* at 52-55 & Trial Exhibit 8 (rejecting submission for coverage based on the location, not the class code).

⁵⁶ (Trial Tr. 11/3/2017 at 339.) Guarantee's reference to Durham's testimony is set forth only for the purposes of establishing an admission by a party. Durham did not in any way established himself as an expert in underwriting or workers compensation insurance coverage issues, including PEO arrangements at the hearing. Guarantee would dispute giving any weight to Durham's testimony regarding underwriting or workers compensation insurance coverage issues on these grounds.

⁵⁷ (Trial Tr. 11/4/2017 at 57-58 & Guarantee APA 45 (no prison location or Kirkland Correctional Facility listed) and Trial Exhibit 9; Tr. Transcript 11/4/2017 at 64-76, Guarantee APA 25, and Trial Exhibits 10-13 (NCCI Scopes Manual Codes 8829, 8833, 7720, and 9410 (explaining that 7720 is proper classification for workers in prisons); *id.* at 79-80 (stating 7720 was not submitted for coverage).)

⁵⁸ (Trial Tr. 11/4/2017 at 78-79.)

For any Policy that was issued on the failure to reveal this class code or location, moreover, Barnette testified that Guarantee would have sought to void the policy for material misrepresentation.⁵⁹

Condustrail's Full Commission Brief really does not appear to dispute these facts. Condustrail's argument apparently hangs on application of the PEO statute in this instance. The Full Commission should reject this argument for the reasons provided above; that is, Countrywide was not a licensed PEO or a "de facto" PEO. Even if the Commission determined that Countrywide was somehow acting as a PEO without a license, moreover, the statutory requirements set forth in section 68-40-10 et seq. only apply to licensees. There is no statute or common law giving the Commission the authority to construe and apply the PEO statutory dictates beyond their plain language and meaning. Thus, there is no coverage under the Policy for Claimant.

CONCLUSION

In conclusion, Condustrail engaged in a specific and knowing attempt to profit by sending uninsured 1099 nurses into dangerous situations in the South Carolina prison system. Condustrail's scheme worked and was profitable, until a terrible event occurred. Condustrail's own witnesses admit it never intended for the 1099 employees to be part of their Agreement with Countrywide. It is undisputed that Countrywide had the right to reject any proposed "Selected" employee, and the Agreement specifically provides that Condustrail bears all responsibility for its business and strategic decisions. After lengthy hearings and substantial consideration, the Commissioner judged the credibility of the witnesses, reviewed the evidence and the law and came to the correct conclusion as it relates to the relationship between Condustrail, Countrywide and

⁵⁹ See *supra* note 24.

GIC. Respectfully, the Full Commission should not come to the aid of Condustrail, rather the Full Commission should affirm the Single Commissioner, and force Condustrail to reap the bitter fruits of their fraud.

*****Signature Page to Follow*****

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November 3, 2020

CERTIFICATE OF SERVICE

I, the undersigned, Legal Assistant of Robinson Gray Stepp & Laffitte, L.L.C., attorneys for Defendants, do hereby certify that I have served the following parties with the foregoing document(s) by mailing a copy of the same via United States Mail, postage prepaid, and/or hand delivering to the following address(es):

Pleading(s):

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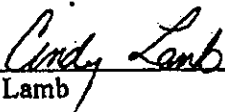
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November 3, 2020

STATE OF SOUTH CAROLINA
BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 1514359

Rachel J. Turner,)
)
 Claimant,)
)
 vs.)
)
 Condustrual, Inc. d/b/a Medustrial,)
)
 Employer,)
)
 and)
)
 Countrywide Staffing Solutions Group,)
 Inc.; South Carolina Property and Casualty)
 Insurance Guaranty Association on behalf)
 of Guarantee Insurance Company; The)
 State Accident Fund; South Carolina)
 Workers' Compensation Uninsured)
 Employers' Fund,)
)
 Carrier(s) and/or the Defendants.)
)

DEFENDANT SOUTH CAROLINA
PROPERTY AND CASUALTY
INSURANCE GUARANTY
ASSOCIATION ON BEHALF OF
GUARANTEE INSURANCE
COMPANY'S BRIEF IN RESPONSE
TO CLAIMANT'S APPEAL

STATEMENT OF THE CASE

Claimant has appealed the Decision and Order of Commissioner Melody L. James ("the Single Commissioner"), filed on July 31, 2020. South Carolina Property and Casualty Insurance Guaranty Association on behalf of Guarantee Insurance Company ("Guarantee") submits this brief in response to Claimant's appeal.¹ This Brief will only address the issues Claimant raised in her Form 30 Notice of Appeal and supporting Appellant Brief to the Full Commission, where she

¹ Guarantee, the State Accident Fund, South Carolina Workers' Compensation Uninsured Employers' Fund, and Condustrual, Inc. d/b/a Medustrial also filed separate Form 30 Notices of Appeal and supporting Appellant Briefs. In addition to this Respondent's Brief, Defendant Guarantee filed a separate Respondent's Brief in response to Condustrual, Inc. d/b/a Medustrial's Appellant Brief.

argues the Single Commissioner erred as a matter of fact and law in limiting temporary total disability compensation (“TTD”) to the period from September 6, 2015, through September 30, 2015. Defendant Guarantee respectfully requests the Full Commission to refer to its Full Commission Brief in Support of its Appeal for an accurate representation of the facts relevant to the issues raised in Claimant’s appeal and find as follows:

1. The Single Commissioner’s finding that 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, was proper;
2. The Single Commissioner’s findings that in releasing Claimant, Dr. Berg found on November 23, 2015, that Claimant was psychiatrically sound, Dr. Westerkam did not issue any psychological work restrictions, and pursuant to *Burnette v. City of Greenville*, 401 S.C. 417, 737 S.E.2d 200 (2012), the Commission cannot issue an opinion that would be the equivalent of a medical opinion, were proper;
3. The Single Commissioner’s finding that Condustrail extended Claimant an offer to work in the office performing light duty work, and the offer was within the restrictions issued by Dr. Hess and Dr. Westerkam, but Claimant did not accept the offer, was proper; and
4. The denial of benefits from September 30, 2015, through the date of the hearing was proper.²

ARGUMENT

- I. **THE SINGLE COMMISSIONER PROPERLY CONCLUDED THE RECORD DOES NOT INCLUDE EVIDENCE TO SUPPORT FINDING CLAIMANT WAS UNABLE TO WORK IN ANY CAPACITY AFTER SEPTEMBER 30, 2015.**

² Defendant Guarantee maintains the greater weight of the evidence in the record demonstrates Claimant was an independent contractor *not* eligible for *any* workers’ compensation benefits. Guarantee respectfully requests the Full Commission to refer to its Full Commission Brief in Support of its Appeal for a full analysis of the independent contractor issue. To the extent the Commission concludes Claimant was an employee, the denial of benefits after September 30, 2015, was proper. Moreover, to the extent Claimant is an employee rather than an independent contractor, Condustrail was an uninsured employer relative to Claimant’s employment and failed to acquire workers compensation coverage for Claimant under the Condustrail/Countrywide Agreement.

The greater weight of the evidence in the record, including the medical records and hearing testimony, confirms the Single Commissioner properly determined Claimant was not entitled to TTD from September 30, 2015, forward because to rule otherwise would have been speculative and an improper issue of an opinion that would be the equivalent of a medical opinion. *Burnette v. City of Greenville*, 401 S.C. 417, 737 S.E.2d 200 (2012).

Pursuant to section 42-9-260 of the South Carolina Code, TTD payments may begin when “an employee has been out of work *due to* a reported work-related injury . . . for eight days” S.C. Code Ann. § 42-9-260 (Supp. 2012) (emphasis added); *Pollack v. S. Wine & Spirits of Am.* 405 S.C. 9, 747 S.E.2d 430 (2013). Under the workers' compensation regulations, disability is considered “*incapacity because of injury to earn wages* which the employee was receiving at the time of the injury in the same or any other employment.” S.C. Code Ann. § 42-1-120 (emphasis added). “The fact that after the injury the employee has not worked and has therefore earned no wages is not in itself determinative of the extent of loss of his earning capacity.” *Shealy v. Algernon Blair, Inc.*, 250 S.C. 106, 156 S.E.2d 646 (1967) (finding the claimant’s efforts were “intermittent and lackadaisical, rather than diligent”). “Loss of earning capacity is the criterion. There is no recognition of the elements of pain and suffering, or of increased discomfort and difficulty in performing the work, as long as there is no diminution in earning capacity.” *Id.* (quoting *Keeter v. Clifton Mfg. Co.*, 225 S.C. 389, 392, 82 S.E.2d 520, 522 (1954)).

Here, directly after the incident on September 5, 2015, Claimant went to the emergency department at Palmetto Health Richland where she was “discharged home in stable condition” with instructions to follow up with counseling. **Claimant’s APA p. 7-8.** Claimant then met with Dr. Robert Dunn at Springdale Family Practice twice. Claimant also began receiving mental health services from the State Office of Victim Assistance (“SOVA”). The September 16, 2015

Physician's Disability Report from SOVA states Claimant will be totally unable to work from "September 16, 2015, through September 30, 2015." **Claimant's APA p. 291.**

On October 20, 2015, Dr. Ryan Hess, an orthopedist at USC Ortho Parkridge, noted that Claimant would attend psychological therapy, but nonetheless released Claimant back to work with a lifting restriction of no greater than ten to twenty pounds. **Claimant's APA p. 28.** Thereafter, Claimant also received psychological treatment at Palmetto Behavioral Day Treatment where instead of discussing any psychological issues, Claimant mostly discussed her financial concerns and transportation issues. She met with licensed social workers and counselors for therapy and psychiatrists for medication and evaluations. On October 21, 2015, Claimant inquired of Palmetto Behavioral if they would give her a note to give to her employer excusing her from work. **Claimant's APA p. 38.** Although Claimant continued to receive services from Palmetto Behavioral after her request, the record does not include any note from Palmetto Behavioral or any other facility excusing her from work after September 30, 2015.

The November 13, 2015 progress note from the therapist states

Patient was encouraged to create a plan for shelter since she reports that she was given an eviction notice yesterday. *Therapist confirmed previous options:* move in with ex-partner's family(which has been offered), children get jobs and go to school part time to help with bills (offered by children), or she could wait for everything to happen (eventually homeless). *Patient declined assistance* from ex-partner's family and her children's help because she doesn't want to burden others. *Patient was encouraged to reconsider her options.* Patient became upset and reported not feeling heard. Patient stated she didn't want to talk anymore and left. *Patient later returned and requested financial assistance to get home because she is almost out of gas. Patient was offered a ride home (per facility resources) but denied financial assistance by staff. Patient refused the ride and decided to leave the building.*

Claimant's APA p. 79 (emphases added).

The November 17, 2015 progress note from the therapist states

Patient reported that she is "a victim" and she should be treated as such. *When asked to move toward defining herself outside of "a victim," she refused. Patient was asked how we could help her and she stated that she didn't know beyond helping her find financial resources.* When asked if she wanted to discharge from program, she stated that she would like to finish last two days of treatment this week because the groups offered her a place to vent and support. Patient to finish out treatment this week and will discharge as planned 11/20/15. Patient will continue with Lexington Mental Health: therapist, MD: appt 11/25/15 at 8am per patient. *Patient scheduled her own outpatient appts and refused the outpatient providers set for patient.*

Claimant's APA p. 81. (emphases added).

The November 19, 2015 progress notes states Claimant became "irritated" and requested to speak with the doctor when the therapist informed her that the doctor would not sign a DMV form stating she was unable to drive. **Claimant's APA p. 83.** Claimant also became "irritated" when the therapist informed her that she could not make copies or fax documents that were unrelated to Claimant's treatment. *Id.*

On November 20, 2015, the therapist called Claimant to inquire about her absence and during the call Claimant reported that she was in Charleston, SC and she planned to present the following Monday to complete her discharge from the program. **Claimant's APA p. 84.** Claimant reported that "she was *stable* and plans to have a good weekend." *Id.* (emphasis added).

That same day, on November 20, 2015, Dr. Stephanie Berg issued a discharge summary when discharging Claimant from care. Dr. Berg's report notes that "[d]uring the course of treatment, pt engaged in group therapy, individual therapy, and medication management. Zoloft was recommended but she did not obtain it citing financial concerns. She was provided several options for medication payment assistance but did not follow through. . . . Patient was to attend on 11/20/15 but did not attend as she had traveled out of town[.]" **Claimant's APA p. 53.** Under "Discharge Condition," the record states "Psychiatrically stable. Patient denied any thought of

suicide or homicide[.] There was no evidence of delusions or hallucinations. Insight, and judgment were fair.” **Claimant’s APA p. 54.**

Thereafter, Claimant received treatment at Lexington County Mental Health. Similarly to the therapy notes from Palmetto Behavioral, the majority of the Lexington County therapy session notes from 2016-2017 state that instead of working through her psychological issues, Claimant mostly discussed her financial concerns, transportation issues, and her perceived lack of financial assistance from various charitable organizations for living expenses. Moreover, by April 3, 2017, the therapist noted that Claimant “continues to struggle with irrational belief that others owe her something, she continues to focus at times on how bad ‘the system is’ instead of focusing on how to improve her own circumstance.” **Claimant APA p. 194-201.**

Accordingly, the records demonstrate Claimant was not entitled to TTD after September 30, 2015. Under South Carolina Code section 42-9-10, TTD benefits are available to a claimant when her incapacity for work resulting from an injury is total. S.C. Code § 42-9-10. On September 30, 2015, Claimant was no longer incapacitated from work due to an injury, as Claimant’s treating doctor released her to work full, unrestricted duty. Moreover, the fact that Dr. Hess subsequently released Claimant from Dr. Hess’s care on October 20, 2015, is not dispositive of whether the Claimant was entitled to TTD from September 30, 2015, to October 20, 2015. Rather, the entitlement to TTD is based upon incapacity to work and whether Claimant was able to return to work without restriction. *See* S.C. Code Regs. 67-502(D). As of September 30, 2015, the greater weight of evidence in the record demonstrates Claimant had no incapacity and therefore the decision to deny an award of TTD beyond September 30, 2015, was correct under section 42-9-10.

Although the Single Commissioner is given discretion to weigh and consider all evidence,

a finding “may not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it.” *Burnette v. City of Greenville*, 401 S.C. 417, 737 S.E.2d 200 (2012). To have found the defendants responsible for TTD after September 30, 2015, would have been based solely on speculation and thus improper. As outlined above, the record does not include any evidence that Claimant was written out of work after September 30, 2015. Moreover, there is no evidence to suggest that Claimant’s alleged psychological condition kept her from working. To the contrary, the therapy notes indicate Claimant searched for work-from-home jobs, suggesting that her condition did not completely hinder her earning capacity. **Claimant’s APA p. 144, 195.** The record also includes evidence that Claimant’s mental health providers questioned whether Claimant did not return to work simply because she did not want to, not because she was incapable of working.

Many individuals work every day with psychological issues such as depression, anxiety, and PTSD and there is nothing in the record to suggest Claimant was incapable of working while concurrently receiving mental health treatment. *See, e.g.* United States Department of Labor <https://www.dol.gov/agencies/odep/topics/mental-health> (stating “[n]early 1 in 5 Americans may experience some form of mental illness each year,” noting those individuals continue to work, and providing resources for the employees and employers). In fact, Claimant reported that her claim for disability benefits was denied because the department found “there was no evidence that she would not be able to return to work.” **Claimant APA p. 120.** The record before this Commission includes at least 100, if not more, pages of medical records and detailed therapy notes. If—at any point after September 30, 2015—any of the numerous therapists, counselors, social workers, psychiatrists, psychologists, or other physicians believed Claimant’s condition was such that she was incapable of working after September 30, 2015, they could have included that in any of the

hundreds of pages of therapy notes and records, but they did not. Accordingly, Claimant failed to meet her burden of providing evidence to support her claim.

II. THE SINGLE COMMISSIONER PROPERLY CONCLUDED CLAIMANT REFUSED SUITABLE EMPLOYMENT AND THEREFORE IS NOT ENTITLED TO TTD BENEFITS.

The Single Commissioner properly found and concluded Claimant failed to prove she was entitled to TTD after she refused suitable employment. A disability is “presumed to continue until the employee returns to work or compensation is otherwise suspended or terminated according to Section 42-9-260.” *Shealy v. Algernon Blair, Inc.*, 250 S.C. 106, 156 S.E.2d 646 (1967). An employer is not obligated to pay TTD benefits if the employee has returned to work for more than fifteen days or the employee has been released by the treating physician for limited duty work and the employer provides limited duty work consistent with the terms upon which the employee has been released. *Id.* Section 42-9-190 of the South Carolina Code provides that “[i]f 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.” *See also Martin v. Rapid Plumbing*, 369 S.C. 278, 289, 631 S.E.2d 547, 553 (Ct. App. 2006) (holding that had the claimant refused to return to work when suitable employment was offered, the employer would have had legal justification to terminate his temporary compensation).

Here, Condustrail—who Claimant alleges was her employer—afforded Claimant suitable employment based on the only light-duty restrictions in the record and Claimant refused the offer. As an initial matter, Claimant grossly mischaracterizes the treatment she received from Condustrail after the incident. **Claimant’s Br. pp. 10-13.** A manager at Condustrail drafted a daily log of the interactions the company had with Claimant following the incident. **Condustrail’s APA p. 31-**

33. The daily log evidences Condustrial's continual offer to assist Claimant even though Claimant was an independent contractor with the company.³

The September 9, 2015 notation in the daily log states "Tom [Sears] and I had a phone conference with Rachel. Rachel did not allow Tom to finish going over the options for assistance. She kept saying since Tom said she was an independent contractor that's all she needed to hear-her perception that we were not going to assist her. She hung up on us." *Id.* The September 10, 2015 notation states as follows:

Spoke to Rachel to try to finish with options of assistance for her. I mentioned option 1 placement at a low key easy facility-she said she isn't going to work as a nurse she doesn't trust her nursing skills since she is very shaky. I mentioned option 2 of coming to assist in the office whenever she wanted to correcting papers, filing; she said she hadn't done filing since she was 15 yrs old. Then asked how much it paid, I told her I didn't know, her reply was then "why did you call me if you ain't going to have all the information." She also said if we wanted to speak to her it would have to be with her counsel(or)? She hung up on me. Rachel did not allow me to discuss the assistance with medical bills. I tried calling Rachel back after consulting with Tom. No reply

Id. Thereafter, the notes state that on September 11, 2015, "I sent [Claimant] 3 text 8:36, 9:58 & 3:51 messages asking her to contact Tom for clarification of what could be done to assist her. No reply[.]" *Id.* The manager again attempted to contact Claimant on September 16 and 17, 2015, with no response.

Contrary to Claimant's mischaracterization that the manager "forced her way into Turner's home" (Claimant's Br. p. 5), the September 24, 2015 note states the following:

³ Defendant Guarantee respectfully requests the Full Commission to refer to its Full Commission Brief in Support of its Appeal for a full analysis of the independent contractor issue. To the extent Claimant is an employee rather than an independent contractor under South Carolina law, Condustrial was an uninsured employer relative to Claimant's employment and failed to acquire workers compensation coverage for Claimant under the Condustrial/Countrywide Agreement.

called Rachel Turner left her a vm. I spoke to Rachel and read to her the options for assistance over the phone. I told her I had a typed letter with the information and could drop it off to her. I asked her if it was ok to go over, she went silent then said "I'll see you later." Matt and I went to see Rachel, we spoke to her outside her door for about 15 minutes or so. In my opinion she didn't look as bad as it was presented by Ms. Smith. She looked clean, looked like she had eaten. She mentioned she hadn't gotten the counseling and she really needed that. She said everything is red tape. I asked her what she needed she said workers comp, she needed to pay her bills, that she's always been the income earner and now she doesn't feel she can do that. I again asked her what she needed and she stated "to keep her lights on, pay her bills, her car, her house, to not be homeless". I reiterated to her that because she is a 1099 we don't have workers comp available so we have to try something else. I asked her to make a list of her needs so I can send them to corporate. I asked her to please read the letter it had the options I mentioned over the phone; to keep me posted and to give me her medical bills that I would forward them to corporate.

Condustrial APA p. 33.

Tony Durham, the Owner/President of Condustrial, explained that after the incident in question, he called Claimant and offered her a full-time, employee position in his office once she felt better. **H.T. 138-40.** Claimant responded, "I don't want that. I just want comp." **H.T. 139.** He politely explained to her that she was not eligible for workers' compensation but that he wanted to help in any way that he could. **H.T. 139.** She declined the offer and insisted of workers' compensation. **H.T. 139-40.** When she would not return Durham's calls, he contacted the police to conduct a wellness check on her and asked Tom Sears to handle the situation. **H.T. 141.**

Tom Sears, General Counsel and Vice President of Administrative Services with Condustrial, testified that the company requested the wellness check after the incident because of concern that she was not doing well and was not responding to repeated calls. **H.T. 191-93 Oct. 12, 2017 Hearing.** He testified that the purpose of the letter was to let Claimant know they were concerned and were trying to help her in the best way they could under the circumstances. **H.T.**

193-94 Oct. 12, 2017 Hearing. He explained Claimant never provided any medical documentation indicating she was unable to perform light-duty or sedentary work that the company offered to her after the incident. **October 13 hearing p. 267.**

Claimant acknowledges that Condustrial offered light-duty work, but claims she is entitled to TTD because (1) the offer was not a genuine offer and (2) it was only offered once. Claimant's contentions lack merit and are not supported by the record or the law of South Carolina. First, as previously discussed, whether she had PTSD or not, the record does not include evidence demonstrating Claimant was incapable of performing light-duty work offered. Claimant maintains that her anxiety related to unfamiliar white males and closed doors kept her from working. However, Claimant was familiar with the males in the Condustrial office and Condustrial offered an office position in which the doors could have remained open. The record does not include any documentation that Claimant was unable to perform that sedentary work, even by Claimant's own testimony and records she provided, Claimant could have performed that work. Second, both Sears and Durham testified that the offer was a genuine offer. The plain language of the letter extended and reiterated the company's "deepest sympathies and heartfelt prayers" for her well-being. The letter also stated for her to contact the company "at any time with questions or concerns about this situation and with which (or all) of these options that [Claimant] would prefer to take." **Condustrial's APA p. 34.** Claimant never contacted the company following the offer and failed to return the calls.

Claimant's reliance on *Johnson v. Rent-A-Ctr., Inc.* is misplaced. Here, there is no speculation of whether Condustrial "would offer Employee light duty work had she remained with Employer" because Condustrial did in fact offer light duty work and asked Claimant to contact the company when she felt able to perform the work. There was no "constructive refusal" as in

Johnson where the claimant did not want to return to a location with a co-worker who she believed caused the accident. By contrast, here, Claimant refused the offer because “she had not filed since high school” and did not agree with the offered pay. **Condustrual’s APA p. 31-33.** Claimant never once mentioned to Condustrual that she was refusing the offer because the “parties hate each other” and the management “resents” her for pursuing this claim as now alleged. **Claimant’s Br. 13.**

Although Claimant argues “black letter law” requires that because Claimant rejected Condustrual’s offer in the letter, the company was required to make another offer, she points to no South Carolina workers’ compensation law requiring the company to make a second offer under Section 42-9-190. Moreover, Claimant points to the Virginia case of *Food Lion v. Lee*, 16 Va. App. 616, 431 S.E.2d 342 (Va. App. 1993), for the proposition that South Carolina requires a two-step inquiry when determining whether a claimant refused suitable employment. Yet again, Claimant’s reliance on this case is misplaced. **Claimant’s Br. p. 13.** Claimant points to no South Carolina case, statute, or regulation requiring a two-step analysis. Furthermore, Claimant does not even meet the standard outlined in the Virginia case because a reasonable person desirous of employment would not have refused the light-duty work offered to Claimant as required under the two-prong analysis. *See Lee*, 16 Va. App. at 619, 431 S.E.2d at 344 (requiring that a reasonable person desirous of employment would have refused the offered work).

Finally, Claimant’s circular argument that the offer could not have been genuine because Condustrual contended she was not its employee is meritless. To the extent Claimant alleges Condustrual was her employer, the work Condustrual offered was light duty work consistent with the only restrictions in the record. Accordingly, the Single Commissioner properly denied TTD because as evidenced by the greater weight of the evidence, including the notes, correspondence,

and testimony, Condustral made a sincere effort to assist Claimant and offered to provide her with light duty work, which Claimant denied and never again contacted Condustral.

III. THE SINGLE COMMISSIONER PROPERLY CONCLUDED *BURNETTE* BARRED AN AWARD OF TTD.

In *Burnette v. City of Greenville*, 401 S.C. 417, 737 S.E.2d 200 (Ct. App. 2012), a single commissioner issued a finding related to the significance of two MRIs four years apart. The Court of Appeals reversed the denial of the claim because no evidence indicated this opinion originated from a medical provider and therefore the Court was forced to conclude the finding was the medical opinion of the single commissioner. *Id.*

Here, Claimant's brief is replete with arguments that would amount to her own medical opinions with the attempt to get the Full Commission to adopt them as the Commission's medical opinions in blatant disregard of the holding in *Burnette*. For example, Claimant argues Dr. Hess's statement in his orthopedic record that "She has not returned to work. It sounds as though this is primarily due to her PTSD issues," shows Claimant was unable to return to work because of her psychological condition. However, contrary to Claimant's argument, when Dr. Hess stated "It sounds as though this is primarily due to her PTSD issues," there is no indication that Dr. Hess examined Claimant and opined that Claimant was incapable of working due to PTSD; instead, the record indicates Claimant *told* Dr. Hess she could not work. Moreover, as an orthopedic surgeon, Dr. Hess clearly could not have diagnosed a mental health disorder and determined it was the cause of her alleged inability to work.

Additionally, Claimant opines on the reference to "GAF" in Dr. Berg's medical records and then interprets the DSM IV⁴ (*See Claimant's Brief p. 9*), implicitly asking the Full

⁴ The DSM IV is the fourth edition of the Diagnostic and Statistical Manual of Mental Disorders. The fifth edition of the manual was published in 2013. Because the record does not include a

Commission to also interpret the GAF and DSM without any opinions from a medical professional specially trained in mental health disorders. Claimant failed to produce any testimony from Dr. Berg or Dr. Hess regarding these alleged interpretations of their medical records. To accept Claimant's interpretations would lead to conclusions not supported by fact, but instead be medical opinions of the Commission supported by pure surmise, conjecture, and speculation. *See Hutson v. S. Carolina State Ports Auth.*, 399 S.C. 381, 387, 732 S.E.2d 500, 503 (2012) ("The second is the equally compelling evidentiary principle that an award may not rest upon surmise, conjecture, or speculation."); *Burnette v. City of Greenville*, 401 S.C. 417, 737 S.E.2d 200 (Ct. App. 2012) ("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.").

Claimant goes on to boldly argue that Dr. Berg's statement that Claimant is stable "means she is still disabled and in need of treatment." **Claimant's Br. p. 9.** However, Claimant points to no evidence other than her own testimony that she was still disabled within the meaning of the statute. Claimant, herself, reported that she was stable. **Claimant's APA p. 84.** The last time Nurse Gudvangen spoke with Claimant, he believed she had started to improve. **H.T. 82-83.** Nurse Gudvangen testified that she had begun receiving mental health counseling, improved her financial circumstances, and "seemed like she was starting to recover." **H.T. 82-83.** Moreover, despite Claimant's contention, our appellate courts have held that a statement by the doctor that a claimant is "stable" was sufficient to end benefits. *See e.g., Fishburne v. Ati Systems Intern.*, 681 S.E.2d 595, 384 S.C. 76 (Ct. App. 2009) (affirming the finding that the claimant's psychological

single opinion from any medical professional regarding the DSM, any conclusions based upon the DSM would amount to pure speculation and a medical opinion by the Commission.

condition was not disabling because the doctor's reports stated her "mood was stable" and the drugs were controlling her depression); *Curriel v. Env. Management Services*, 655 S.E.2d 482, 376 S.C. 23 (S.C. 2007) (holding the commissioner's finding that the claimant had reached maximum medical improvement was supported by the record where the record included the doctor's assessment that the medical condition was "stable").

Claimant incorrectly maintains that the Single Commissioner cited *Burnette* to imply that an out of work note is required in order to establish entitlement to TTD. **Claimant's Brief 14-16.** Certainly, as the adjudicator and decisionmaker, the Single Commissioner agreed she could consider any and all evidence in the record. Unfortunately, however, Claimant failed to introduce for consideration any sound medical evidence taking Claimant out of work for the period requested and instead asked the Single Commissioner and now the Full Commission to issue a medical opinion in order to reach that conclusion. Claimant failed to introduce sufficient evidence to meet her burden of proof. The defendants are not allowed or required to meet that burden of proof on behalf of Claimant. Accordingly, the greater weight of the evidence in this case support the Single Commissioner's finding that Claimant failed to establish she is entitled to TTD benefits.

CONCLUSION

The greater weight of the evidence in the record supports the Single Commissioner's determination that Claimant failed to meet her burden of proof and accordingly is not entitled to TTD benefits for the period requested.

[Signature on the following page]

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
Rachel J. Turner,)
Employee,)
vs.)
SC Department of Corrections –)
Kirkland, Medustrial Healthcare)
Staffing Services, Condustrual, Inc.,)
and/or Countrywide Staffing)
Solutions Group, Inc.,)
Employer(s),)
and)
State Accident Fund, South Carolina)
Property and Casualty Insurance)
Guaranty Association on behalf of)
the Guarantee Insurance Company,)
and/or SC Workers' Compensation)
Uninsured Employers' Fund,)
Carrier,)
Defendants.)

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION
COMMISSION

WCC FILE NO: 1514359

MOTION TO RECONSIDER

YOU WILL PLEASE TAKE NOTICE THAT pursuant to WCC Regulation 67-215 (B), SCRCF 59 (e), and S.C. Code §1-23-380 (1), the Defendant Condustrual in the above-captioned claim hereby moves for the South Carolina Worker's Compensation Commission Appellate Panel ("Panel") to Reconsider its Order dated April 6, 2021 and enter AMENDED findings as outlined herein. Without waiving any additional arguments for any further appeal of this matter, this Motion is based on the following specific grounds:

- 1) The Panel's ruling on the contractual issue between Condustrual and Countrywide is dispositive of the liable party issue, thus rendering all findings regarding coverage of Countrywide's policy with Guarantee Insurance moot, irrelevant, and superfluous.

Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (recognizing that an appellate court need not address remaining issues when resolution of one issue is dispositive); see also I'On, LLC v. Town of Mount Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) (recognizing the principle that courts should usually refrain from deciding unnecessary questions). In addition, such findings may unnecessarily prejudice or otherwise affect other pending civil litigation between Condustrail and Countrywide, which simply provides additional impetus for Condustrail's request.

- 2) The Guaranty Association misapprehends Condustrail's position in this case regarding the coverage issues. Specifically, contrary to Guaranty's understanding, Condustrail has NEVER argued that there is a direct insured-insurer relationship between it and Guarantee Insurance- *See* following snippet from Condustrail's Appellant's Brief – *"Next, if Condustrail is deemed to be Claimant's employer for purposes of the Act, and the service agreement with Countrywide is somehow not implicated, then Condustrail is essentially left "uninsured" relative to Claimant's employment. Under that scenario, Condustrail argues that Countrywide is a de facto "professional employment organization" (PEO) subject to all conditions and responsibilities imposed by S.C. Code § 40-68-10 et seq. As such, GIC would still be vicariously liable for the claim by operation of S.C. Code §40-68-70 (C) and S.C. Code §40-68-120(A)(7)."* In sum, Condustrail has always conceded that coverage for this claim only reaches Guarantee via the contract with Countrywide or by operation of law via the PEO statutes, which are all issues disposed of by Section H of the affirmed Order. The fact that there was a prior insurance relationship between Condustrail and Guarantee on a policy pre-dating this claim is simply irrelevant and all findings regarding same, specifically, Section I, should be vacated.
- 3) Next, Condustrail respectfully submits that the Panel's decision to affirm the Hearing Commissioner's denial of running TTD requires additional legal and factual support. As such, Condustrail submits the Panel's Order should be AMENDED to include the following specific findings:

- a) The burden for proving entitlement to compensation benefits under S.C. Code §42-9-10 rests squarely on the Claimant. Coleman v. Quality Concrete Products, 245 S.C. 625, 142 S.E.2d 43 (1965);
- b) Excluding Claimant's subjective claims of "disability" due to her PTSD, the objective "medical evidence" in the Record establishes that Claimant was only disabled from working for the finite period between September 6, 2015 and September 30, 2015. This finding is based on a record from the State Office of Victim's Assistance (SOVA) stating, "Patient will be totally unable to work from 9/16/2015 through 9/30/2015." [Claimant's APA p. 291];
- c) There are no other medical opinions or out of work notes from medical providers in the Record. On November 23, 2015 Dr. Berg authored a discharge note indicating that Claimant was psychiatrically stable. [Claimant's APA p. 54];
- d) Moreover, the provider to whom Claimant was referred by her counsel in anticipation of litigation, Dr. Westerkam, did not write Claimant out of work or impose any specific limitations on working due to her psychological condition;
- e) The Hearing Commissioner correctly denied TTD beyond September 30, 2015 because there was insufficient "medical evidence" of "disability" due to "injury" after such date; f) The Hearing Commissioner also correctly found that "disability" due to psychological injury as presented in this case is a medical issue. "Medical evidence" is defined via the statute governing "injury" as meaning "expert opinion or testimony stated to a reasonable degree of medical certainty, documents, records, or other material that is offered by a licensed health care provider." S.C. Code §42-1-160. Further, "disability" is defined by S.C. Code §42-1-120 as the "incapacity *because of injury* to earn wages which the employee was receiving at the time of injury in the same or any other employment." *See also Pollack v. Southern Wine and Spirits*, 405 S.C. 9, 747 S.E.2d 430 (2013);
- f) North Carolina law governing the role of medical evidence in disability determinations is instructive. *See Carter v. Penney Tire and Recapping Co.*, 261 S.C. 341, 200 S.E.2d 64 (1973) (noting that the South Carolina Worker's

Compensation Act was fashioned after the North Carolina act and the opinions of North Carolina courts construing such Act are entitled to great weight with South Carolina courts [internal citations omitted]). The North Carolina Act's definition of "disability" is identical to the South Carolina Act. N.C. Gen. Stat. §97-2(9). The North Carolina Court of Appeals has held that a claimant can show total disability or "incapacity" within the meaning of the statute via "the production of *medical evidence* that he is physically or mentally, as a consequence of the work-related injury, incapable of work in any employment." Church v. Bemis Mfg. Co., 743 S.E.2d 680 (2013). Further, in Knight v. Walmart, 149 N.C. App. 1, 562 S.E.2d 434 (2002) the Court suggested that a claimant's mere allegation of disability may not be sufficient proof of entitlement to compensation benefits in the absence of medical evidence corroborating the legitimacy of the claimant's subjective complaints. 562 S.E.2d at p. 440 ("medical evidence that plaintiff suffers from genuine pain as a result of physical injury, combined with plaintiff's own credible testimony that his pain is so severe that he is unable to work may be sufficient to support a conclusion of total disability.").

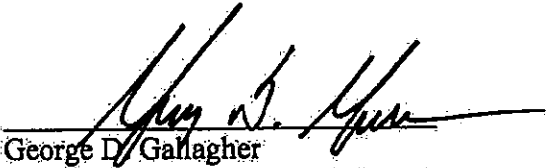
- g) Again, the only medical evidence supporting any period of total disability within the meaning of the Act is the out of work note from SOVA for the finite period between September 6, 2015 and September 30, 2015. [Claimant's APA p. 291]. Claimant's Brief cites numerous medical records outlining her subjective complaints of mental incapacity in support of her arguments for TTD beyond 9/30/2015. However, these references are merely recitations of her post-accident history and subjective complaints of her alleged mental incapacity. They do not constitute medical opinions that Claimant is incapacitated from performing gainful work due to physical or mental injury. As such, they are insufficient proof of Claimant's ongoing disability due to mental injury beyond September 30, 2015.
- h) Further, Claimant's prayer for running TTD from the date of accident is denied pursuant to S.C. Code §42-9-190, which bars compensation based on refusal of suitable employment. Specifically, Condustral presented Claimant with an

offer to work in their office performing light duty work consisting of filing and paperwork. The offer allowed Claimant to work away from prisoners and for Claimant to set her own schedule. The Panel specifically finds that Condustral's light duty offer complied with the restrictions per Dr. Hess and Dr. Westerkam and that Claimant did not accept the offer.

- i) S.C. Code §42-9-190 specifically bars a claimant's entitlement to compensation for refusal of "employment *procured for him* suitable to his capacity." The operative language- "procured for him"- is not dependent on the status of the party offering the employment or the claimant's status in the underlying claim. The statute does not require that the employment being offered come from the "employer." Rather, a purported employer can "procure" suitable employment within an injured worker's capacity and cause that employment to be offered. The purpose of the statute is to mitigate an injured worker's disability regardless of the circumstances of the underlying claim. In this case, it is not improper for Condustral to offer employment to Claimant even though they have unsuccessfully contended that Claimant was an independent contractor at the time of the underlying accident. Claimant would have merely become Condustral's employee upon the acceptance of such offer, which ultimately was refused.
- j) The aforementioned findings regarding Claimant's entitlement to TTD only apply to accrued benefits before the Hearing record was closed. Claimant may pursue entitlement to benefits after such date in a subsequent proceeding.

WHEREFORE for all the aforementioned reasons, Defendants respectfully request that the Panel Reconsider its April 6, 2021 Order and issue an AMENDED Order accordingly.

Respectfully submitted,


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Columbia, South Carolina

4/12, 2021

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO.: 1514359

Rachel J. Turner,

Claimant,

v.

SC Department of Corrections - Kirkland,
Medustrial Healthcare Staffing Service,
Condustral, Inc., and/or Countrywide
Staffing Solutions,

Employer(s),

and

State Accident Fund, South Carolina Property
and Casualty Guaranty Association on behalf
of the Guarantee Insurance Company, and/or
SC Workers' Compensation Uninsured
Employers' Fund,

Carrier(s),

Defendants,

**CLAIMANT'S MOTION TO SUBMIT
ADDITIONAL AND NEWLY
DISCOVERED EVIDENCE**

Claimant, by and through her undersigned attorney, hereby submits her **CLAIMANT'S
MOTION TO SUBMIT ADDITIONAL AND NEWLY DISCOVERED EVIDENCE**

in support of her claim for workers' compensation benefits. As grounds for granting rehearing, Claimant would show the following:

1. The Appellate Panel issued its Decision and Order on April 6, 2021 in which the Panel Affirmed in Part and Reversed in Part the Decision and Order of the Single Commissioner.
2. Defendant Condustral timely filed a MOTION TO RECONSIDER on April 12, 2021. As that motion has not been ruled upon, this matter is still pending before the Appellate Panel.

3. In the Decision and Order of the Appellate Panel, the Panel affirmed the Single Commissioner's ruling that Claimant Rachel Turner was entitled to temporary total disability compensation through September 30, 2015. 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." [Claimant's APA page 291]. 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" [Order, pages 27-28, Findings of Fact G 7-8].

4. 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.
[Order, pages 29-30, Finding of Fact G 12].

5. Claimant'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.

6. 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 maxed 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.
[Tr. I, page 323, lines 8-19].

7. Turner lost all her records when she was evicted because she could not pay her rent.

She testified “I’ve lost everything.” [Tr. I, page 299, 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].

8. 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.

9. 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.

10. 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.

11. 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. 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.

12. 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. [Exhibit page 4]. 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 04/05/15 (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 appointment on (date) 11/19/15 - MD 11/20/15 - therapist
follow up appointments with therapist MD

Type or print Treating Physician's name Stephanie Dera MD

Phone (803) 296-87165

13. 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.

14. 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 Claimant's attorney obtained from SOVA.

15. As SOVA did not provide this specific note to Claimant'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.

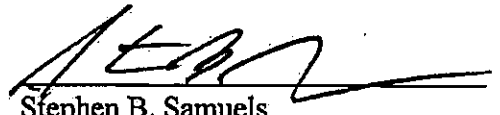
16. The new evidence is being brought to the Commission's attention immediately upon discovery.

THEREFORE, As the elements of Regulation 67-707 are satisfied, Claimant moves the Appellate Panel to receive and consider this additional evidence. Claimant consents to the evidence being forwarded via remand to the Single Commissioner or for consideration by the Appellate Panel.

CONCLUSION

For the foregoing reasons, the Appellate Panel should grant the Motion to Submit Additional and Newly Discovered Evidence. The evidence should be considered by the Appellate Panel or by the Single Commissioner on Remand. Following review, the Appellate Panel should also reverse in part and hold TTD must be paid on a running award from the date of the assault.

Respectfully Submitted,



Stephen B. Samuels
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May 4, 2021
Columbia, South Carolina

ATTORNEY FOR CLAIMANT

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO.: 1514359

Rachel J. Turner,

Claimant,

v.

SC Department of Corrections - Kirkland,
Medustrial Healthcare Staffing Service,
Condustral, Inc., and/or Countrywide
Staffing Solutions,

Employer(s),

and

State Accident Fund, South Carolina Property
and Casualty Guaranty Association on behalf
of the Guarantee Insurance Company, and/or
SC Workers' Compensation Uninsured
Employers' Fund,

Carrier(s),

Defendants,

**SWORN AFFIDAVIT OF
STEPHEN B. SAMUELS**

PERSONALLY appeared before me, Stephen B. Samuels, who first being duly sworn, deposes and says that on the 4th day of May, 2021, that he gave the following statement:

1. My name is Stephen Samuels. I am an attorney in good standing and admitted to practice in the State of South Carolina. I was admitted to the South Carolina Bar on May 11, 1997. I am an attorney with the firm of Samuels Reynolds Law Firm, LLC, with my office located at 1320 Richland Street, Columbia, SC, 29201.

2. I represent Rachel Turner in a workers' compensation case arising out of injuries Ms. Turner sustained when she was assaulted at her place of employment on September 5, 2015. I was

retained by Ms. Turner on April 14, 2016.

3. As part of my investigation of her case, records were requested from multiple sources including SOVA. At the trial of the case, we submitted the entire file from SOVA in our possession. Specifically, this included a form filled out by Turner's family doctor stating she was unable to work from September 15, 2015 through September 30, 2015. This was the only out of work document we received from SOVA.

4. 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.

[Tr. I, page 323, lines 8-19].

5. Turner lost all her records when she was evicted because she could not pay her rent. She testified "I've lost everything." [Tr. I, page 299, 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].

6. I informed my client of the rulings from both the Single Commissioner and Appellate Panel. 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.

8. Although the email containing these document was supposed to have been sent to my office, it was not received. The Compensation Recovery Coordinator misspelled the email address for my 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, both me and my client were unaware that these records had been sent.

9. On April 19, 2021, Turner learned that my office had not been sent the records in question – despite my previous specific records request to SOVA and my client arranging for the Attorney General’s office to email their file to her attorney. Ms. Turner located the email from August 20, 2020 and forwarded it directly to me on April 19, 2012.

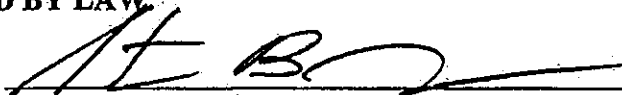
10. I reviewed the documents in question. I discovered that many of the documents had not been produced to me previously despite my due diligence in attempting to obtain them through the normal channels and methods used to obtain such documents. Among these documents is a form filled out by Dr. Stephanie Berg stated Turner was completely unable to work from October 21, 2015 through November 20, 2015. This was the first time I had seen this document and become aware that it did actually exist.

11. Upon receiving the document, I realized that it was of the nature and character that it would entitle my client to a new trial of the issue of TTD payable to her. This is true because the Commission rejected her statement that the document did exist due to its unavailability at trial. I therefore drafted and filed a Motion to Submit Additional and Newly Discovered Evidence immediately upon discovery of this evidence.

12. The new evidence is necessary to ensure a fair and just result in this case.

13. Having satisfied the elements of Regulation 67-707, I request that the Motion be granted.

**"A FALSE STATEMENT CONCERNING THE FACTS CONTAINED IN THIS
AFFIDAVIT MAY SUBJECT THE PERSON MAKING THE FALSE STATEMENT TO
CRIMINAL PENALTIES AS PROVIDED BY LAW."**

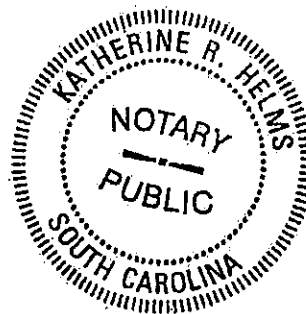

Stephen B. Samuels

Sworn before me this 4th

day of May, 2021


Notary for South Carolina

My Commission Expires: 8.19.29



SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO.: 1514359

Rachel J. Turner,

Claimant,

v.

SC Department of Corrections - Kirkland,
Medustrial Healthcare Staffing Service,
Condustral, Inc., and/or Countrywide
Staffing Solutions,

Employer(s),

and

State Accident Fund, South Carolina Property
and Casualty Guaranty Association on behalf
of the Guarantee Insurance Company, and/or
SC Workers' Compensation Uninsured
Employers' Fund,

Carrier(s),

Defendants,

**CLAIMANT'S RENEWED MOTION TO
SUBMIT ADDITIONAL AND NEWLY
DISCOVERED EVIDENCE**

Claimant, by and through her undersigned attorney, hereby submits her **CLAIMANT'S RENEWED MOTION TO SUBMIT ADDITIONAL AND NEWLY DISCOVERED EVIDENCE** in support of her claim for workers' compensation benefits.

This motion was originally filed and served on May 4, 2021. Prior to a decision being reached, the underlying case was appealed to the Court of Appeals. On June 21, 2021, the Full Commission denied the Motion on the grounds that the Commission "lacks jurisdiction" due to the appeal to a higher court. On September 2, 2021, the Court of Appeals issued an Order granting Claimant's "motion for partial remand to the Workers' Compensation Commission to submit

additional evidence and newly discovered evidence pursuant to S.C. Code Ann. § 67-707(A) . . .”

A copy of the court’s order is attached.

As grounds for granting the motion, Claimant would show the following:

1. The Appellate Panel issued its Decision and Order on April 6, 2021 in which the Panel Affirmed in Part and Reversed in Part the Decision and Order of the Single Commissioner.
2. Claimant filed her Defendant Condustrial timely filed a MOTION TO RECONSIDER on April 12, 2021. As that motion has not been ruled upon, this matter is still pending before the Appellate Panel.
3. Claimant filed her original MOTION TO SUBMIT ADDITIONAL AND NEWLY DISCOVERED EVIDENCE on May 4, 2021.
4. Claimant appealed the Decision and Order of the Appellate Panel on . Defendant Condustrial cross-appealed on
5. On June 21, 2021, the Full Commission denied the Motion on the grounds that the Commission “lacks jurisdiction” due to the appeal to a higher court.
6. Upon receiving the Full Commission’s Administrative Order, Claimant filed a Motion for Partial Remand with the Court of Appeals. The gravamen of that motion was that “The Motion concerns newly discovered evidence that would, if accepted by the Commission, change the result on a central issue in this appeal, to wit: Turner’s entitlement to temporary total disability compensation.”
7. On September 2, 2021, the Court of Appeals issued an Order granting Claimant’s “motion for partial remand to the Workers’ Compensation Commission to submit additional evidence and newly discovered evidence pursuant to S.C. Code Ann. § 67-707(A) . . .” *Per the Order of the Court of Appeals, the Commission has been granted jurisdiction to rule on the merits*

of Claimant's Motion to Submit Additional and Newly Discovered Evidence.

9. In the Decision and Order of the Appellate Panel, the Panel affirmed the Single Commissioner's ruling that Claimant Rachel Turner was entitled to temporary total disability compensation through September 30, 2015. 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." [Claimant's APA page 291]. 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" [Order, pages 27-28, Findings of Fact G 7-8].

10. 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.
[Order, pages 29-30, Finding of Fact G 12].

11. Claimant'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.

12. 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 maximized 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.
[Tr. I, page 323, lines 8-19].

13. Turner lost all her records when she was evicted because she could not pay her rent. She testified “I’ve lost everything.” [Tr. I, page 299, 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].

14. 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.

15. 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.

16. 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.

17. 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. 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.

18. 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. [Exhibit page 4]. 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 ^{mental} physical 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 appointment on (date) 11/19/15 - MD 11/20/15 - therapist
Follow up appointments with therapist/MD

Type or print Treating Physician's name Stephanie Dera MD

Phone (803) 296-87105

19. 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.

20. 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 Claimant's attorney obtained from SOVA.

21. As SOVA did not provide this specific note to Claimant'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.

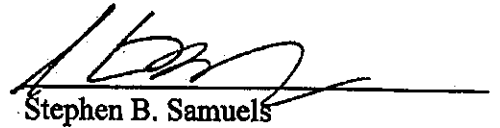
22. The new evidence is being brought to the Commission's attention immediately upon discovery.

THEREFORE, As the elements of Regulation 67-707 are satisfied, Claimant moves the Appellate Panel to receive and consider this additional evidence. Claimant consents to the evidence being forwarded via remand to the Single Commissioner or for consideration by the Appellate Panel.

CONCLUSION

For the foregoing reasons, the Appellate Panel should grant the Motion to Submit Additional and Newly Discovered Evidence. The evidence should be considered by the Appellate Panel or by the Single Commissioner on Remand. Following review, the Appellate Panel should also reverse in part and hold TTD must be paid on a running award from the date of the assault.

Respectfully Submitted,



Stephen B. Samuels
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(803) 779-4000

September 3, 2021
Columbia, South Carolina

ATTORNEY FOR CLAIMANT

RECEIVED

Jan 07 2022

SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

**APPEAL FROM THE SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION**

Appellate Case Number 2021-000633

Rachel J. Turner, Employee, Appellant-Respondent,

v.

**Medustrial Healthcare Staffing Service and Condustrail, 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 Condustrail, Inc. f/k/a Medustrial Healthcare Staffing Service, Employer, is the
Respondent-Appellant.**

**INITIAL BRIEF OF THE RESPONDENT-APPELLANT
CONDUSTRAIL, INC.**

**George D. Gallagher, Esq.
S.C. Bar # 12149
Speed, Seta, Martin, Trivett & Stubley, LLC
P.O. Box 11669
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(803) 748-2919
Attorney for Respondent-Appellant**

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STATEMENT OF ISSUES ON APPEAL

1. Was Turner an independent contractor or employee of Condustral when a) Turner and Condustral specifically rejected an employment relationship via the execution of a valid independent contractor agreement in 2014; b) the terms of that independent contractor agreement closely mirror the practical real world relationship of the parties; and c) application of the four-prong employment test otherwise mitigates in favor of an independent contractor relationship because Condustral exercised no control over Turner?
2. If Turner is an "employee" entitled to benefits under the Act, then is Countrywide her co-employer liable for same via its Contract with Condustral?
3. Can Countrywide deny liability for the claim via operation of law and/or estoppel pursuant to S.C. Code § 40-68-70 (C) and/or S.C. Code § 40-69-120 (A)(7) by failing to obtain a license as a PEO as required by South Carolina law?
4. Does South Carolina law permit GIC to deny coverage for this claim under the risk of its insured Countrywide?

STATEMENT OF THE CASE

I. Background and Facts

This matter stems from an accident sustained by Rachel Turner ("Turner") on September 5, 2015 while working as a licensed professional nurse (LPN) at the Kirkland Correctional Institution in Columbia, South Carolina. ("Kirkland"). Specifically, Turner was taken hostage and assaulted by inmates in the infirmary. At the time in question, Turner was operating under an independent contractor agreement with Medustrial dated October 9, 2014. (CI's Exhibit D pp. 233-237). Medustrial is a division of Condustrual, Inc. ("Condustrual"), an industrial staffing company.¹ Turner specifically acknowledges that she is an "independent contractor" in the 2014 agreement, including a stipulation that she will perform her duties in reliance upon her professional training, experience, and judgment, will not be under the direction or control of Condustrual, and agreeing to payment for professional services on an hourly basis via a Form 1099.

Condustrual in turn had an agreement with the South Carolina Department of Corrections ("SCDC") for the provision of medical staffing personnel, including LPNs like Turner, to staff SCDC medical facilities. (CI's Exhibit G pp. 253-259). Under that agreement, the nurses performed medical services for SCDC's inmates, at SCDC facilities, and generally under SCDC's direction. Condustrual itself never agreed to undertake any nursing work on behalf of SCDC; it merely acted as a broker for provision of nurses to SCDC. All other administrative functions related to payments for professional nursing services were Condustrual's responsibility. Claimant

¹ Medustrial previously operated as a separate legal entity, including at the inception of Claimant's agreement with them in 2013. Medustrial's book of business was subsequently acquired by Condustrual. Thereafter, Condustrual elected to continue operation of Medustrial's business under that moniker or trade/brand name. Medustrial is not a separate legal entity apart from Condustrual. As such, Condustrual is the relevant business entity for all purposes pertaining to this matter.

agreed to her assignment as a nurse for SCDC. She was free to accept or decline any shifts for work offered by SCDC.

Condustral entered into a service agreement with Countrywide Payroll & HR Solutions, Inc. d/b/a Countrywide Staffing Solutions Group (collectively referred to herein as "Countrywide") to address its worker's compensation coverage on March 26, 2015 (CI's Exhibit F pp. 243-252). That agreement states that Countrywide is a "contract labor service (CLS) entity" that will "outsource" certain "Selected Staffing/Employees" for Condustral's "normal business operations." Further, the service agreement provides that Countrywide shall "provide unemployment insurance and worker's compensation benefits; and handle unemployment and worker's compensation claims involving Selected Staffing/Employees." The service agreement also states that "all labor and/or employment performed by the Selected/Staffing Employees under this agreement *shall be performed under the mutual direction and control of both parties as co-employers, as recited throughout this agreement...*" (emphasis added).

Countrywide and Condustral executed a separate document modifying Countrywide's standard service agreement. [CI's APA Exhibit F]. The modified agreement stated that Condustral would process payroll under its own federal tax identification number (FEIN). Under the modified terms, Condustral would still upload new employee information and applicable class codes into Countrywide's system for employment administrative purposes. Moreover, Condustral would also report all payroll tax and other payroll deductions, including workers compensation premiums, to Countrywide. Countrywide would then "report all required payroll tax reports and remit those monies on Condustral's behalf." Based on its belief that its contract nurses for SCDC were independent contractors not subject to the workers compensation laws, Condustral never

submitted any assigned employee information regarding Turner and other contract nurses to Countrywide.

Countrywide's workers compensation carrier on the date of Turner's accident was Guarantee Insurance Company ("GIC"). GIC's policy for Countrywide (policy period 6/30/2015-6/30/2016) specifically states that it "will pay promptly when due the benefits required of you by the workers' compensation law." (GIC APA # 24). The policy also provides that the premium on the Information Page of the policy is just an "estimate," and that final premium due shall be determined at the end of the term by using "actual premium basis" and the "proper classifications and rates *that lawfully apply to the business and work covered by this policy.*" (emphasis added).

II. Position of the Parties

Turner contends she is a covered employee under the South Carolina Workers Compensation Act ("Act"). She alleges Condustral is her "employer" for purposes of the Act, although she also acknowledges in the alternative that SCDC could also be deemed her employer pursuant to Shatto v. McCleod Regional Medical Center, 406 S.C. 470, 753 S.E.2d 416 (SC 2013). (7/24/17 HT p. 10). She seeks medical and compensation benefits for physical and psychological benefits under the Act.

All Defendants submitted as a common defense that Turner is an independent contractor and not entitled to benefits under the Act.² Regarding the liable party and coverage issues presented, defendants' respective positions diverge sharply. First, Condustral argues that if Turner is adjudicated to be its employee, then she would be covered *ab initio* by operation of law as an

² After the evidentiary Hearing was convened, GIC was declared insolvent and responsibility for the claim was assumed by the South Carolina Property and Casualty Guaranty Association ("Guaranty") per S.C. Code § 38-31-10 *et seq.* Guaranty essentially "stepped into the shoes" of GIC to defend the claim.

“assigned employee,” “Selected Staffing/Employee,” and/or co-employee via the plain language and effect of its service agreement with Countrywide. GIC as the carrier for Countrywide would then be responsible for providing coverage for the claim. GIC’s remedy for having to cover a previously unclassified employee would then be to audit its coverage of Countrywide and assess additional premium to cover the risk assumed via the Commission’s determination. In turn, Countrywide’s recourse against Condustrail would be an action to recover the additional premium assessed by GIC under the indemnification provision of its service agreement with Condustrail. (See Section 9 of service agreement)

Next, if Condustrail is deemed to be Turner’s employer for purposes of the Act and the service agreement with Countrywide is not implicated, then Condustrail is essentially left with the untenable situation of being “uninsured” relative to Turner’s employment. Under that scenario, Condustrail argues that Countrywide is a *de facto* “professional employment organization” (PEO) subject to all conditions and responsibilities imposed by S.C. Code § 40-68-10 *et seq.* As such, GIC would still be vicariously liable for the claim by operation of S.C. Code §40-68-70 (C) and S.C. Code §40-68-120(A)(7), which impose liability under the Act on the carrier of a PEO when a non-assigned employee of the PEO’s client company is injured and the client company has no other coverage. If Condustrail indeed failed to secure and maintain worker’s compensation coverage for Turner’s employment, then liability still defaults to Countrywide/GIC as Countrywide’s “client company.”

Countrywide and GIC, by and through Guaranty as its successor in interest, jointly submit that Turner’s purported employment with Condustrail does not implicate the service agreement

between Condustral and Countrywide.³ Specifically, Turner was not a "Selected Staffing/Employee" within the meaning of that agreement because she was never submitted to Countrywide as such. Further, Turner's employment was never otherwise contemplated by Countrywide in its agreement with Condustral. Further, both GIC and Countrywide aver that the d/b/a party to the service agreement with Condustral- Countrywide Staffing Solutions Group (CSSG)- is not a licensed PEO in South Carolina. Therefore, liability cannot be imputed to Countrywide and GIC via operation of S.C. Code § 40-58-70 and/or §42-9-120.

However, GIC and Countrywide part ways regarding the issue of coverage for the claim if Countrywide is deemed Turner's employer under the agreement with Condustral. Specifically, GIC argues that its policy for Countrywide did not cover appropriate class codes in line with Turner's work at a dangerous high security prison infirmary. GIC further submits that it never would have underwritten such a risk had it been disclosed to them. GIC does not argue for cancellation or rescission of its policy for Countrywide based on misrepresentation or fraud. Rather, GIC contends it can simply carve out coverage of Turner's purported employment even if she is otherwise subject to the Countrywide/Condustral agreement by operation of law.

SCDC submits Turner was not its direct employee per the holding of Shatto supra. SCDC also points to the terms of its contract with Condustral, which specifically states that contract nurses are not SCDC employees. In the alternative, SCDC contends any potential liability on its part as an "upstream" or "statutory" employer of Claimant is secondary to that of Condustral as Claimant's direct employer. SCDC reserves all rights of indemnity against Condustral via S.C. Code §42-1-440 and other applicable law. Finally, SCDC submits any liability imposed upon it

³ Countrywide and GIC also argued in the alternative at the 7/24/17 Hearing that Claimant is an employee of SCDC per Shatto supra.

for this claim should be transferred to the UEF pursuant to S.C. Code §42-1-415. UEF in turn submits there is no evidence supporting the transfer of liability under the statute and WCC Regulations, including, but not limited to, the absence of a certificate of insurance properly relied upon by SCDC for the proposition that Claimant was somehow a covered employee.

III. The Commission's Orders

By Order dated July 31, 2020, Commissioner James found, *inter alia*, the following regarding the employment, coverage and liable party issues: 1) Applying the four prong legal test for determination of an employment relationship, Turner was Condustrail's "employee," not an independent contractor; 2) Claimant is not a "Selected Staffing/Employee" within the meaning of the service agreement between Condustrail and Countrywide; 3) there is no basis for "reformation" of the contract between Condustrail and Countrywide to confer coverage under that agreement; 4) Condustrail failed to acquire workers compensation insurance coverage for Turner via its contract with Countrywide or otherwise; 5) Countrywide/GCI is not liable for the claim via the PEO statutes because Countrywide was not a licensed PEO in South Carolina; 6) GIC's policy for Countrywide would not cover the claim because: a) Countrywide never reported the appropriate class codes corresponding with Turner's employment and location to GIC; and b) GIC underwriting would not have approved insuring that risk regardless; 7) Condustrail was essentially "uninsured" as to Turner's employment at the time of her accident; 8) SCDC is Turner's upstream "statutory employer" liable for benefits under the Act per S.C. Code §42-1-400 *et seq* because the nursing work performed by Turner was of the same type performed by SCDC's direct employee nurses;

and 8) there is no basis for transferring liability from SCDC and SAF to the UEF under §42-1-415.⁴

STANDARD OF REVIEW

The usual standard of judicial review of a decision and order of the Workers Compensation Commission is the “substantial evidence rule.” Under this standard, the court may not substitute its judgement for that of the Commission on questions of fact but may reverse if the decision is affected by an error of law. Gibson v. Spartanburg school District No. 3, 338 S.C. 510, 526 S.E.2d 725 (Ct. app. 2000). However, the existence of an employment relationship is jurisdictional; therefore, the Court’s standard of review of whether Claimant is an employee or independent contractor is *de novo*. See Fortner v. Thomas M. Evans Constr. And Development LLC, 402 S.C. 421, 741 S.E.2d 538 (Ct. App. 2013) (determination of whether a worker is a statutory employee under the Act is jurisdictional; therefore, the question on appeal is a matter of law and the Court has the power to review the entire record to decide the jurisdictional facts in accordance with its own view of the preponderance of the evidence).

Likewise, the determination of coverage under an insurance policy is a question of law. See Nationwide Mut. Ins. Co. v. Prioleau, 359 S.C. 238, 597 S.E.2d 165 (Ct. App. 2004). Under the Administrative Procedures Act (“APA”) the Court may reverse the Commission if its judgement is affected by an error of law. S.C. Code §1-23-380(5)(d). Moreover, the appellate court’s standard of review in equitable matters is *de novo*, meaning its own view of the preponderance of the evidence. Belle Hall Plantation Homeowner’s Association v. Murray, 419

⁴ Thereafter, all parties appealed the Hearing Commissioner’s adverse rulings on their respective positions to the Full Commission Appellate Panel (“Panel”). By Order dated April 6, 2021, the Panel affirmed the Hearing Commissioner on the employment, coverage, and liable party issues by adopting her findings of fact and conclusions of law verbatim. [Full Commission Order].

S.C. 605, 799 S.E.2d 310 (Ct. App. 2017) (it is the appellant's burden to satisfy the appellate court that the *preponderance of the evidence* is against the findings of the master) (*emphasis added*). Pursuant to these authorities, this Court owes no deference to the Commission regarding the employment relationship, insurance coverage, and equitable issues presented.

ARGUMENTS

Condustrail argues the Panel erred as follows: 1) By finding Turner was its employee and not an independent contractor; 2) Finding that Condustrail was "uninsured" relative to Turner's employment; 3) Failing to find Countrywide liable for the claim via the "four corners" of its contract with Condustrail and coverage via Countrywide's insurance policy with GIC; 4) In the alternative, failing to find Countrywide and GIC liable under the PEO statutes- S.C. Code §40-68-10 *et seq*; 5) Failing to find that Countrywide is estopped from denying it is a *de facto* PEO and subject to all laws governing same; and 6) Failing to find that GIC's policy should cover all of Countrywide's liability under the Act as lawfully determined by the Commission.

I. THE PREPONDERANCE OF THE EVIDENCE IN THE RECORD CONFIRMS TURNER WAS AN INDPENEDENT CONTRACTOR AND NOT CONDUSTRIL'S EMPLOYEE.

An "independent contractor" is one who, exercising an independent employment, contracts to do work according to his own methods, skill, and expertise, without being subject to the control of an employer except to the results of his work. *See Chavis v. Watkins*, 256 S.C. 30, 180 S.E.2d 648 (SC 1970). It is elementary that in the absence a statutory provision to the contrary, an injured person who is not an employee, but an independent contractor, is not within the scope of the Act. *Tillotson v. Keith Smith Builders*, 357 S.C. 554, 593 S.E.2d 621 (Ct. App. 2004). The determination of whether a claimant is an employee or an independent contractor focuses on the issue of control, specifically, whether the purported employer had the right to control the method

or manner of the work. Wilkinson v. Palmetto State Transport Co., 382 S.C. 295, 676 S.E.2d 700 (SC 2009).

Under its *de novo* standard of review (See Fortner supra), the Court must examine four factors to analyze parties' working relationship: 1) direct evidence of the right or actual exercise of control; 2) the furnishing of supplies and/or equipment; 3) the method of payment; and 4) the right to fire. Ray Covington Realtors, 318 S.C. 546, 459 S.E.2d 302 (SC 1995). Evidence of a purported employer's actual exercise of, or right to exercise, control mitigates in favor of an employment relationship. *Id.* All four factors must be analyzed even handedly in both directions to determine whether the totality of the circumstances favor an employment or independent contractor relationship. Wilkinson supra. No one factor alone is outcome determinative of the issue. *Id.*

A. The direct evidence of the right or exercise of control factor favors a finding that Turner was an independent contractor.

The Panel erred in relying on Shatto v. McLeod Reg'l Med. Ctr., 406 S.C. 470, 753 S.E.2d 416 (2013) for its finding that the "exercise of/right to control" prong of the employment test indicates an employee/employer relationship between Turner and Condustral. As an initial matter, Shatto is distinguishable from the instant case. Unlike the claimant in Shatto, who alleged an employment relationship with the hospital where she was assigned and not the agency who assigned her, Turner does not contend she is SCDC's employee. Rather, she seeks to impute SCDC's requirements and control over its contract nurses to Condustral. The Panel erroneously bought this argument, which is simply contrary to South Carolina law, as well as the documentary evidence and testimony in the record. Even if SCDS's requirements for its contract nurses vicariously implicate Condustral, they do not rise to the level of control required for an

employment relationship.⁵

First, Courts across the country, including North Carolina, have had the opportunity to determine whether nursing agencies with business models similar to Condustrial's contract nursing brokerage are "employers" of the nurses they placed at various facilities.⁶ Those courts generally agree that the nursing brokerage in those arrangements were not employers.

In Rhoney v. Fele, 134 N.C. App. 614, 618-19, 518 S.E.2d 536, 540 (1999), the North Carolina Court of Appeals reviewed its state's workers' compensation precedent and determined that a nurse in a similar nursing brokerage was an independent contractor and not an employee of the staffing company, Nursefinders. The Court reasoned that the following factors support a finding that the nurse was an independent contractor: (1) as a registered nurse, he was engaged in an independent profession; (2) the nurse was free to provide nursing services through other placement services; (3) the nurse exercised his duties and responsibilities as a nurse at the hospital, free from supervision by Nursefinders; (4) the nurse's work through Nursefinders was sporadic rather than regular; (5) the nurse was able to accept or reject a job assignment offered by Nursefinders; and (6) Nursefinders did not provide the nurse with valuable equipment. As to control, the Court stated:

These factors demonstrate that while Nursefinders exercised control over extraneous aspects of [the nurse]'s work, such as the dates and times when work was offered and collection of his salary, Nursefinders exercised no control over [the nurse]'s nursing, the function for which hospitals sought him. To the contrary, [the nurse] was a free agent who could and did maintain similar arrangements with other suppliers of medical personnel, and who could and did

⁵ Although Turner alleges Condustrial is her "employer" for purposes of the Act, she also acknowledges in the alternative that SCDC could be deemed her employer pursuant to Shatto v. McCleod Regional Medical Center, 406 S.C. 470, 753 S.E.2d 416 (SC 2013). (7/24/17 HT p. 10).

⁶ "Because South Carolina adopted large portions of the North Carolina Workers' Compensation legislation, we rely on North Carolina precedent in Workers' Compensation cases." Stephen v. Avins Const. Co., 324 S.C. 334, 340, 478 S.E.2d 74, 77 (Ct. App. 1996).

accept or reject work offered to him through Nursefinders, as suited him. Conversely, Nursefinders could not compel [the nurse] to take any particular assignment. Once [the nurse] accepted work proposed by Nursefinders, [the nurse] was not under any control by Nursefinders while working. Apparently, the relationship could be terminated at will by either party at any time. Thus, Nursefinders' role was similar to that of a broker or other middleman. We therefore agree with the trial court that, as a matter of law, Nursefinders exercised insufficient control to create an employee-employer relationship between the nurse and Nursefinders. *Id.* at 619, 518 S.E.2d at 540-41.⁷

Likewise, Condustral's brokerage model is inapposite to a finding that it exercised control over Turner. Like the nursing brokerage in Rhoney, the overwhelming evidence in the instant case demonstrates Condustral never considered Turner to be an employee, never treated her as an employee, and did not exercise control over the method or manner of her work. *See, e.g.*, [Condustral APA p. 42-47] (Condustral's completed "Questionnaire for the Purpose of Determining the Employment Relationship of Workers by Request of S.C. Employment Security Commission" asserting that the nurses similar to Turner were independent contractors and that the Employment Security Commission had found Condustral "to properly use I.C.s in this way by SCDEW several times in the past").

Tom Sears, General Counsel and Vice President of Administrative Services with Condustral, explained that the company operated on a brokerage model with respect to the nurses supplied to SCDC. He stated Turner and other similarly situated nurses were independent contractors under the brokerage model. [Oct. 12, 2017 Hearing H.T. 175]. He testified that

⁷ This finding is not a legal anomaly, as other states' courts have likewise held nurses to be independent contractors under similar facts and circumstances as presented in the instant case. *See Health Care Assocs., Inc. v. Oklahoma Employment Sec. Comm'n*, 2001 OK 50, ¶¶ 2-3, 26 P.3d 112, 113 (2001) Trauma Nurses, Inc. v. Bd. of Review, New Jersey Dep't of Labor, 242 N.J. Super. 135, 144-45, 576 A.2d 285, 290 (App. Div. 1990), Contract Mgmt. Servs., Inc. of Texas v. State ex rel. Dep't of Labor, Office of Employment Sec. CMSI-TX. 745 So. 2d 194, 199 (La. Ct. App. 1999), HRP of Tennessee, Inc. v. State, Dep't of Employment Sec., No. E2005-01176-COA-R3CV, 2006 WL 1763673, at *1 (Tenn. Ct. App. June 28, 2006).

Claimant operated as an independent contractor during the entire time that she worked with Condustrial. [October 13, 2017 hearing p. 240].

Sears explained that Condustrial received confirmation from the South Carolina Department of Employment and Workforce that those nurses were properly classified and were in fact true independent contractors with Condustrial. [Oct. 12, 2017 Hearing H.T. 203]. He stated that had the nurses been classified as employees, Condustrial would have taken out taxes from their payroll and offered them insurance and other standard employee benefits. [H.T. 175 Oct. 12, 2017 Hearing; October 13, 2017 hearing p. 236-37]. He explained Claimant's own testimony regarding her tax deductions while working with Condustrial clearly indicated she was an independent contractor. [H.T. 177 Oct. 12, 2017 Hearing]. Moreover, months before the incident leading to this claim, Claimant contacted Sears regarding an issue related to overtime pay. [H.T. 179-80 Oct. 12, 2017 Hearing]. During that conversation with Claimant, Sears discussed with Claimant her status as an independent contractor and the fact that she was not an employee. [H.T. 181]. Per Sears, Claimant did not question her status as an independent contractor at that time or at any time before the incident. [H.T. 181, 186 Oct. 12, 2017 Hearing].

Sears explained that Condustrial had a written independent contractor agreement with Claimant that she signed in 2013 and 2014. [H.T. 205 Oct. 12, 2017 Hearing]. Pursuant to the independent contractor relationship, the company did not control her work, guarantee her a set number of hours or minimum amount of pay, provide equipment or uniforms, or pay for continued education or licensures or any other normal employment. [P. 267-71 Oct. 13, 2017 Hearing]. Condustrial did not provide her any supplies or materials or reimburse her for the performance of her services. [H.T. 205-207 Oct. 12, 2017 Hearing].

Sears testified that Condustrial did not provide training or instruction on the way her work was to be performed. [H.T. 205 Oct. 12, 2017 Hearing]. Condustrial did not have onsite supervisors at SCDC. [H.T. 129, October 13, 2017 Hearing]. Claimant was not required to follow a routine established by Condustrial and she did not report to Condustrial to perform her work. [H.T. 205-207 Oct. 12, 2017 Hearing]. Condustrial could not change the methods Claimant used and the company did not require that Claimant be supervised or controlled in the performance of her services. [H.T. 205 Oct. 12, 2017 Hearing]. In sum, Turner exercised her own professional judgement, skill, and training to conduct her nursing duties without any supervision or control from Condustrial.

Sears further explained that Claimant was able to work for other nursing agencies and was not prohibited from competing with Condustrial. [H.T. 209 Oct. 12, 2017 Hearing]. In fact, as an independent contractor, she was encouraged to go work for other agencies. [October 13, 2017 hearing p. 238]. He explained that Claimant received all the benefits and flexibility that came with the independent contractor relationship—she could take off when she wanted, negotiate her rate of pay, accept jobs with other agencies and in fact was encouraged to do so, choose her own shifts, refuse shifts, have no taxes withheld from her pay, and was able to deduct business expenses from her taxes. [H.T. October 13, 2017 p. 239-42, 268, 271, 274].

Similarly, Tony Durham, the Owner/President of Condustrial, explained that Durham inherited the healthcare staffing business model and the SCDC client from Palmetto Healthcare Staffing. [11/3/2017 H.T. 12-15]. Durham was unfamiliar with healthcare staffing when he inherited the company. Further, no one on his staff had any nursing qualifications or expertise in nursing. At that time, his company employed hundreds of construction workers as employees. The construction workers were full-time employees who completed numerous standard employment

documents. [H.T. 7-9]. They received health benefits and other employee benefits. [H.T. 9]. Durham explained that by contrast, the independent contractor nurses who worked at SCDC did not want to become employees of Condustrail and the company never considered them to be employees. [H.T. 17-19; Condustrail's APA p. 149-53] (Condustrail's completion of an IRS questionnaire to determine that the nurses were independent contractors). Durham testified that he would have preferred for the nurses to be employees, but those nurses insisted on remaining independent contractors because they did not want to take on the responsibilities of becoming employees. [H.T. 19-22, 27-28, 39-40.] They wanted the option to have dual employment, did not want assignments restricted to certain areas, and preferred negotiating their pay and selecting their shifts. [H.T. 19-22, 28, 40-41]. They could "come and go at they please." [H.T. 22.]

Like Sears, Durham explained that had the nurses been Condustrail's employees they would have received health insurance, vacation pay, drug cards, and many other employment benefits. [H.T. 40]. However, the trade off would have been that their pay would have been non-negotiable, they would have had taxes withdrawn from their checks, and they could not decline assignments—the nurses did not want those requirements. [H.T. 41, 158, 182]. He explained that he made less money with the nurses being independent contractors and it resulted in more "hassle" from him as the business owner. [H.T. 42-43]. He stated three of the nurses in the same group as Claimant filed unemployment claims and the Department of Employment and Workforce ("SCDEW") issued an opinion ruling those nurses were independent contractors. [H.T. 32-37; Condustrail's ABA Ex. 36-40] (written determination from SCDEW finding the nurses similarly situated to Claimant were independent contractors). He completed the IRS questionnaire and checked with his attorneys who drafted the Independent Contractor Agreement and who closed the

deal with Palmetto Healthcare Staffing to verify that these nurses were correctly classified as independent contractors. [H.T. 30-31, 38].

Consistent with Sears and Durham's testimony, several other witnesses testified regarding the independent contractor relationship. Justin Gudvangen⁸ was the Nurse Administrator with the SCDC. [July 24, 2017, H.T. 96]. Nurse Gudvangen was familiar with the independent contract relationship with Medustrial because his career path with SCDC began as an independent contractor with Medustrial. [H.T. 60]. He testified that he understood that he was a 1099 independent contractor when he worked with Medustrial. [H.T. 85]. Further, he stated Medustrial never misled him to believe that he was covered by workers' compensation while he was an independent contractor with the company. [H.T. 85]. He testified that SCDC had employee nurses and contract nurses and in 2015, 70% of SCDC's nursing shifts were covered by contract staff. [H.T. 62, 96]. Nurse Gudvangen testified that Claimant was classified as a contract nurse placed at SCDC. [H.T. 96].

Despite the Panel's finding that "[o]n a day to day basis, there was no difference between nurses employed by SCDC directly and those placed at SCDC by Condustrual, Nurse Gudvangen testified about the numerous differences between the employee nurses and contract nurses placed at SCDC by Condustrual. First, Nurse Gudvangen testified that SCDC did not have control over Claimant's or any contract nurse's schedule. As part of his job duties, he set the schedules for all the nurses at SCDC. He explained that the scheduling process for the employee nurses was different than for the contract nurses. [H.T. 96.] The employee nurses *were required* to work on a rotating schedule and as the supervisor, Gudvangen could make the employee nurse work any particular shift, and if the employee nurse refused, it would be considered insubordination. [H.T.

⁸ The Single Commissioner referred to Nurse Gudvangen as "Nurse G." See Nov. 6, 2017 H.T. 14-15.]

97]. The employee nurses were expected to appear for the shifts for which they were scheduled, but “[i]f it’s a contract person, they can cancel it within a certain time limit window.” [H.T. 67].

By contrast to the employee nurses, the contract nurses provided their availability of the shifts they could work. Gudvangen had to set the schedule around the contract nurse’s availability, and the contract nurse “basically picked their own schedule.” [H.T. 88.] SCDC had no control over the contract nurse’s availability. [H.T. 89.] Further, although the employee nurses were required to request leave, the contract nurses did not. [H.T. 91, 106-07]. The contract nurses, like Claimant, were not required to work any shift. [H.T. 89]. According to Gudvangen, the contract nurses “didn’t have to work at all” and Gudvangen could not make those contract nurses work a specific shift. [H.T. 89, 97]. He stated there were occasions when a contract nurse would work one shift and never return to the facility. [H.T. 111]. He explained that if Claimant decided that she was no longer interested in working for SCDC, she would not need to resign as a contractor, but the employees were required to resign. [H.T. 113]. Claimant also confirmed that she would not need to resign from SCDC if she no longer wanted to work at the facility, she could simply stop taking shifts. [H.T. 321].

Further, Nurse Gudvangen explained that the independent contractor nurses at SCDC were readily distinguishable because the employees of SCDC wore identification badges with blue letters stating “employee,” while the contractors’ badges stated “temporary” in red letters. [H.T. 64, 118]. Although the Kirkland SCDC location divided the parking lot into “staff parking” and “visitor parking” and the contract nurses parked in the “staff” lot, Gudvangen believed that it would have been strange to further divide the staff lot into “employee nurse” and “contract nurse.” He stated he had worked in several different types of organizations as a nurse and he had never seen a facility designate a specific parking area for contract employees. [H.T. 98-99].

Nurse Gudvangen further testified that the contract nurses at SCDC did not receive the same training as the employee nurses. The employee nurses received annual training which consisted of eight hours of a new employee orientation class, a week of basic training at the training academy, some nursing-specific classes to complete within a year, and training related to hostage situations. [H.T. 90, 92, 103-04]. On the other hand, the contract nurses only received a three-day orientation shift, which was similar to a job shadow. During those three days, SCDC transitioned the independent contractor into doing the job. [H.T. 90, 103-04]. The contract nurses did not receive training related to hostage situations. [H.T. 92].

Turner's own testimony supports finding she was not a direct employee of Condustrail, and by extension, not a statutory employee of SCDC. She admitted she never asked to be an employee of SCDC because the schedule would not be "flexible", and she preferred a flexible schedule. [H.T. 222, 224-26, 306]. She agreed she could decline shifts if the supervisor at SCDC asked her to work a certain shift. [H.T. 154]. She admitted she had the flexibility to choose the shifts she wanted to work and decline any shifts she did not want to work. [H.T. 217-19].

Turner admitted Condustrail did not supervise her work at SCDC or control how she did her work as an LPN. [H.T. 304-305]. She was not required to report to Condustrail before, during, or after any shift on how the shift went that day. [H.T. 232, 239]. She did not have to ask Condustrail for permission to take vacation, and they never forbid her from taking days off or from working concurrently at a different agency. [H.T. 220-21]. She agreed she could work for more than one agency at any given time period. [H.T. 154]. She understood that Condustrail was not taking out taxes and did not provide benefits such as overtime pay. [H.T. 155]. She testified that she supplied her own healthcare insurance. [H.T. 173, 230]. She admitted Condustrail did not provide dental insurance, transportation, mileage reimbursement, vacation pay, sick pay, uniforms,

appropriate footwear, nursing scrubs, or retirement plans. [H.T. 227-29]. She admitted that there was nothing on her SCDC badge that identified Condustrial. [H.T. 230]. She admitted that Condustrial did not provide business cards, cell phones, or laptops, nor did the company provide any formal training or pay her nursing license renewal fees. [H.T. 220-31].

Nurse Sidney is a similarly situated LPN who worked through Condustrial at SCDC. Her testimony proves there was no employment relationship between Condustrial and its contract nurses. [H.T. 25-26, November 6, 2017 Hearing]. Nurse Sidney testified that she signed the exact same independent contractor agreement with Condustrial that Claimant signed, and by signing, she understood that she was not eligible for any employment related ERISA benefits “like medical, dental, none of those kind of benefits.” [H.T. 26-27, 31-32.] She knew she was not eligible for workers’ compensation because “the contract stipulated that.” [H.T. 27, 47]. She stated being an independent contractor gave her “a lot of flexibility” and that she was able to accept or decline shifts. [H.T. 27]. Over her thirty-two-year career in the nursing profession, she has worked as an employee and as an independent contractor. [H.T. 40-41]. Based on her experience, she explained the following advantages of working as an independent contractor: (1) flexibility to schedule shifts based on your own availability, (2) availability to work other jobs with other agencies, (3) receiving tax advantages, and (4) the ability to negotiate rates of pay and take different shifts if the rate was higher. [H.T. 41-45]. Contrary to the Panel’s finding that “a flexible schedule is hardly inconsistent with an employee/employer relationship as many hourly jobs offer flexible schedules,” Nurse Sidney testified that the flexibility as an independent contractor was not the same as other employee jobs she worked. [H.T. 52].

B. The furnishing equipment factor favors an independent contractor relationship.

The Panel erred in finding this factor to be “somewhat neutral.” Sears, Durham, and Claimant’s own testimony demonstrate that Condustrail did not provide any equipment to Claimant to perform her nursing duties at SCDC. Durham testified that the company did however provide some equipment to its direct employees. Moreover, Turner explained that SCDC provided medical equipment and she provided her own uniform and shoes. She stated she had her own stethoscope, but she did not take it into the facility because they were “limited on supplies [they] could bring in.” [H.T. 166]. Regardless of any equipment SCDC supplied, Turner contends SCDC was not her direct employer. *See Collins v. Charlotte*, 400 S.C. 50, 732 S.E.2d 630 (Ct. App. 2012) (holding that whether an entity is a statutory employer requires a different analysis than the employee/independent contractor test). Again, Turner is essentially trying to impute SCDC’s actions to Condustrail.

Even if SCDC’s furnishing of equipment to Turner vicariously implicates Condustrail, the greater weight of the evidence demonstrates the minimal furnishing of equipment is not indicative of an employment relationship. Although Claimant testified regarding SCDC’s uniform and grooming procedures, Gudvangen explained those policies applied to all nurses for safety reasons. Nurse Gudvangen testified that all nurses at SCDC were required to provide their own uniform and shoes. [H.T. 89, 99]. He explained that some nurses also brought in their own stethoscopes. [H.T. 76-77]. SCDC provided the other medical equipment because of safety concerns related to the potential for the equipment to be used as a weapon by inmate in the facility. [H.T. 76-77, 108]. As such, the SCDC’s provision of medical equipment under these circumstances mitigates an inherent risk of its mission to provide healthcare services to its inmates and is not an affirmative exercise of control over the nurses.

Further, the fact SCDC provided certain equipment to abide by certain regulatory controls does not change this analysis. See Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 676 S.E.2d 700 (2009) ("We agree with the Pennsylvania Supreme Court that requiring a worker to comply with the law is not evidence of control by the putative employer."); *Id.* ("[R]estrictions upon a workers' [sic] manner and means of performance that spring from government regulation (rather than company initiatives) do not necessarily support a conclusion of employment status. Indeed, employer efforts to ensure the workers' compliance with government regulations, even when those efforts restrict the manner and means of performance, do not weigh in favor of employee status") (quoting "Universal Am-Can, Ltd. v. Workers' Comp. Appeal Bd., 563 Pa. 480, 762 A.2d 328, 335 (2000)).

The he Court in Shatto rejected mere regulatory compliance as a basis to support a finding of an independent contractor under the provision of equipment prong. However, unlike Shatto SCDC did not provide "everything" Turner needed to perform her work. Shatto 406 S.C. at p. 480. McCleod provided Shatto medical equipment and supplies, including sterile clothing. In this case, Turner provided her own uniforms, nursing shoes and other miscellaneous nursing tools like a stethoscope. Furthermore, the furnishing of equipment in this case goes beyond simply having equipment available for mere regulatory compliance. Nurses, visitors, and other persons in an SCDC facility are not allowed to bring any non-approved items due safety concerns. In this respect, a prison infirmary is a fundamentally different setting than the hospital in Shatto. The health and safety for everyone, not just its nurses, is SCDC's paramount concern; thus, its requirements to further that end are clearly not just an exercise of control for employment purposes. This Court should therefore employ the same analysis of the furnishment of equipment factor as the Supreme Court previously endorsed in Wilkinson to find an independent contractor relationship.

C. The method of payment factor favors finding that Turner is an independent contractor.

The method of payment here is entirely consistent with Turner's independent contractor status. Sears and Durham testified Condustrail never guaranteed a set pay. Turner had the ability to negotiate rates of pay when placed at any facility for a shift and the direct employees did not have that option. They both explained Turner was not eligible for any pensions, bonuses, paid vacations, sick leave, or any other ERISA benefit through Condustrail. Moreover, the company did not deduct any social security or federal taxes from her pay. [Sears H.T. 207-08 Oct. 12, 2017 Hearing; October 13, 2017 hearing p. 236-39; Durham H.T. 40-43, 158, 182]. Turner further testified that she understood the difference between a 1099 self-employed earnings form and a W-2 employee. [H.T. 144]. She understood that under a 1099, no additional taxes were taken out of her paycheck. [H.T. 291]. At the same time, she enjoyed the benefits of an earned income credit and numerous business deductions via her classification as a 1099 self-employed person. [H.T. 293-99]. Condustrail furnished 1099 forms to Claimant, who in turn routinely filed tax returns as a sole proprietor, specifically an "LPN Nursing Contractor." [Condustrail's APA p. 71, 82, 86]. Claimant's tax returns include forms for her business expenses and self-employment taxes. As expressed in Wilkinson, "[t]he method of payment bears no indicia of an employment relationship." (finding that the method of payment did not support an employment relationship where the company provided the claimant with 1099 tax forms and the claimant filed tax returns as a sole proprietor, specifically an "over the road trucker," including deductions for his business expenses and self-employment taxes).

Further, Nurse Gudvangen testified that the contract nurses placed at SCDC received different pay than the SCDC employee nurses. SCDC employee nurses qualified for bonuses and raises and received ERISA benefits such as health and general benefits, but contract nurses such

as Claimant did not. [H.T. 91-92, 106-07, 119; *see also* Claimant's testimony H.T. 320-21] (Claimant's testimony confirming she was not paid by SCDC, and was not eligible for any raise, bonus, retirement benefits or leave from SCDC). Gudvangen recalled that when an employee position opened up at SCDC, he offered the position to Claimant, who responded "No, I can't do that 'cause y'all don't pay enough." [H.T. 116].

The Panel misinterpreted Shatto's holding on this issue. The Court held that the method of payment factor in that case pointed to an independent contractor relationship because, like the instant case, the alleged employer did not supply the claimant with insurance, vacation days, sick days, or a retirement plan—"benefits that are available to other employees directly employed by" the alleged employer. Shatto 406 S.C. 470 at p. 480. Here, Turner alleges Condustrial was her direct employer, but the overwhelming evidence in the record demonstrates Condustrial did not provide insurance, vacation days, sick days, or a retirement plan—"benefits that are available to other employees directly employed by" Condustrial.

D. The evidence of the right to fire factor favors finding Claimant to be an independent contractor.

The Court in Wilkinson explained that this factor is the most difficult to evaluate for the following two reasons: (1) unlike the other three factors the parties may never need to confront this issue; and (2) a right of termination, in some form, exists in an independent contractor arrangement. 382 S.C. 295, 676 S.E.2d 700 (2009). "The critical inquiry is the term "fire," for it embraces the employment relationship." *Id.*

Durham testified Condustrial did not have the right to fire Claimant. [H.T. 130]. Moreover, the fact that two of Condustrial's documents provided the right to "termination," does not change the relationship status to that of an employee. *See id.* (noting that a right of termination, in some form, exists in an independent contractor arrangement). Nurse Gudvangen testified that although

he had the right to fire employee nurses at SCDC, he had *no right to fire* contract nurses such as Claimant. [H.T. 100, 105]. Gudvangen could reprimand employee nurses and those nurses were entitled to a corrective action review meeting in which they could provide supporting documentation. [H.T. 104-105]. The reprimanding authority would then determine the appropriate sanction and include the sanction in the employee's personnel file if the sanction was anything above an informal resolution. *Id.* By contrast, Gudvangen explained that SCDC did not maintain files for Claimant or contract nurses like her, and if he had any issues with Claimant's performance, "her being a contractor, there was no disciplinary measures [he] could take other than inform her agency that [they] had an issue . . . up to the point of [him] requesting her not to come back or that they not send her back" [H.T. 74, 88]. He explained that even if he put the contract nurse on a "do-not-use" list, the contract nurse could immediately go work at a different SCDC location. [H.T. 100-01]. Further, Gudvangen explained he had "no recourse" or reprimand authority if a contract nurse such as Claimant declined a shift. [H.T. 98].

In Wilkinson, the Court determined that the termination of the parties' relationship was controlled by their agreement. Viewing the agreement here in conjunction with Turner's and Condustral's practical relationship leads to a finding of an independent contractor relationship. As previously explained, Claimant could simply decline shifts and Condustral could choose to send another independent contractor for the job. *See id.*; *see also* Ferguson v. New Hampshire Ins. Co., 412 S.C. 203, 213, 771 S.E.2d 851, 857 (Ct. App. 2015) (holding the company did not have the right to fire where the company could choose to use someone other than the claimant for a job, the claimant could also decline or refuse to perform a job, there was no set schedule, and the claimant did not work on a consistent basis); Rhoney, 134 N.C. App. at 619, 518 S.E.2d at 540-41

(finding there was no employment relationship where the relationship could be terminated at will by either party at any time).

E. The Panel erred by totally dismissing the Independent Contractor Agreement between Turner and Condustrail.

The Supreme Court in Wilkinson specifically acknowledged the significance of an independent contractor agreement when analyzing employment relationship issues for coverage under the Act. Wilkinson 382 S.C. 295 at p. 300.⁹ The Court stated, “[i]n evaluating the four factors we are guided initially by the parties’ independent contractor agreement. But more importantly, *we are guided by the parties’ conduct*, which mirrored the terms of the contract.” *Id.* (emphasis added).

Here, Turner executed several documents representing that she agreed to be an independent contractor. The “Licensed Professional Independent Contract Agreement” that Turner signed in 2013 and again in 2014 stated “No other document, including any agreement between the broker and the client, shall be deemed to modify any terms of this agreement unless expressly stated in writing to do so and signed by both the broker and the independent contractor.” (Claimant’s APA p. 237). The contract further stated, “The independent contractor represents that the independent contractor has read and understands the terms of this agreement.” (Claimant’s APA p. 237.) The Licensed Professional Independent Contractor Agreement mentioned the term “independent contractor” seventy-eight times in the four-page document.

In addition to the independent contractor agreement itself, Turner also signed numerous other documents memorializing herself out as an independent contractor. The “Facilities Expectations” required signature of the “contractor.” (APA tab 9, p. 313). Turner signed as a “contractor” to

⁹ This Court recently recognized the primacy of an independent contractor agreement in workers compensation cases. Ramirez v. May River Roofing, Inc. Opinion No. 5827 (Ct. App. Filed June 23, 2021). Although the Court found an employment relationship in that case, it acknowledged the outcome may have been different if there had been an independent contractor agreement in place.

permit the company to obtain her SLED report. (APA 10 for Countrywide p. 314). In February 2013 and October 2014, she signed the "Substance Abuse Policy Consent Form" on the line for "contractor name." [H.T. 208-09]. The body of that document referenced "contractor" on several occasions. Turner signed her own 2013 and 2014 federal income tax returns which named her as an "LPN Nursing Contractor." [H.T. 287; APA p. 333]. Sears also explained that Claimant consented as a "contractor" on several forms and the New Hire/Rehire Checklist classified her as an independent contractor. [H.T. 183-84, 186-87 Oct. 12, 2017 Hearing].

The Panel erroneously discounted the significance of the independent contractor agreement based on Turner's dubious contention that she never read the document. However, her plea of ignorance of her independent contractor arrangement is invalid. One who signs a written instrument has the duty to exercise reasonable care to protect herself. DeHart v. Dodge City of Spartanburg, 311 S.C. 135, 427 S.E.2d 720 (Ct App. 1993). It is well established that "a person is bound to read an agreement before signing it." Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2000) (footnote omitted). Thus, "[a] person who signs a contract or other written document cannot avoid the effect of the document by claiming he did not read it." Wachovia Bank v. Blackburn, 394 S.C. 579, 585, 716 S.E.2d 454, 458 (Ct. App. 2011); *See also J.B. Colt Co. v. Britt*, 129 S.C. 226, 123 S.E.2d 845, 847 (1924) ("[O]ne cannot avoid a written contract into which he has entered on the ground that he did not attend to its terms, that he did not read the document which he signed, that he supposed it was different in its terms, *or that it was a mere form.*")(emphasis added).

The only exception to this rule is that "if the party is ignorant and unwary, his failure to read the document may be excused." Regions Bank v. Schmauch, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003)(citing cases). However, South Carolina courts "very strictly construe his

exception.” *Id.* “In determining whether a party can be classified as ignorant and unwary, an individual’s education, business experience and intelligence are all considered.” *Id.* Turner is a well-educated licensed professional. As such she is clearly not ignorant or unwary based on her education and experience. Therefore, the Panel’s total dismissal of the independent contractor agreement based on her alleged failure to read it is patently erroneous as a matter of law.

In a stunning double standard, the Panel dismisses the significance of the independent contractor agreement between Turner and Condustrail as evidence of an independent contractor arrangement in one breath yet cites purported *pro forma* employment paperwork executed by Turner (CI’s Exhibits H-P pp. 261-274) as evidence favoring an employment relationship in another. First, the Panel points to an “Application Form Waiver” executed by Claimant and Condustrail on October 9, 2014 (CI’s Exhibit U p. 282) as evidence of an “at will employment relationship,” but fails to recognize that Turner simultaneously executed the independent contractor agreement that very same day, wherein it is specifically memorialized that she is not an employee. The Panel cannot arbitrarily endorse documents favoring an employment relationship, and flippantly dismiss documents mitigating for an independent contractor arrangement, *especially when Claimant acknowledged that she did not read or appreciate the significance of ANY of the documents she signed.* She merely signed all the documents requested without actually reading them in order to obtain shifts. [7/24/17 H.T. p. 138 ll. 13-21; 190 ll. 11-25- p. 19 ll. 1-5; p. 192 l. 2; p. 198 ll. 23-24; p. 201 ll. 15-23; p. 209 ll. 20-21].

If Turner indeed failed to read the purported employment forms and independent contractor agreement, then what is good for the goose should be good for the gander and *neither set of documents should have any probative value.* If the competing documents are not probative because Turner failed to read them, then the Court must focus more on the actual real-life relationship

between the parties, which for the reasons noted earlier, clearly mitigate toward a finding that Turner is an independent contractor. See Wilkinson supra (holding that the court must be guided by the parties' conduct). Again, the Panel erred as a matter of law by arbitrarily endorsing one set of documents over the other. See S.C. Code §1-23-380 (5)(f) (the court may reverse a Commission's decision if it is "arbitrary or capricious").

Next, Turner erroneously contends Shatto supra stands for the proposition that execution of purported employment documents is outcome determinative of one's employment status. However, the Court's primary focus in Shatto was McCleod's *actual exercise* of control over claimant in that case, not just the *right of control* purportedly enabled by the paperwork she signed for McCleod. Shatto 406 S.C. at p. 479 ("McLeod Regional's exercise of control over virtually every facet of Shatto's duties as a nurse anesthetist was so pervasive that we conclude the factor of direct evidence of the right or exercise of control supports a finding of an employment relationship."). This focus on the practical real world relationship between the parties is in accordance with the holding of Wilkinson supra.

Here, Turner signed routine *pro forma* paperwork for Condustrail, including an employment application, federal I-9 citizenship verification form, a W-4 tax withholding form, a Fair Credit Reporting Act release, a Second Injury Fund knowledge statement, terms of employment from, none of which memorialize any right of control by Condustrail. (CI's Exhibits H-P pp. 261-274). Turner also signed a "Facility Expectation" acknowledgement, which was a requirement for SCDC not Condustrail. (Countrywide/GIC APA # 9 p. 313). Claimant executed additional documents, including an attendance policy acknowledgement, another client facility requirement form, another I-9 form, a new-hire checklist, and an Application Form Waiver confirming an "at will employment relationship." [CI's Exhibit U p. 28]. However, none of these documents evidence an

actual right of control by Condustrial over Turner regarding the performance of her job duties. Perhaps most significantly, Claimant's acknowledged lack of understanding of these *pro forma* employment documents lessens their importance when compared with the paperwork the claimant in Shatto knowingly signed in that case.

Moreover, several other factors present in the in this case belie the practical significance of these purported *pro forma* employment documents to the real-world relationship between Turner and Condustrial. The W-4 is completely irrelevant because it is undisputed that payroll taxes were never withheld from Claimant's payments. Moreover, a W-4 does not otherwise evidence any right of control Condustrial may have over Turner. The same is true of the I-9 immigration status form, FCRA release, an employment application, the new hire checklist, the SIF Knowledge Statement, and the facility and client requirement acknowledgement.

The only paperwork from 2013 arguably impacting the right of control inquiry is the "Terms of Employment." However, upon closer inspection, this document does not comport with how Turner in fact performed her work. For example, the form addresses a host of issues that are indisputably not applicable to Claimant's arrangement with Condustrial, including provisions regarding unemployment benefits, sick and vacation pay and policies, and a prohibition against side or dual employment. As such, this form proves nothing and is not germane to the real work relationship between Turner and Condustrial.

The employment contract waiver and at will employment acknowledgement (CI's Exhibit U. p. 82) is another proverbial red herring. This document is merely a *pro forma* document renouncing the creation of an employment contract for liability purposes. It is clearly not an employment contract or an earnest manifestation of either party's intent to create an employment relationship. The Shatto Court apparently relied on a similar at will employment document as evidence of

McCleod's right to control and fire the claimant in that case. **However, the instant case is further distinguishable from Shatto because Turner executed an independent contractor agreement with Condustrial specifically disavowing any employment relationship on the very same day (October 9, 2014) that she signed this purported employment document.** The simultaneous execution of these wholly incongruent documents neutralizes their mutual relevance to the right of control test. This elevates to primacy whether Turner's and Condustrial's conduct mirrors the terms of the independent contractor agreement, which for reasons previously discussed was clear the situation.

In sum, the purported *pro forma* employment paperwork Turner signed is immaterial to that right of control issue because: a) Turner and Condustrial specifically rejected an employment relationship via the simultaneous execution of a valid independent contractor agreement in 2014 that is wholly incongruent with those documents; b) the terms of that independent contractor agreement closely mirror the practical real world relationship of the parties per Wilkinson supra; c) Claimant testified that she never read, appreciated, or understood ANY of the documents she was presented; she merely signed them as requested in order to be assigned work; and d) if none of the documents are probative because Turner never read them, then the analysis defaults to the practical real world relationship of the parties as applied to the four-prong employment test discussed earlier.

For all these aforementioned reasons, the Panel's finding that Turner was Condustrial's employee must be **REVERSED**. The Court should enter its own finding that Turner was an independent contractor based on the preponderance of the evidence in the case. Her claim for compensation and medical benefits under the Act should be **DENIED** accordingly.

II. THE PANEL ERRED IN FINDING THAT CONDUSTRIAL WAS “UNINSURED” RELATIVE TO TURNER’S EMPLOYMENT WHEN HER WORK FALLS UNDER CODUSTRIAL’S CONTRACT WITH COUNTRYWIDE.

If the Court determines that Condustrual was indeed Turner’s employer, then Condustrual’s service agreement (“Contract”) with Countrywide secures its liability for Turner’s claim under the Act via Countrywide’s policy with GIC as a matter of law.¹⁰ [Cl’s Exhibit F.]. The Contract states that Countrywide is a “contract labor service (CLS) entity” that will “outsource” certain “Selected Staffing/Employees”¹¹ for Condustrual’s “normal business operations.” Further, the Contract provides that Countrywide *shall* “provide unemployment insurance and worker’s compensation benefits; and handle unemployment and worker’s compensation claims involving Selected Staffing/Employees.” Selected Staffing Employees are supposed to be described and designated under “Exhibit B” to the agreement; however, there is no “Exhibit B” attached.

The Contract also states that “all labor and/or employment performed by the Selected/Staffing Employees under this agreement *shall be performed under the mutual direction and control of both parties as co-employers.....*” (emphasis added). The Contract clearly envisions the addition of employees intended to be covered under its terms on a continuing or rolling basis. Specifically, Section 2 c. of the Contract requires Condustrual to “submit timely, complete, and accurate payroll information (including gross wages earned, any deductions, time worked, leave time/off status, workers’ classification code, and overtime exempt status) for each Assigned

¹⁰ The agreement contains a choice of law provision designating Florida law as governing the agreement; however, Countrywide is noted to be a Tennessee corporation and Condustrual is incorporated and principally located in South Carolina. The contract was executed in South Carolina. Therefore, Condustrual submit that the choice of law designation is invalid because if its lack of substantial relationship with Florida. South Carolina law applies to the interpretation of the agreement. See Russell v. Wachovia Bank, 353 S.C. 208(2003)(a settlor may designate the law governing his trust absent a violation of public policy or lack of substantial relationship to the trust).

¹¹ The agreement between Countrywide and Condustrual interchangeably refers to persons subject to that agreement as a “Selected Staffing/Employee,” a “leased employee,” and an “Assigned Employee.”

Employee for each applicable payroll period." (emphasis added). Finally, there is a list of employee classification codes for Condustrial's South Carolina nursing operations attached to the agreement for Countrywide's pricing purposes. This list of class codes includes two medical/nurse staffing codes substantially similar to Turner's LPN job class— 8829 and 8833.

The Panel found that Turner was not a "Selected Staffing/Employee" within the meaning of the Contract because Condustrial never reported her as such to Countrywide; therefore, GIC as Countrywide's carrier is not responsible for providing benefits under the Act. This rationale is erroneous because Condustrial never considered Turner to be its employee prior to the Commissioner's ruling in this case. For the reasons stated previously, Condustrial reasonably deemed Turner to be an independent contractor. The reasonableness of this belief is underscored by determinations from LLR and DEW that Condustrial's contract nurses were properly classified as independent contractors. It is therefore understandable why Turner was never reported to Countrywide as an "employee" to be covered under the service agreement from the outset.

The crux of the matter, therefore, becomes how does the agreement between Countrywide and Condustrial apply when an injured worker, who was previously classified as an independent contractor, is subsequently adjudicated by the Commission to be Condustrial's "employee" under the Act? Countrywide and GIC contend there is no basis under the Contract to account for this scenario. This interpretation, of course, leaves a huge potential gap in Condustrial's coverage.¹² The Commissioner found this gap is precisely what Condustrial, as a sophisticated business, bargained for in its agreement with Countrywide. However, the Contract itself, the law, and usual and customary insurance/business practices tell a different tale.

¹² Condustrial engaged over 180 contract nurses at some point or another in 2014 and 2015.

From the outset, Condustrial stresses that the Contract applies to its “normal business operations,” which included engagement of over 180 contract nurses. Countrywide was certainly aware of Condustrial’s nursing operations. Tony Durham’s testimony that he disclosed this aspect of Condustrial’s business model to Countrywide during their negotiations is unrefuted. [H.T. p.]. In addition, Countrywide clearly knew of this exposure since nursing class codes were attached to the Contract for pricing purposes. [CI’s Exhibit F]. The Contract clearly contemplates a fluid arrangement whereby Condustrial may submit additional “Selected Staffing/Employees” to Countrywide for processing on a weekly basis. Contrary to Countrywide’s and GIC’s assertions, this Contract was never intended to apply only to Condustrial’s payroll and circumstances existing at the time of its inception in March of 2015. It is the Contract’s inherent flexibility that provides the mechanism whereby an unreported or misclassified employee can be brought under the umbrella of the Contract at any time, as long as Condustrial complies with the submission of “timely, complete, and accurate payroll information (including gross wages earned, any deductions, time worked, leave time/off status, workers’ classification code, and overtime exempt status) for each *Assigned Employee for each applicable payroll period*.” Because there is no “Exhibit B” attached to the Contract specifically limiting in advance who can be considered “Selected Staffing/Employees,” that designation is reserved exclusively to Condustrial under Section 2 c. of the agreement. In sum, the Contract provides that “Selected Staffing/Employees” are essentially whomever Condustrial designates as such via submission to Countrywide under Section 2 c. of the agreement.

Condustrial submits this flexibility extends to the addition of anyone subsequently adjudicated to be an employee by the Commission during the term of the Contract. Presumably, Countrywide and GIC would not contest the assertion that any employee submitted by Condustrial

in accordance with the Contract, regardless of the reason for any previous failure to do so, would at least be prospectively covered under the Contract going forward. Indeed, there is no logical or practical distinction between the submission of an employee that is new, previously misclassified or unclassified, and one adjudicated to be an employee by the Commission. The issue in this case then becomes how does the Contract apply retroactively to cover a possible claim under the Act?

Testimony from Countrywide's own representatives is enlightening on this topic. George Kaspars, Countrywide's VP for business development, first confirmed that Countrywide knew Condustral was going to submit employee nursing professionals to be covered under the agreement based on nursing class codes submitted for pricing purposes. (Kaspars Depo. p. 11-12). Mr. Kaspars further confirmed that Condustral's engagement of independent contractor nurses would not have changed Countrywide's desire to enter the agreement. (Kaspars Depo. p. 19). Mr. Kaspars testified generally about the audit process and assessment of additional premium for misclassified or unclassified employees. He specifically acknowledged his understanding of Countrywide's and its carrier's ability to do so. (Kaspars Depo. p. 28).

The owner and president of Countrywide, Zach Collier, testified that it is primarily the carrier's decision how to cover previously unreported and/or misclassified employees, but also added **"I would think that they would have to cover the business of ours if it was an employee, whether approved or unapproved."** (Collier Depo. p. 30). Collier, therefore, specifically acknowledges that the Contract accounts for possible coverage of a previously unreported and subsequently adjudicated employee. Whether or not that person would then be covered for worker's compensation purposes is not Countrywide's concern; it's a matter for the carrier according to Collier.

Condustral argues that Turner became a "Selected Staffing/Employee" *ab initio* (from the outset) within the meaning of the Contract via operation of law pursuant to the Panel's Order finding that she was an employee of Condustral on her date of accident. This finding should apply retroactively because Condustral would have submitted Turner to Countrywide for coverage per the Contract but for its belief that Turner was an independent contractor. Condustral intended for all of its employees to fall under its Contract with Countrywide, including Countrywide's provision of comprehensive worker's compensation coverage.

The Panel's finding that Tuner was Condustral's employee as of September 5, 2015 is a remedial measure. Its retroactivity must include interpretation and application of the law to find coverage under the Act to further its beneficent purposes. *See James v. Anne's Inc. supra*. It is said that the common law is not merely a pronouncement of what exists now and going forward, as it is the discovery or revelation of what has always been the case. *See Cash v. Califano*, 621 F.2d 626, 628 (4th Cir. 1980) (the concept that judicial decisions are to be applied retroactively "stems from the Blackstonian view, that judges do not make law; they find law. Judicial declaration of law is merely a statement of what the law has always been."). Therefore, Turner is covered under the Contract by operation of law.

In addition, the Contract, specifically, the definition of "Selected Staffing/Employee," is vague and ambiguous on its face. Condustral points to the following ambiguities: a) referring interchangeably to employees subject to the Contract as "Selected Staffing Employee," "Assigned Employee," "recruited employee," and "leased employee;" b) specifically stating that "Selected Staffing/Employees" will be described on "Exhibit B" to the agreement when no such exhibit is attached; and c) stating in section 1. a. that the "Selected Staffing/Employee" will work under the "Client's supervision" (Condustral is designated as "Client" in the agreement). However, the

Contract states in a separate section specifically governing “Selected Staffing/Employees” that duties of the employee “shall be performed under the *mutual direction and control of both parties as co-employers.*” (emphasis added). Because the contractual term “Selected Staffing/Employee” is vague and ambiguous, extrinsic evidence of the intentions of the parties is admissible.¹³ Condustrial representatives testified their intention was for the service agreement with Countrywide to provide comprehensive workers compensation coverage, which would obviously include previously unclassified, misclassified, and/or subsequently adjudicated employees in its definition. (10/13/2017 HT p. 72 ll. 11-17 and p. 122 ll. 8-18); (11/3/2017 HT p. 211 ll. 3-18). As discussed previously, Condustrial’s understanding of how coverage should apply to Turner is essentially on point with the testimony of Countrywide’s representatives.

As such, Countrywide’s contention that it had no knowledge of the risks of Turner’s potential employment is not supported by the evidentiary record. In fact, unrefuted testimony from Condustrial and other documentary evidence proves Condustrial expected and bargained for full coverage of liability under the Act. Specifically, Tony Durham, Condustrial’s owner and president who negotiated and executed the agreement with Countrywide, testified that nursing class codes 8829 and 8833 corresponding with approximately \$1.4 million dollars in payroll was presented to Countrywide during the contract negotiations. (11/3/2017 HT p. 127 ll. 5-20). Mr. Durham clarified that those payroll figures and class codes included both Condustrial’s employee nurses AND their independent contractor payments. When questioned why independent contractor

¹³ The general rule is that parol evidence is admissible to show the true meaning of an ambiguous written contract. An ambiguous contract is one capable of being understood in more ways than just one, or an agreement unclear in meaning because it expresses its purpose in an indefinite manner. The purpose of all rules of contract construction is to determine the parties’ intention. The courts, in attempting to ascertain this intention, will endeavor to determine the situation of the parties, as well as their purposes, at the time the contract was entered into. Bruce v. Blalock, 241 S.C. 155, 127 S.E. (2d) 439 (1962). The court should put itself, as best it can, in the same position occupied by the parties when they made the contract. In doing so, the court is able to avail itself of the same light which the parties possessed when the agreement was entered into so that it may judge the meaning of the words and the correct application of the language. 17 Am. Jur. (2d), Contracts § 272 (1964).

payments were presented to Countrywide even though they were not initially considered to be part of the agreement, Mr. Durham explained, "I wanted to show him the exposure of all of our people that worked there." [H.T. p.]In a nutshell, even though both Countrywide and Condustrual never intended for independent contractors to be "employees" under their Contract from the outset, Countrywide was definitely aware of Condustrual's contract nursing operations and the risks associated with it. Since Countrywide agreed in the Contract to cover Condustrual's "normal business operations" it cannot now claim surprise.

For these reasons, Turner is a covered employee under the terms of the Contract between Condustrual and Countrywide via operation of law, which furthers the beneficent purposes of the Act to liberally provide coverage for injured workers. Countrywide in turn secured its liability under the Act via its policy with GIC. Therefore, the Commissioner's finding that Condustrual failed to secure its liability under the Act relative to Turner's employment must be REVERSED.

III. Countrywide is liable for this claim because a) it was acting as a *de facto* Professional Employer Organization("PEO") under its agreement with Condustrual despite the fact it was purportedly not licensed to do so; and b) it is liable for Condustrual's "entire work force" pursuant to S.C. Code §40-68-10 *et seq.*; and c) it is estopped via its conduct and misrepresentations.

The Panel concluded that the d/b/a entity in the Contract between Condustrual and Countrywide was not a professional employer organization ("PEO") because it was not licensed in South Carolina. However, S.C. Code §40-68-10 defines words and phrases under the ensuing PEO statutes. Subsection (10) defines a PEO as "professional employer organization means individual business entity that *offers* professional employer services." (emphasis added).

The Panel likewise declined to hold Countrywide accountable as a PEO based on testimony from Condustrual's representatives that Condustrual did not desire a "full spectrum" of PEO services from Countrywide- the "full spectrum of PEO services" presumably meaning all services

a PEO may offer under the statutes- S.C. Code §40-68-10 *et seq.* However, there is no authority holding that all PEO services permitted by statute must be utilized by a client company in order for the PEO statutes to apply to the arrangement. Condustrail's general counsel testified consistently as to his belief that Countrywide was acting as a PEO. (11/13/2017 HT p. 106). The Panel's finding also runs counter to the usual and customary business practices of staffing companies and PEOs. Condustrail's owner and president, Tony Durham, explained how the PEO industry works in providing tiered level of services to their clients, ranging from a "Cadillac" full service plan to essentially a cafeteria or "a la carte" plan where the parties bargain for including and excluding various PEO services. (11/13/2017 p. 212 ll. 4-25- p. 213 ll. 1-5).

Moreover, the Panel erred in implying that the alleged *quid pro quo* for the unique payroll arrangement between Condustrail and Countrywide was leaving a huge potential gap in Condustrail's workers compensation for presumed independent contractors who may subsequently be adjudicated to be employees. The former proposition clearly has absolutely nothing to do with the latter. Any purported cost savings from the payroll arrangement between Condustrail and Countrywide does not offset the coverage risk Condustrail would be assuming. Rather, the record is clear that Condustrail still intended for Countrywide to provide it with a "comprehensive workers compensation program," despite the payroll arrangement between the two. As a sophisticated business who had previously engaged PEOs, Condustrail undoubtedly knew that the PEO statutes would provide a coverage "catch all" for any of its employees not otherwise falling under the four corners of its agreement with Countrywide.

A. Countrywide is a PEO for purposes of its Contract with Condustrail.

Countrywide contends that it is not a "licensed" PEO in South Carolina. Therefore, since the PEO statutes refer to "licensees," Countrywide argues those statutes do not apply. Condustrail

initially retorts that the Countrywide entity with which it negotiated the contract at issue (Countrywide Payroll & HR Solutions) was indeed a PEO. Representatives from Condustrual testified that Scott Hanson, Countrywide's president who initially approached Condustrual and negotiated the deal, represented that "Countrywide" was a PEO during the negotiations of the agreement. [11/13/2017 HT p. 106]. The only evidence in the Record that Countrywide can point to defeat its status as a PEO is Condustrual's mere assertion that it did not wish to engage Countrywide for a full spectrum of PEO services. The implication here is that an entity can only be a PEO for purposes of the statutes if it provides *every* PEO service permitted by the statutes. However, there is no provision in the PEO statutes intimating that a client company must utilize all of a PEO's permissible services in order to constitute a PEO relationship.

Condustrual's president, Tony Durham, who has been in the contract staffing business for 30 years, confirmed that he used only *selected* services with licensed PEOs in his past business dealings. (11/3/2017 HT p. 212 ll. 4-25- p. 213 ll. 1-7; p. 240 ll. 12-25; p. 246 ll. 1-10; p. 280 ll. 11-25- p. 281 ll. 1-12). Mr. Durham testified that Condustrual is a sophisticated staffing company that does not typically require all available PEO services. He mainly prefers utilization of a PEO specifically for workers compensation purposes. (11/3/2017 HT p. 222). Countrywide did not present any PEO industry expert testimony to counter Mr. Durham's assertions regarding the usual and customary business practices and relationships between PEOs and staffing companies. It is also significant to note that, Countrywide's own representatives never disavowed the notion that Countrywide was operating as a PEO in its dealings with Condustrual. There is simply no evidence in this record proving that Countrywide is not a *de facto* PEO subject to all conditions and responsibilities imposed by S.C. Code §40-68-10 *et seq.*

Even if Countrywide did not possess a license to operate as a PEO in South Carolina, it is still a *de facto* PEO and is not immune from the terms, conditions, responsibilities, and liabilities imposed by the PEO statutes. Generally, words and conduct of the parties to a business transaction best define the true nature of their association, including the formation of *de facto* legal relationships that carry legal consequences. See Bankers Trust of S.C. v. Bruce, 283 S.C. 408, 323 S.E.2d 523 (1979) (in the case of agency relationships a written agreement, or lack of a written agreement, is not as compelling as the words and conduct of the parties and circumstances of the particular case); See also Beasley v. Kerr-McGee Chemical Corp., 273 S.C. 523, 257 S.E.2d 726 (1979) (it is well-established that the terms of a contractual agreement are not conclusive in determining the association between the two parties where this evidence of an agency relationship outside the contract); Harris v. Stephens Wholesale Bldg. Supply Co., 309 So.2d 115, 54 Ala. App. 405 (1975)(a corporation by estoppel come about when the parties to a contract are estopped to deny corporate existence by their words, agreements and/or conduct). In this case, the evidence establishes that Countrywide and Condustral clearly behaved as if they were engaged in a PEO relationship- Countrywide offered and conducted substantial services of a PEO for Condustral under their Contract and Condustral paid Countrywide at the rates bargained for in that agreement.

In addition, the statutory scheme clearly confirms that PEOs are not merely creatures of statute. As such, PEOs can exist in fact outside the contemplation of the statutes. First, Chapter 68 of Title 40 is titled "*Regulation of Professional Employer Organizations.*" (emphasis added). The ensuing statutes clearly envision operation of unlicensed PEOs. For example, §40-68-150 is titled, in part, "Prohibited acts; *operation without a license*; wrongful use of title or representation of being licensed.... ." (emphasis added). It states "A person may not: (1) engage in professional employer services without holding a license under this chapter as a professional employer

organization or a professional employer organization group; (2) use the name or title "staff leasing services company", "licensed staff leasing services company", "licensed staff leasing services group", or "professional employer organization", "licensed professional employer organization", "licensed professional employer organization group", "professional employer organization group", "staff leasing services group", or otherwise represent that it is licensed under this chapter, unless the entity holds a license issued under this chapter..." (emphasis added). This statute ultimately provides criminal penalties on an organization holding itself out as a PEO and essentially operating as a PEO under various monikers.¹⁴ Finally, §40-68-160 (B) states that the Department of Consumer Affairs may take disciplinary action against a "licensee, *or a person engaging in professional employer services without a license.*" (emphasis added). For these reasons, Countrywide's failure to obtain a license as a PEO in South Carolina does not insulate it from accountability under the statutes.

In addition to the d/b/a designation of "Countrywide Staffing Solutions Group" sounding like a statutorily recognized PEO entity referred to as a "staff leasing services group," Countrywide is a *de facto* PEO via its actions, representations, and obligations under its Contract with Condustral. Specifically, Section 3 items (a) through (e) of the Contract regarding Countrywide's obligations to Condustral mirrors the exact language and requirements of S.C. Code §40-68-70 (A) items 1-5. These statutory items enumerate the fundamental benchmarks of a PEO arrangement, which tracks nearly identically with the terms and responsibilities imposed by the Contract.

Condustral submits that its desire to pay employees under its own FEIN as reflected in the "Procedural Amendment to CONTRACT SERVICE AGREEMENT" is immaterial, because such

¹⁴ In this case, "Countrywide Staffing Solutions Group" sounds uncannily similar to the prohibition against operating as a "staff leasing services group."

amendment does not relieve Countrywide from its ultimate responsibility for the payment of wages to assigned employees under Section 3 (b) of the Contract in the event Condustrail did not pay those employees for some reason. Specifically, the Contract states Countrywide “**assumes responsibility for the payment of wages to the leased employees** without regard to payments by Client to the leasing company.” Again, the Contract and statutory language of and §40-68-70 (A)(2) are identical. In sum, Countrywide’s obligations under its Contract with Condustrail are essentially that of a PEO in every meaningful sense including: establishment the co-employment relationship for assigned employees, guarantee for the payment of wages, responsibility for remitting payroll taxes, maintaining personnel and employment files, the provision of workers compensation coverage and unemployment insurance, handling of claims, and the performance of “all other administrative functions customarily performed by an employer for its employees.” (See Section 1. f. of Contract between Condustrail and Countrywide).

Because the PEO statutes clearly contemplate the existence and operation of unlicensed PEOs, it is illogical to claim that an unlicensed business entity engaging in professional employer services is immune from the substantive provisions of the PEO statutes. That would be akin to claiming that an unlicensed driver is immune from violation of the highway and traffic laws, or that an unlicensed physician cannot be held accountable for the results of his malpractice. Such a contention offends every notion of justice and common sense.

The Panel’s ruling to this effect also invites fraud and chicanery to the workers compensation system. A shadowy third-party employment service could simply come into South Carolina with promises to a prospective client of full coverage of its liabilities under the Act and then leave that client “holding the bag” for a claim via contractual sleights of hand and claims of immunity because it is “unlicensed.” Condustrail argues that this is precisely the unacceptable

scenario the Legislature envisioned when enacting S.C. Code § 40-68-70 (C) and/or S.C. Code § 40-69-120 (A)(7). The Court must not let Countrywide off the hook.

B. If Claimant is not an “assigned employee” under Condustral’s agreement with Countrywide, then coverage would still fall on Countrywide via operation of S.C. Code § 40-68-70 (C) and/or S.C. Code § 40-69-120 (A)(7).

As noted in the previous discussion, Countrywide was clearly acting as a PEO via the Contract with Condustral. The Contract uses the terms “Selected Staffing employee,” “leased employee,” and “assigned employee” interchangeably throughout. An “assigned employee is defined by the South Carolina PEO statutes “as a “person performing services for a client company *as affected by a contract* between a licensee and a client company in which employment responsibilities are shared.” S.C. Code §40-68-10 (12). Conversely, it logically follows that a “nonassigned” is one who is not deemed a co-employee of the PEO. As such, Turner becomes a “nonassigned employee” if she is not otherwise covered as an “assigned employee” a/k/a “Selected Staffing/Employee under the Contract.

The law places the burden on a PEO and its carrier for providing coverage under the Act when a client company it is engaged with fails to cover its own nonassigned employees. S.C. Code § 40-68-70 (C) states “[u]pon the failure or neglect of a client company to secure and maintain workers’ compensation insurance, the licensee and its workers’ compensation carrier agree and are liable to pay to a worker employed in the work of the client company compensation under Title 42 which the licensee would have been liable to pay if the worker had been employed by the licensee as provided in Section 40-68-120.”(emphasis added). Further, S.C. Code §40-68-120 (A)(7) provides the following:

(7) When a person referred to as a licensee undertakes to provide assigned employees to a client company, the licensee is liable to pay a worker employed by the client company compensation under Title 42 which the licensee would have been liable to pay if the worker had been immediately employed by the licensee. When the licensee is liable to pay

compensation under this section, it is entitled to indemnity from a client company who would have been liable to pay compensation to the worker independently of this section and have a cause of action for indemnity. **This section must be construed to require that a licensee's workers' compensation carrier is liable to pay compensation to the client company's entire work force with the licensee and carrier's right to indemnity from the client company. (emphasis added).**

Further, "entire work force" is defined as "all persons engaged by a client company as defined in Title 42." S.C. Code §40-68-10 (13). Since Claimant has been adjudicated to be an employee under Title 42, she is obviously a member of Condustral's "entire work force."

Again, if Turner is not deemed an "assigned employee" as defined by the PEO statutes via construction of the four corners of the Contract between Countrywide and Condustral, then the Panel's finding that Condustral is uninsured relative to Turner's employment could perhaps stand. However, coverage of Condustral's "entire work force," including Turner, would still default to Countrywide and GIC via operation of the aforementioned statutes' provision of coverage for nonassigned employees. The Panel's finding that there is no "indirect" method to impose coverage on GIC via statute is therefore patently erroneous in light of the PEO statutes.

C. Countrywide is estopped from denying that it is a PEO subject to all responsibilities and liabilities imposed by law based on its representations and actions prior to this claim.

If Countrywide is not deemed a *de facto* PEO for imposition of the PEO statutes as a matter of law, then equity should step in to estop Countrywide from escaping liability. The essential elements of equitable estoppel as it relates to the party estopped are 1) representations or conduct which are calculated to convey an impression of facts; 2) that are different than those which the party subsequently attempts to assert; 3) the intention or expectation that an opposing party will act upon such representations or conduct; and 4) knowledge of the actual facts. See Langdale v. Harris Carpets, 395 S.C. 194, 717 S.E.2d 80 (Ct. App. 2011). The party asserting estoppel must

show 1) a lack of knowledge and the means of knowledge of the truth of the facts in question; 2) reliance on the representations and/or conduct of the party to be estopped; and 3) a prejudicial change in its position based on such reliance, *Id.*

In this case, the elements of estoppel against Countrywide are established via the following undisputed facts: 1) Countrywide represented that it was a PEO to Condustrial during contract negotiations and actually provided all essential services of a PEO to Condustrial following the execution of the service agreement [HT p. 81 ll. 7-23; Trial Exhibit # 6 HT p. 83 ll. 5-20]; 2) Countrywide now asserts the contrary position that it is not a PEO for purposes of the statutes governing same because it failed to obtain a license from the state; 3) Countrywide clearly intended for Condustrial to rely on the representation of its PEO status as an inducement for Countrywide to do business with them when Condustrial's previously declined to do business with them because they were not a PEO; and 4) Countrywide obviously knew it did not possess a license to provide PEO services.

Likewise, Condustrial can satisfy all elements of estoppel regarding its reliance on Countrywide's representations, including: 1) Condustrial did not know that Countrywide was not a licensed PEO in South Carolina and had no reason to doubt Countrywide's representations to that effect in its marketing materials and solicitations for Condustrial's business, especially when the contract itself and their subsequent course of dealing confirmed a PEO arrangement;¹⁵ 2) Condustrial undoubtedly relied on the belief that Countrywide was a PEO because it knew that, if all else failed, any gaps in its worker's compensation coverage under the service agreement would

¹⁵ Tony Durham testified that Countrywide initially approached them about Condustrial's business in 2014 but further investigation confirmed that Countrywide was not a licensed PEO, so he declined to do business with them. (11/13/2017 H.T. p. 79 ll. 1-15). Countrywide later emailed Mr. Durham again in 2015 stating, "Hi Tony I hope this finds you well. About a year ago we were working through quoting Condustrial but the timing was not great. The reason I am reaching out to you now is that Countrywide H.R. is now set up as a PEO in the states you operate in." (HT p. 81 ll. 7-23). Attached to the email is a marketing brochure reflecting "Who we are- Countrywide is full service professional employment organization. (Trial Exhibit # 6 HT p. 83 ll. 5-20).

still default to Countrywide via operation of the PEO statutes; and 3) believing that coverage of its entire work force should still default to Countrywide under the PEO statutes, Condustral, to its detriment, did not think it was necessary to secure alternative means of coverage for potential exposures stemming from its contract nurses.

All elements of estoppel applied to Countrywide and Condustral are satisfied. Since Countrywide is estopped from denying it is a PEO, then Countrywide and GIC are liable for Turner's claim via operation of S.C. Code § 40-68-70 (C) and/or S.C. Code § 40-69-120 (A)(7). *See Langdale supra* (Court of Appeals held that a staffing company was estopped to deny coverage for Claimant's accident based on its client company's actions/representations and carrier for staffing company was ultimately liable for the claim).

IV. GIC IS ULTIMATELY LIABLE FOR THIS CLAIM AS COUNTRYWIDE'S WORKERS COMPENSATION CARRIER PURSUANT TO ANY THEORY BECAUSE COVERAGE MUST FOLLOW THE LAW.

The Panel found that that GIC's policy for Countrywide does not cover Turner's accident and claim for benefits even if Countrywide is otherwise implicated this matter. Specifically, the Order states that GIC's policy for Countrywide does not cover employees via the Contract between Countrywide and Condustral UNLESS Countrywide "properly reported" same to GIC and GIC approved it for coverage. [Panel's Order] This finding is contrary to well-established South Carolina law regarding worker's compensation coverage.

First, workers compensation coverage in South Carolina is largely dictated statute. A carrier has very little, if any, discretion to modify or limit coverage required by the Act via the policy itself. S.C. Code §42-5-70 states, in pertinent part, that " [a]ll policies insuring the payment of compensation under this title must contain a clause to the effect that, ... *the insurer shall be in all things shall be bound by and subject to the awards, judgements, or decrees rendered against*

insured employer....” (emphasis added). In addition, S.C. Code §42-5-80 (A) also provides, in pertinent part, that “[n]o policy of insurance against liability arising under this title may be issued unless it contains the agreement of the insurer that it will promptly pay to the person entitled thereto all benefits conferred by this title... .” Subsection B of that statute states “[s]uch agreement must be construed to be a direct promise by the insurer to the person entitled to compensation enforceable in his name.” The worker’s compensation law expressly incorporates its terms into all employment agreements and insurance contracts entered into thereunder. *See Tedars v. Savannah River Veneer Co.*, 202 S.C. 363, 25 S.E.2d 235 (1943). Collectively, these authorities confirm that an insurance carrier is bound by statute to cover whatever the Commission lawfully deems its insured is liable for under the Act.

In this case, GIC argues that it is only required to cover risks it agrees to cover at the inception of its policy with its insured, Countrywide. Countrywide did not report nursing services for a prison on its policy application to GIC; therefore, GIC is not liable for claims involving employees falling within that class code. In addition to flouting the aforementioned statutory principles binding a carrier to assume all risks lawfully deemed to be part of their insured’s business, GIC cannot point to any provision in the Countrywide policy to support this contention. Part One B of the policy states that GIC will “pay promptly when due the benefits required of you by the workers compensation law,” (GIC APA # 24 p. 409). The term “workers compensation law” is defined under the policy as “the workers compensation and occupational disease law of each state” endorsed by the policy. Contrary to GIC’s arguments, its own policy language clearly defers coverage to the “workers compensation law.”

Next, to whatever extent GIC relies on Countrywide’s argument that coverage of Turner does not attach because Condustral failed to report her to Countrywide, such defense is specifically

barred by § 40-68-120 (2), which states in pertinent part, “An insurer issuing a policy of workers compensation insurance to a licensee may not plead as a defense: (c) breach of contract by the licensee or client company. The insurer is not entitled to plead as a defense to an employer’s claim for benefits any defects in the performance of the contract between the licensee and client company.”

Regarding GIC’s argument that it cannot be compelled to cover risks for which it is not aware, the policy specifically provides a mechanism to remedy that quandary. Part Five C of the policy states the following:

Premium for each work classification is determined by multiplying a rate times a premium basis. Remuneration is the most common premium basis. This premium basis includes payroll and all other remuneration paid or payable during the policy period for the services of: 1) all your officers and employees engaged in work covered by this policy; and 2) all other persons engaged in work that **COULD MAKE US LIABLE** under Part One (Workers Compensation Insurance) of this policy. (EMPHASIS added). [GIC policy].

This policy language expressly contradicts GIC’s position that it is only required to cover risks it agrees to take on at the inception of the policy. The policy clearly recognizes that its insured’s circumstances may change, which is the basis for the “could make us liable” policy language” and reference back to the workers compensation law in Part One of the policy. The policy, therefore, contemplates and takes into account the risk posed by workers who *could be* held to be employees under the Act. In this case, Turner clearly falls under the “all other persons engaged in work” policy language that “could make us [GIC] liable” under the workers compensation law.

Moreover, Part Five E of the policy provides GIC with the right to conduct a premium audit of Countrywide’s policy and assess additional premium for risks it is required to assume under the workers compensation law that were unknown or not in existence at the inception of the policy. The policy states, “ [t]he final premium will be determined after this policy ends by using the

actual, not the estimated, premium basis and the proper classifications and rates that lawfully apply to the business and work covered by this policy.” (emphasis added). Again, the provision for the premium audit and reassessment defers to the workers compensation law as to what proper class codes “lawfully apply.” This includes unclassified employees at the time of the policy inception that have been subsequently adjudicated to be covered under the workers compensation law like the Turner. The testimony of Albert Hyndshaw, Condustrail’s former agent with decades of experience in the insurance industry, confirms that a premium audit and reassessment of premium against the insured is the usual and customary method for an insurer to cover risks after the fact. [11/2/17 H.T. pp. 137-158; p. 183; pp. 227-238].

Interestingly, GCI audited and reassessed premium on a separate Countrywide policy with an audit period between 6/30/2015 and 4/22/2016 (GCI APA # 26 pp. 568-591). That audit found 77 workers that needed to be reclassified, including 21 workers that were previously unknown to GCI. The audit also references the same nursing class codes- 8829 and 8833- that Condustrail submitted to Countrywide for pricing purposes at the time the Contract was being negotiated. (Condustrail APA p. 285). This audit resulted in the assessment of additional premium against Countrywide. It is curious why GCI contends it cannot employ the same process to the instant case to remedy its issues with having to cover a previously misclassified or unknown risk.

Finally, the Panel’s reliance on the testimony of GIC’s underwriting auditor, especially her self-serving testimony that GIC never would have insured Claimant’s class code as being too risky had it been disclosed by Countrywide, was an error of law. This contention is irrelevant and immaterial since the workers compensation law governs coverage, not the non-legal opinion of an insurance underwriter.¹⁶

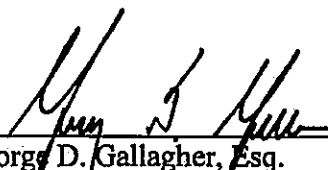
¹⁶ It should also be noted again that GIC never moved to cancel or rescind the Countrywide policy based on alleged fraud or material misrepresentation in its application and inducement. See S.C. Code §38-75-730 (a)(2) (governing

In sum, GIC cannot pick and choose which risks implicated by its policy with Countrywide that it will cover. As a corollary, an employer's liability under the Act is entirely insured or it is totally uninsured. An employer cannot purchase a single policy that insures some of its employees but not others. Simply put, GIC is the carrier for Countrywide and is bound to cover all risks incurred by Countrywide under the Act as determined by the workers compensation law of South Carolina, including contractors subsequently adjudicated to be employees under the Act.

CONCLUSION

Condustral prays that the Court REVERSE the Panel and find that Turner was an independent contractor not subject or entitled to benefits under the Act. This disposition will render all other issues moot. In the alternative, the Court should impose liability for Turner's claim on Countrywide pursuant to its contract with Condustral and/or by operation of law under pursuant to S.C. Code § 40-68-70 (C) and/or S.C. Code § 40-69-120 (A)(7). GIC's policy for Countrywide should then cover all benefits due under the workers compensation laws of South Carolina.

Respectfully submitted,



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cancellation of policy due to material misrepresentation of fact, which if known by insurer would have caused the insurer not to write the policy); *See also Bessinger v. R-N-M Builders*, 421 S.C. 349, 806 S.E.2d 731 (Ct. App. 2017) (addressing rescission of an insurance contract based on fraud but did not address cancellation voiding policy *ab initio*).

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO.: 1514359

Rachel J. Turner,

Claimant,

vs.

SC Department of Corrections and/or
Condustrual, Inc. and/or Countrywide
Staffing Solutions,

Employer(s),

and

State Accident Fund and/or National Union
Fire Insurance Company and/or American
Zurich Insurance Company and/or
Guarantee Insurance Company,

Carrier(s) and or the,

South Carolina Workers' Compensation
Uninsured Employers' Fund,

Defendant(s).

TELEPHONIC

DEPOSITION OF:

ZACHARY A. COLLIER

DATE TAKEN:

April 19, 2017

TIME:

1:41 p.m.

PLACE:

707 Mendham Boulevard
Suite 250
Orlando, Florida 32825

REPORTED BY:

Jan L. O'Steen, Court Reporter
Notary Public

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1 APPEARANCES (CONT'D):

2 ALSO PRESENT: Thomas Sears, General Counsel for
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4 representative
(Appearing via telephone)

5 Mike Neil, Board Member, Countrywide

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I N D E X

April 19, 2017

TESTIMONY OF ZACHARY A. COLLIER

Direct Examination by Mr. Goodwyn 5

CERTIFICATE OF REPORTER 43
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* * * * *

E X H I B I T S

Exhibit No. 6 34
(Countrywide HR letter, dated 11/13/15)

(Exhibits 1 through 5 marked for identification in Jess
Carrillo's deposition attached for reference)

1 WHEREUPON,

2 The following proceedings were had,

3 ZACHARY A. COLLIER,

4 a witness herein, having first been duly sworn, was examined,
5 and testified as follows:

6 THE WITNESS: Yes.

7 DIRECT EXAMINATION

8 BY MR. GOODWYN:

9 Q. Mr. Collier, can you hear me okay?

10 A. I can.

11 Q. My name is Jeff Goodwyn. I represent

12 Condustrial in this case and --

13 A. Nice to meet you telephonically.

14 Q. Nice to meet you, too. Just for the record,
15 this is -- your deposition has been noticed individually
16 de bene esse in this case, and you've also been
17 designated to respond to some topics from the 30(b)(6)
18 deposition. Is that your understanding?

19 A. That is correct. Yes.

20 Q. All right. Have you ever given a deposition
21 before?

22 A. Not on this matter, no.

23 Q. On any matter?

24 A. No.

25 Q. And your attorney may have gone over some of

1 this with you, but there's some basic rules of the
2 deposition I'm required to go over with you. You know,
3 the court reporter is taking down everything that we're
4 saying. So it's important that all of your answers are
5 said aloud, which I'm sure you'll do since we're on the
6 phone. Try to avoid saying uh-huh and huh-uh so the
7 record is clear as to what your -- what your response
8 was.

9 If you don't understand my question, just ask
10 me to repeat it or rephrase it. You're not allowed to
11 look to your attorney for answers during the deposition.
12 If we take a break and you talk to your attorney, I'm
13 allowed to ask any questions about what you said to your
14 attorney. That's the only time I can ask you what you
15 and your attorney talked about. But keep that in mind
16 if we take a break. If we do need -- or if you need to
17 take a break, rather, just let me know. You can take a
18 break to get a glass of water, use the restroom,
19 whatever you need. Just let me know.

20 Do you have any questions before we get going?

21 A. Not at this time.

22 Q. All right. Can you please state your full
23 name, for the record?

24 A. Zachary Alan Collier.

25 Q. What's your date of birth?

1 A. July 25th, 1991.

2 Q. All right. That makes you how old?

3 A. That makes me 25.

4 Q. All right. And you're currently employed with
5 Countrywide?

6 A. That is correct.

7 Q. How long have you been with Countrywide?

8 A. I think it was basically since, you know, the
9 starting of the company. So 2013, 2014, early 2014.

10 Q. All right. When was the company formed?

11 A. I don't know that off the top of my head, the
12 exact date.

13 Q. But late 2013, early 2014?

14 A. That is correct, yes.

15 Q. All right. And what's your position with the
16 company?

17 A. I'm the chief executive officer, CEO.

18 Q. Are you an owner?

19 A. I am a principal in the company, yes.

20 Q. All right. What percentage ownership do you
21 have?

22 A. One hundred percent.

23 Q. All right. What did you do before starting
24 Countrywide?

25 A. I owned a staffing firm.

1 Q. A what firm?

2 A. A staffing firm. I owned a staffing firm.

3 Q. What was the name of that staffing firm?

4 A. A2Z Global Staffing.

5 Q. All right. And how long did you own Global
6 Staffing?

7 A. I think it was about two years.

8 Q. All right. Why did you close A2Z Global
9 Staffing?

10 A. I did not close the business. I --

11 Q. What --

12 A. Go ahead.

13 Q. What became of A2Z Global Staffing, I ended up
14 purchasing that here at Countrywide. I purchased the
15 assets, at least.

16 Q. Okay. Global -- A2Z Global Staffing purchased
17 Countrywide?

18 A. No. I purchased the assets of A2Z Global
19 Staffing while here at Countrywide.

20 Q. All right. I'm a little confused. I asked
21 you what you did before Countrywide, and you said you
22 owned A2Z Global Staffing?

23 A. That's correct.

24 Q. And so you started Countrywide and then
25 purchased the assets of -- Countrywide purchased the

1 **assets of A2Z Global Staffing?**

2 A. Yes. That is correct.

3 Q. Why did you do that?

4 A. Well, because I wasn't a hundred percent -- I
5 was not a 100 percent owner in A2Z.

6 Q. And you wanted to be?

7 A. I mean, I wanted to own the assets obviously,
8 yes.

9 Q. So you, basically, were able to get rid of
10 your other partners by doing it that way?

11 A. That's correct.

12 Q. All right. And how long were you with A2Z
13 Global Staffing before you formed Countrywide?

14 A. Well, I'm just going off rough time lines in
15 my head, but I think approximately two years.

16 Q. All right. What about before that?

17 A. I worked for a -- actually, I'll take a step
18 back. In between A2Z -- in between when -- before
19 Countrywide, I did a consulting project with Kelly
20 Services for about 90 days to six months, which also
21 kind of ran into some of my beginning startup stages of
22 Countrywide.

23 Q. Okay.

24 A. And prior to that is when I owned A2Z. So I
25 forgot that piece there. And prior to A2Z, I worked at

1 a staffing firm called Countrywide Therapy.

2 Q. Any relation to Countrywide Staffing?

3 A. Kind of funny that they have the same names.
4 And I did also buy part of the assets of that company as
5 well, but there's no relationship.

6 Q. Okay.

7 A. I had no ownership in that company either.

8 Q. All right. Let me look at this -- the
9 30(b)(6) deposition notice. We deposed Mr. Carrillo,
10 and he's been able to address a number of the topics
11 listed in the 30(b)(6) notice. Your attorney has
12 indicated that you are going to be able to respond to
13 topic number four related to, "The negotiating and
14 execution of the Countrywide Service Agreement dated
15 March 26, 2015 between Countrywide and Condustral"; is
16 that correct?

17 A. I can respond at a high level, that's correct.

18 Q. Okay. And then topic number six, "The
19 insurance carrier(s) that covered Condustral and its
20 clients for 2015, and if more than one carrier was used,
21 the dates the carriers were changed and the reason for
22 the change." Are you qualified to respond to that
23 topic?

24 MR. HARBISON: And, again, I will object on
25 the same grounds that I objected in the deposition

1 of Jess Carrillo. We don't have any problem in him
2 testifying about Countrywide's coverage with GIC at
3 the time of this alleged accident, which was
4 September 5, 2015, but anything before or after
5 that falls outside the scope of this litigation and
6 workers' compensation matter and my representation.

7 So as it -- as I stated in the Carrillo
8 deposition, we'll be moving for a protective order
9 to exclude that testimony; and if it is allowed to
10 go forward, he would need separate counsel for
11 that.

12 MR. GOODWYN: Okay. And, again, I don't want
13 to necessarily rehash everything we did in the
14 prior deposition, but, again, our assertion is we
15 think this is a relevant topic. No motions to
16 quash or protective orders have been filed as of
17 the date of the deposition. And we think -- we
18 think the question should be answered.

19 But, again, I will refer back to the arguments
20 made in the prior deposition for a complete -- a
21 complete set of arguments.

22 BY MR. GOODWYN:

23 Q. All right. Just for the record, then, if you
24 are ultimately required to testify as to topic number
25 six, are you qualified to testify to that topic?

1 A. That would be -- I would at a high level be
2 able to testify to that topic. However, I would -- you
3 know, I would need to defer to, you know, our V.P. of
4 Risk and a few other leaders in the company to assist.

5 Q. All right. Let's -- let me ask you some
6 questions then about topic number four. Can you -- walk
7 me through the beginning stages of the contact with
8 Condustrual and how Countrywide was contacted by or how
9 Countrywide contacted Condustrual about getting their
10 business?

11 A. All right. You know, I'm not familiar with --
12 with which entity reached out to which entity, whether
13 Condustrual reached out to us or we reached out to
14 Condustrual. I can walk you through at a high level
15 what a normal sales process looks like, you know, but,
16 you know, it was an individual of our company who's no
17 longer with us who sold this account. Would you like me
18 to walk you through --

19 Q. Who was the individual that -- who was the
20 individual that was leading up the sales process for
21 Countrywide for the Condustrual?

22 A. Scott Hanson.

23 Q. All right. And when did Scott Hanson leave
24 the company?

25 A. End of 2015.

1 Q. Do you know why Scott Hanson left the company?

2 A. He was terminated for employee theft and, you
3 know, various other things.

4 Q. All right. Did his termination have anything
5 to do with the Rachel Turner claim or the Condustrual
6 account?

7 A. I mean, you know, when you have an employee
8 who's committed fraud against your company and the --
9 you know, the size of fraud that he's committed, I mean,
10 it could be ever-reaching; but to the best of my
11 knowledge, it had nothing to do with that.

12 Q. All right. So who else besides Scott Hanson
13 was involved in the negotiation of the service agreement
14 with Condustrual?

15 A. Scott Hanson would have done 90 percent of it.
16 In addition to that, you know, there were brokers on
17 that account as well --

18 Q. Who are they?

19 A. -- referral partners. To my understanding, it
20 was KeenanSuggs Insurance. And we had an internal
21 underwriter on the account. Her name was Melanie Van
22 Anda.

23 Q. Can you spell that last name?

24 A. Yeah, I will try. V-a-n and then A-n-d-a.

25 Q. Van Anda, is that close?

1 A. That's close. I can look it up.

2 THE WITNESS: Am I allowed?

3 MR. HARBISON: Yeah. Do you want him to look
4 it up? He may have it. Just a second.

5 BY MR. GOODWYN:

6 Q. If you've got it handy.

7 A. Yep. It's Melanie, M-e-l-a-n-i-e. Last name
8 Van, V-a-n, space, Anda, A-n-d-a.

9 Q. Okay. Do you have a last known address for
10 Melanie Van Anda?

11 A. We can pull that from her -- we can pull that
12 from her employment file.

13 Q. Okay. Can you do that and give that to your
14 attorney for us?

15 A. Yes.

16 MR. GOODWYN: And, Will, if you could --

17 MR. HARBISON: That's fine.

18 THE WITNESS: At the end of the deposition,
19 right?

20 MR. HARBISON: Yeah.

21 MR. GOODWYN: Yeah. Yeah. Not right now.

22 THE WITNESS: Okay.

23 BY MR. GOODWYN:

24 Q. All right. Tell me this, is Countrywide
25 involved in any litigation with Scott Hanson?

1 A. Yes.

2 Q. Does it have anything to do with the Rachel
3 Turner case?

4 A. You know, the same response as earlier. To
5 the best of my knowledge, no, not at this time, but it's
6 an ever-developing litigation that has to do with, you
7 know, a large amount of employee theft and fraud.

8 Q. Okay. You're just seeking to get reimbursed
9 for the amounts that you're claiming he stole?

10 MR. HARBISON: You know, I think that's
11 out -- I'm going to object. That's a separate
12 total legal matter. I think he said to the extent
13 that he knows it doesn't have anything to do with
14 this workers' compensation case. But if it's an
15 ongoing litigation, I would hesitate for him to
16 testify about that without his legal counsel here.

17 MR. GOODWYN: Well, I'm just asking what --
18 what his claims were.

19 MR. HARBISON: Well --

20 MR. GOODWYN: That's what I was going to ask.

21 MR. HARBISON: Yeah, and I wouldn't want him
22 to be limited or pinned down or anything like that
23 in a -- in his deposition today with regard to that
24 legal action. Therefore, you know, I think he
25 would have the right to have his attorney in that

1 action here today.

2 MR. GOODWYN: All right. Fair enough.

3 BY MR. GOODWYN:

4 Q. All right. Scott Hanson, at the time he
5 signed the service agreement with Condustrual on
6 March 26, 2015, did he have authority to bind
7 Countrywide to that type of agreement?

8 A. Scott Hanson was the president of the company
9 and an officer of the company, so yes.

10 Q. Okay. At the time the Countrywide/Condustrual
11 agreement was entered into in March 2015, were you CEO
12 at that time as well?

13 A. Yes.

14 Q. And what were your day-to-day duties as CEO?
15 You apparently felt the need to hire a president. But
16 what did you do?

17 A. Well, you know, Countrywide provides separate
18 services than of A2Z Global Staffing. So we had other
19 businesses that were involved in our, you know,
20 portfolio of companies that I was involved in the
21 day to day of, as well as giving, you know, direction
22 to, you know, Scott, my president, as well as, you know,
23 a few other leaders of the company, obviously, you know,
24 working to hit financial goals and reporting to our
25 board on such matters.

1 Q. Okay. Who was on the board?

2 A. I don't know at that point in time the exact
3 board members.

4 Q. I mean, if you're a hundred percent owner, why
5 did you need a board of directors?

6 A. Well, I would believe it's in every company's
7 best interest to have an independent board of directors,
8 and I have an independent board of directors.

9 Q. All right. Does the independent board of
10 directors have any control over the company?

11 A. I mean, from the standpoint of obviously they
12 have an ability to give input and they draw consents.
13 And in areas where, as a shareholder, I'm biased in the
14 decision-making process, you know, I defer to -- to my
15 board to assist me with those decisions.

16 Q. All right. Did anybody on the board have any
17 contribution or input or knowledge of the Countrywide
18 and Condustrual service agreement or the negotiation of
19 it?

20 A. I highly doubt so.

21 Q. Is that because they're not involved in the
22 day-to-day business of the company?

23 A. Yes, that is correct. And a board member
24 wouldn't be made aware of, you know, an account that
25 we're in a contract negotiation with. I mean, they

1 might be made aware of a large account, but, you know,
2 it's not something we standardly talk about.

3 Q. Were you aware that Condustrual was a
4 potential client before the service agreement was
5 entered into?

6 A. I don't have any recollection of the matter.

7 Q. So you're saying you didn't -- you didn't even
8 know that they were a client?

9 MR. HARBISON: Objection to form.

10 BY MR. GOODWYN:

11 Q. Well, tell me this: When did you first become
12 aware that Condustrual was a client of Countrywide?

13 A. I don't remember exactly. I can speak in
14 theory.

15 Q. Sure.

16 A. In theory, an account like Condustrual I would
17 have been made aware of or heard about during the
18 implementation stages.

19 Q. All right. And what do you mean by "the
20 implementation stages"?

21 A. When the account has executed a client service
22 agreement and is in the process of working with our
23 operations team to, you know, become a -- an actual
24 client where revenue is being generated, you know, of
25 Countrywide's.

1 Q. Okay. All right. So do you know who was
2 involved in the negotiation of the service agreement for
3 Condustrual other than Scott Hanson?

4 A. I've named only the parties that I'm aware of.

5 MR. HARBISON: Jeff, can you hear us okay?

6 MR. GOODWYN: Yeah. I've got some static
7 again on my end.

8 MR. HARBISON: We can get another wireless
9 telephone, if you like.

10 MR. GOODWYN: I mean, I can hear him okay. It
11 kind of comes and goes.

12 MR. HARBISON: Do you mind if we just run and
13 get another one real quickly?

14 MR. GOODWYN: Sure.

15 MR. HARBISON: It should take just a second.
16 We'll go off the record.

17 (Off the record.)

18 MR. HARBISON: Jeff, do you mind if I briefly
19 introduce everybody so we know who is on the phone?

20 MR. GOODWYN: Sure.

21 MR. HARBISON: We have Jeff Goodwyn, who is
22 asking the questions on behalf of Condustrual. We
23 have Erin Farthing, who is the attorney for the
24 South Carolina Department of Corrections and the
25 State Accident Fund. We have Lisa Glover, who is

1 the attorney for the South Carolina Uninsured
2 Employers Fund. We have Tom Sears, who's not an
3 attorney participating in the deposition, but he's
4 on the call. And Steven Samuels, the attorney for
5 Rachel Turner, may join us at some point. Thanks
6 guys.

7 MR. NEIL: And also here is Mike Neil. I'm a
8 current board member of Countrywide.

9 MR. GOODWYN: Okay. Thank you, Mike. You're
10 in the room there with them, Mike?

11 MR. NEIL: I am, yes.

12 MR. GOODWYN: All right. Are we ready?

13 MR. HARBISON: Is that okay with you, Jeff?

14 MR. GOODWYN: Yes. Yes, that's fine.

15 BY MR. GOODWYN:

16 Q. All right. So, Mr. Collier, you're telling me
17 then that there's nobody at Countrywide currently that
18 knows anything about the negotiation of the contract
19 between Countrywide and Condustrual?

20 A. No. I mean, we do have individuals who are
21 here that might have knowledge of that, specifically one
22 being George Kaspers.

23 Q. Okay. Anyone else?

24 A. Not -- not that I'm aware of.

25 Q. All right. So would George Kaspers be more

1 knowledgeable than you about number four, the
2 negotiation and execution of the Countrywide Service
3 Agreement?

4 A. He would have the same -- probably the same
5 type of knowledge, level of knowledge I would just from
6 being close to it, but not, you know, intimately
7 involved in it.

8 Q. All right. And you can't think of anybody
9 else, other than Scott Hanson, that would have had any
10 contact with Condustrual?

11 A. During the contract negotiation or sales
12 process, you know, outside of, you know, KeenanSuggs,
13 our insurance agent, I can't think of anybody else, no.

14 Q. Okay.

15 A. Again, that's to the best of my knowledge. I
16 wasn't the one who was actually doing the contract
17 negotiations.

18 Q. All right. Well, after you became aware that
19 Condustrual was a client, did you have any personal
20 involvement or knowledge of the -- what they did, what
21 kind of employees that were being run through the
22 agreement?

23 A. My understanding was, is they were an
24 industrial staffing firm.

25 Q. All right. And where did you get that

1 understanding from? Was it from Scott or did you --

2 A. Yes. It was from individuals at our company,
3 from Scott.

4 Q. All right. Did you review the service
5 agreement itself?

6 A. Not that I can recall.

7 Q. Okay. Did Scott make mention that there were
8 any medical staffing personnel involved with the --
9 under the contract?

10 A. Not that I can recall.

11 Q. Is it possible that there were medical
12 staffing personnel referred to in the contract but Scott
13 just didn't tell you about it?

14 MR. HARBISON: Objection. Objection to the
15 form.

16 You can go ahead and answer. I'm sorry.

17 THE WITNESS: Okay. I mean, anything is
18 possible.

19 BY MR. GOODWYN:

20 Q. Have you reviewed the service agreement to
21 date?

22 A. I have looked at it at a high level.

23 Q. When you say, "a high level," what do -- what
24 do you mean by that?

25 A. Well, I mean, I haven't read it word for word

1 and, you know, reviewed the pricing and the information
2 behind it and how it was all broken down. You know, we
3 looked over sections of it in discussions with, you
4 know, our counsel.

5 Q. Do you know anyone named Daniel Rivero?

6 A. Danell Rivero?

7 Q. Excuse me. Danell.

8 A. Yes, I do.

9 Q. Who is that?

10 A. She was a prior employee of Countrywide's.

11 Q. And what was her role with Countrywide?

12 A. She started off as, you know, an
13 administrative employee and then moved into a role
14 responsible for assisting with, you know, reporting
15 claims.

16 Q. Is she still with the company?

17 A. She is no longer with the company.

18 Q. Do you know when she left?

19 A. Yep. A few months ago.

20 Q. All right. Why did she leave the company?

21 A. The company changed corporate headquarters
22 about two years ago. And, you know, because of that we
23 had a lot of employees that, A, it wasn't cost effective
24 for us to relocate or, B, due to family obligations were
25 unable to relocate. She was one of those employees

1 based in Knoxville. We let -- you know, she's moved
2 on to a new position at this time. We left amicably.

3 Q. Did she have any input into the negotiation of
4 the Countrywide/Condustrual agreement?

5 A. No, not -- she wouldn't have had any input
6 into the negotiation.

7 Q. All right. Going back to the service
8 agreement, are you -- in looking at pages eight and nine
9 where they have a listing of all of the workers'
10 compensation codes for the various states and the prices
11 that are going to be charged for each one --

12 MR. HARBISON: You're referring to Exhibit 1,
13 for clarification?

14 MR. GOODWYN: Yes. Exhibit 1, yes.

15 BY MR. GOODWYN:

16 Q. And just to make clear for everybody, the same
17 exhibits that we used in the prior deposition, the other
18 30(b)(6) deposition of Mr. Carrillo, we'll be referring
19 to those same exhibits and exhibit numbers in this
20 deposition.

21 Have you had a chance to get to that page?

22 A. Yes. I'm on page eight.

23 Q. All right. And you see all the -- the seven
24 columns there with the workers' compensation codes?

25 A. Yes.

1 Q. And then in the third column, the W/C column,
2 that's the rates that Countrywide is charging
3 Condustrual; is that correct?

4 A. That would have been the workers' compensation
5 rates, that's correct.

6 Q. Okay. And who arrives or who comes up with
7 that workers' compensation rate for each of those
8 workers' compensation codes?

9 A. That would have been a combination of Melanie
10 and Scott Hanson. Melanie Van Anda and Scott Hanson.

11 Q. Okay. But somebody from Countrywide comes up
12 with those figures, correct?

13 A. Correct.

14 Q. Okay. And are you at all familiar with the
15 underwriting process?

16 A. You know, at a -- at a high level, yes.

17 Q. Is it your understanding that each of these
18 codes is verified?

19 A. Verified, what do you mean by that?

20 Q. Each of these codes is -- is looked up to
21 determine which -- what type of work it is, and then
22 there's an effort made to verify that that, in fact, is
23 the type of work that those people -- those employees
24 are actually performing?

25 A. Assuming that the prospect and/or client

1 reports the data and information to us accurately, yes.

2 Q. Okay. And --

3 A. And it's always an effort, but, you know,
4 there's a significant amount of classification codes.
5 So the scopes manual is thousands -- I think, you know,
6 hundreds of pages thick, I mean, that runs this. I
7 mean, there's oftentimes differences of opinions on how
8 things can be classified.

9 Q. Right. Right. Go to page nine. There's two
10 codes on page nine, SC 8829 and SC 8833. Do you see
11 those?

12 A. I do.

13 Q. Are you aware those are medical staffing
14 codes?

15 A. Yeah. I would not know that without looking
16 at the scopes manual.

17 Q. Well, I've got a manual that's been marked as,
18 I think, Exhibit 3. Do you have that?

19 A. I do have that, yes.

20 Q. Can you look up and see what 8829 and 8833
21 are?

22 A. 8829 I see is "Nursing or" -- what's this --
23 "Convalescent Home - All Employees, and 8833 is
24 "Hospital - Professional Employees."

25 Q. Okay. And those codes would have been looked

1 up by your underwriting staff prior to providing a
2 quote?

3 A. Again, assuming the client provided us with
4 all the accurate information to do so, yes.

5 Q. Okay. Do you have any reason to believe that
6 Condustrual didn't provide Countrywide with the -- with
7 the proper information to look up those codes?

8 A. From what I've been told, in this individual
9 situation we were not provided with that information for
10 this individual worksite surrounding the Rachel Turner
11 case.

12 Q. What I'm asking you is, did Countrywide -- did
13 Condustrual have actual nursing staff personnel that
14 would fit those codes?

15 A. I mean, I don't know without doing research on
16 that.

17 Q. Okay. And I understand you're saying that
18 Rachel Turner was not specifically included because she
19 was considered a 1099 independent contractor; is that
20 correct?

21 A. No. I'm saying that Rachel Turner wasn't
22 specifically included because of the fact that she
23 was -- her worksite location and her busi- -- and her
24 place of, you know, work, as well as her being an
25 actual, you know, individual that is reported to us as

1 an employee was never done. So we never got the
2 worksite location, never got the employer reported to
3 us, and, in turn, never had the ability to determine if
4 these are the proper class codes or if this was, you
5 know, the right business.

6 Q. Okay. These two codes are medical nursing
7 codes, correct?

8 A. Yes.

9 Q. All right. What other codes do you think
10 would better fit Ms. Turner's occupation?

11 A. I will defer to Jess Carrillo for that
12 question, and his underwriting team would make that
13 determination.

14 Q. Do you know of any other codes that she could
15 have been coded under?

16 A. Yeah, I was told in discussions that there was
17 potentially another code that would have been utilized
18 if we were made aware of this business and this business
19 was reported to us under something that has to do with
20 government or municipality employees, but, I -- again,
21 you know, I'm just going off of recollection from
22 conversations. I wasn't -- I wouldn't be the person who
23 was actually doing that determination.

24 Q. All right. I'm going to ask you some
25 questions about topic number six on the 30(b)(6)

1 deposition notice. And, again, we've asked -- you've
2 confirmed that Guarantee was the -- or is the insurance
3 carrier for Condustrual employees as of the date of
4 Rachel Turner's injury of September 5th, 2015; is that
5 correct?

6 MR. HARBISON: No. We said that Guarantee
7 Insurance Company provided workers' compensation
8 company -- excuse me, coverage for the employees of
9 Countrywide Staffing Solutions Group.

10 MR. GOODWYN: All right.

11 MR. HARBISON: In other words, Condustrual --
12 Condustrual was not.

13 MR. GOODWYN: Let me ask my next question.

14 MR. HARBISON: I'm sorry. I think you got
15 confused just by the names, but the named insured
16 was Countrywide, not Condustrual.

17 BY MR. GOODWYN:

18 Q. Okay. So Guarantee covered Countrywide
19 employees as of September 5th, 2015; is that correct?

20 MR. HARBISON: Go ahead.

21 THE WITNESS: You know, Guarantee covered
22 Country -- you know, the approved business,
23 approved employees, and worksite locations of
24 Countrywide's during that period of time, yes.

25 BY MR. GOODWYN:

1 Q. All right. And are you saying they did not
2 cover non-approved employees?

3 A. I would defer to an attorney on that. I would
4 think that they would have to cover the business of ours
5 if it was an employee, whether approved or unapproved.
6 I don't. . .

7 Q. All right. What about -- so tell me this,
8 when did -- when was Guarantee -- when did Guarantee
9 begin to cover Countrywide employees for workers'
10 compensation?

11 A. At the policy inception date. I don't know
12 the first date of the policy. I don't know that without
13 looking up records.

14 Q. Okay. Was it before or after the Countrywide
15 agreement with Condustrual was entered into in March of
16 2015?

17 MR. HARBISON: Jeff, do you want me to answer
18 that for you or -- I don't want to interrupt,
19 but. . .

20 MR. GOODWYN: If he knows it.

21 THE WITNESS: I mean, I would have to do some
22 research on that to determine that.

23 BY MR. GOODWYN:

24 Q. You don't know if it was before or after the
25 agreement started?

1 A. That's correct. I don't know.

2 Q. Was there ever another workers' compensation
3 carrier on the -- for Countrywide between March 26,
4 2015, and September 5, 2015?

5 MR. HARBISON: Again, I'm going to object.
6 You know, we put it in writing several times to
7 counsel for Condustrual, and we're putting -- have
8 stated it again today on several occasions in both
9 this deposition and the Carrillo deposition. We
10 believe the scope of this claim only involves
11 September 5, 2015, the day of the alleged accident.
12 We have repeatedly confirmed that workers'
13 compensation coverage was in place for the
14 employees of Countrywide Staffing Solutions Group.

15 Anything that's -- it's my understanding that
16 there's a separate legal action or dispute between
17 Condustrual, Medustrial, and Countrywide before --
18 maybe events occurring before or events occurring
19 after September 5, 2015, in which we are not
20 involved and I'm not involved as counsel. So I
21 can't let you go into that without Countrywide's
22 legal counsel present.

23 MR. GOODWYN: For the record, there is no
24 pending lawsuit, that I know of.

25 BY MR. GOODWYN:

1 Q. And I will ask Mr. Collier, is there any other
2 pending litigation between Countrywide and Condustrual
3 that you know of at this time?

4 MR. HARBISON: I will -- I don't think there's
5 any legal action, but I know that Tom Sears has
6 threatened -- has made some threats about it. And
7 so there's no question there have been some --

8 MR. GOODWYN: I think there's actually the
9 settlement agreement, that there is no other legal
10 pending action.

11 MR. HARBISON: Well, again, you're going
12 into -- Jeff, I've got to move for a protective
13 order on this. I've already asked --

14 MR. GOODWYN: I understand. We don't have to
15 get into all of this right now.

16 MR. HARBISON: Then why are you getting into
17 it?

18 MR. GOODWYN: Well, I've got to preserve it
19 for the record. I'm asking him questions. And
20 you're instructing him not to answer; is that fair
21 enough?

22 MR. HARBISON: That is fair.

23 MR. GOODWYN: All right. All right. Again, I
24 think we're both referring back to arguments made
25 in the Carrillo deposition as to getting into topic

1 number six.

2 MR. HARBISON: And just so you know, you're
3 referencing legal document stuff that I didn't
4 even -- you know, that I'm not representing
5 Countrywide on. So, yeah, let's just move on, if
6 you don't mind.

7 BY MR. GOODWYN:

8 Q. All right. Who is Ted Bryant, Mr. Collier?

9 A. He's our prior general counsel.

10 Q. Okay. Is he still with the company?

11 A. Not at this time.

12 Q. Why did Ted Bryant leave the company?

13 A. He -- we mutually agreed it was in his best
14 interest to move on to be the general counsel at our
15 insurance carrier, SUNZ Insurance.

16 Q. Did his departure have anything to do with
17 this -- the relationship between Condustrail and
18 Countrywide?

19 A. No.

20 MR. GOODWYN: All right. I don't know if we
21 marked -- so tell me this, which exhibit number are
22 we on, six?

23 THE COURT REPORTER: We are on six.

24 MR. GOODWYN: Let's mark the November 13, 2015
25 letter Exhibit 6.

1 MR. HARBISON: Help me out here, which one is
2 that?

3 MR. GOODWYN: It's on Countrywide HR
4 letterhead, dated November 13, 2015.

5 (Whereupon, Exhibit 6 was marked for identification.)

6 BY MR. GOODWYN:

7 Q. Mr. Collier, I see you're cc'd on this letter.
8 Do you see that at the bottom?

9 A. Yes.

10 Q. All right. This is -- what is basically the
11 substance of this letter?

12 A. It looks to be just a letter of explanation to
13 Eric Dawson I guess --

14 Q. Who is Eric Dawson?

15 A. Eric Dawson is, it looks like, the
16 vice-president and counsel for Guarantee Insurance
17 Company.

18 Q. Okay. And why was this an issue on
19 November 13, 2015, this coverage confirmation?

20 MR. HARBISON: Objection to the form.
21 Go ahead.

22 THE WITNESS: I have a very vague memory of
23 this, but I believe that there was a conflict that
24 existed between Guarantee Insurance Company and
25 Condustrual, and we were attempting to help

1 Condustrial work through that conflict.

2 BY MR. GOODWYN:

3 Q. All right. What was the conflict?

4 A. I don't have an exact memory. I seem to
5 remember something along the lines of late reporting of
6 claims and inaccurate reporting of information, but, I
7 mean, I don't have the full picture in front of me.

8 Q. Did it have to do with the Rachel Turner case?

9 A. No.

10 Q. All right. Let me -- do you have Exhibit 5 in
11 front of you?

12 A. I'm looking for it here. And I have it.

13 Q. Okay. This is an invoice from Countrywide to
14 Condustrial, correct?

15 MR. HARBISON: No. This does not look --
16 Exhibit 5 was that letter dated March 24. There
17 appears to be two exhibit fives, so we must have
18 mislabeled --

19 THE COURT REPORTER: Make sure it's not one of
20 those labels you're looking at, five.

21 MR. HARBISON: Oh, you know, you're right. It
22 is from another deposition. I'm sorry.

23 THE WITNESS: Looking at a Countrywide CSSG
24 invoice to Condustrial.

25 BY MR. GOODWYN:

1 Q. Okay. Why was -- why was Countrywide
2 invoicing Condustrail for \$177,000 on January 4, 2016?

3 MR. HARBISON: Again, same objection.

4 Instructing the witness not to answer. Again, I
5 believe it's -- upon information, I believe this
6 involves a separate dispute between Condustrail and
7 Countrywide in which I'm not involved and which --

8 MR. GOODWYN: There is no dispute. There's no
9 litigation pending.

10 MR. HARBISON: Jeff, are you -- are you
11 asserting that there was no dispute around the
12 termination of their agreement? Because Tom has
13 already --

14 MR. GOODWYN: I'm saying there's a settlement
15 agreement signed. There's no pending litigation.

16 MR. HARBISON: Your general counsel --

17 MR. GOODWYN: In this --

18 MR. HARBISON: Your general counsel --

19 MR. GOODWYN: -- case --

20 THE COURT REPORTER: Wait. One at a time.

21 MR. HARBISON: Your general counsel has
22 already testified under oath that they had a
23 dispute.

24 MR. GOODWYN: A settlement agreement. There's
25 no litigation. I can ask about it.

1 MR. HARBISON: No. I am asking for a
2 protective order on a separate legal -- if it's so
3 relevant -- apparently, you're referring to a
4 settlement agreement that was reached between
5 Countrywide and Condustrual. If there was
6 relevance to that, then why didn't they include me
7 on that since I represent Countrywide in connection
8 with this workers' compensation claim?

9 It's my understanding Tom Sears, as general
10 counsel, participated in that without my knowledge
11 or including me on it.

12 MR. GOODWYN: Your client never asked that you
13 be included.

14 MR. HARBISON: Well, Tom, as an attorney,
15 obviously should have known that if he thought that
16 any sort of settlement agreement between the
17 parties was relevant to this workers' compensation
18 claim then it would be ex parte communication
19 without communicating me on it -- with me on it.
20 Tom, as an attorney in South Carolina and officer
21 of the court in South Carolina, should have known
22 that.

23 So I'm not sure you want to go there, but to
24 the extent that you do, I'm going to move for a
25 protective order and have separate counsel, who was

1 ever involved in the dissolution of the
2 relationship, be present; and then if the
3 commissioner allows it, you can ask them those
4 questions to the extent that the commissioner
5 allows it. But they've got to have separate
6 counsel, Jeff. I don't represent them in
7 connection with that matter.

8 MR. GOODWYN: This is a coverage dispute. You
9 do represent them on the coverage dispute, correct?

10 MR. HARBISON: We -- and I have repeatedly
11 told you-all coverage was in place as of
12 September 5, 2015. I don't know how many times I
13 can explain it.

14 MR. GOODWYN: So you're saying there's
15 coverage and you'll are providing --

16 MR. HARBISON: No. We provided insurance
17 coverage --

18 MR. GOODWYN: I don't --

19 MR. HARBISON: Jeff, let me try to explain
20 this position one more time. Guarantee Insurance
21 Company provided workers' compensation insurance
22 for the employees of Countrywide Staffing. Rachel
23 Turner was not an employee of Countrywide Staffing.

24 MR. GOODWYN: Okay. And I understand your
25 position. However, if she's found to be an

1 employee, you're still saying there's no coverage.
2 That's a dispute.

3 MR. HARBISON: Absolutely, it -- there's no
4 coverage for her. But this termination agreement
5 has no relevance to this. There was workers'
6 compensation insurance in place for Guarantee
7 Insurance Company, not for Condustrual. They
8 didn't have -- they were not a named insured. CSSG
9 was the employer -- CSSG was the employer of
10 record.

11 MR. GOODWYN: Understood. Understood. And
12 that's your position, sure.

13 MR. HARBISON: Okay. So any -- I wasn't --
14 Tom Sears did not make me privy to any sort of
15 conversations he had in connection with a
16 settlement agreement. Apparently, he's had a
17 number of communications outside of my presence.

18 MR. GOODWYN: So did your client. I mean,
19 your client --

20 MR. HARBISON: Tom --

21 MR. GOODWYN: Your client obviously has their
22 own in-house attorney.

23 MR. HARBISON: Tom is a lawyer in South
24 Carolina and general counsel for one of the
25 parties.

1 MR. GOODWYN: Tom didn't do anything wrong.

2 MR. HARBISON: You have brought this up.

3 MR. GOODWYN: You can say what you want to
4 say, but Tom --

5 MR. HARBISON: I'm just saying let's get a
6 protective order.

7 MR. GOODWYN: You can ask for whatever you
8 want.

9 MR. HARBISON: Okay. Well, then, let's --
10 let's move on.

11 MR. GOODWYN: All right.

12 MR. HARBISON: I don't know why you keep going
13 into it when I've told you I cannot let you go into
14 that because I'm not their attorney for that.

15 MR. GOODWYN: All right. Can I ask, who is
16 their attorney for that?

17 MR. HARBISON: I don't know. I will ask them
18 to identify. I think it's Mark Zisholtz.

19 MR. GOODWYN: Let me ask him.

20 BY MR. GOODWYN:

21 Q. Mr. Collier, who is your attorney for this
22 dispute that Mr. Harbison is saying exists?

23 A. Mark Zisholtz from -- we call them trip- --

24 MR. NEIL: Morris, Manning.

25 THE WITNESS: Morris, Manning & Mack (sic)?

1 BY MR. GOODWYN:

2 Q. I think I've got his information.

3 A. Yes.

4 MR. HARBISON: You've actually been in contact
5 with him, so you should have it. I can provide it
6 to you.

7 MR. GOODWYN: All right. It's 2:30. I can
8 keep going if you-all can.

9 MS. FARTHING: I'm good to keep going.

10 MR. HARBISON: I actually have a taxi at 2:40.
11 How much longer do you think you're going to be?

12 MR. GOODWYN: A while probably. I mean, we
13 can -- we need to take George Kaspers' deposition
14 anyway. We can convene this when we do that.

15 MR. HARBISON: Okay. I think that's fine.
16 And as far as scheduling -- do you mind if we go
17 off the record now?

18 MR. GOODWYN: Yeah. Just for the record,
19 before we go off the record, just to the extent
20 that Mr. Collier was not the person most
21 knowledgeable with Countrywide on these 30(b)(6)
22 deposition topics, I reserve the right to compel
23 the person that is.

24 MR. HARBISON: Okay. And, Jeff, also, you
25 know, I can file my motion. Maybe the commissioner

1 can hear it by the time we reconvene.

2 MR. GOODWYN: Yeah. I'm sure she would be
3 more than willing to do anything to move this case
4 along.

5 MR. HARBISON: Okay. I appreciate it,
6 everybody.

7 THE COURT REPORTER: Mr. Goodwyn, are you
8 ordering this deposition?

9 MR. GOODWYN: Yes, I am.

10 THE COURT REPORTER: Are you ordering a copy?

11 MR. HARBISON: Yes, I am.

12 MS. GLOVER: I would like a copy.

13 THE COURT REPORTER: Ms. Farthing, do you wish
14 to order a copy also?

15 MS. FARTHING: Yes, please. Thank you.

16 MR. HARBISON: We will read and sign once it's
17 all completed, if that's okay with -- Jeff, if
18 that's okay with you.

19 MR. GOODWYN: Fine with me.

20 THE COURT REPORTER: When do you need it by?

21 MR. GOODWYN: Can you get it to me in e-mail
22 by maybe Monday?

23 THE COURT REPORTER: Okay.

24 (Whereupon, the deposition was adjourned at
25 2:33 p.m.)

CERTIFICATE

STATE OF FLORIDA)
COUNTY OF ORANGE)

I, Jan L. O'Steen, Professional Court Reporter, and
Notary Public, do hereby certify that I was authorized
to and did stenographically report the foregoing
deposition of Zachary A. Collier; that a review of the
transcript was requested at the conclusion of the deposition;
and that the foregoing transcript, pages 1 through 42, is a
true record of my stenographic notes.

I FURTHER CERTIFY that I am not a relative,
employee, attorney, or counsel of any of the parties'
attorneys or counsel connected with the action, nor
am I financially interested in the action.

DATED this 21st day of April, 2017, at Orlando, Orange
County, Florida.


JAN L. O'STEEN, NOTARY PUBLIC, AND
COURT REPORTER

CERTIFICATE OF OATH

STATE OF FLORIDA)
COUNTY OF ORANGE)

I, JAN L. O'STEEN, Professional Court
Reporter, a Notary Public for the State of Florida, certify
that the witness, Zachary A. Collier, personally appeared
before me this 19th day of April, 2017, and was duly sworn.

WITNESS my hand and official seal this 21st
day of April, 2017.

Jan O'Steen

JAN L. O'STEEN, COURT REPORTER
Notary Public - State of Florida
MY COMMISSION #FF 111018
Expires: April 8, 2018



IN RE: RACHEL J. TURNER VS. SC DEPARTMENT OF CORRECTIONS, ET AL.

DO NOT WRITE ON THE TRANSCRIPT - ENTER CHANGES HERE

At the time of the reading and signing of the deposition, the following changes were noted:

Page	Line	CHANGE	REASON

SIGNATURE OF DEPONENT: _____

DATE: _____



SERVICE AGREEMENT

This CONTRACT LABOR SERVICE AGREEMENT (hereinafter "Agreement") is made on this 11th day of March, 2015, by and between Countrywide Payroll & HR Solutions, Inc. DBA Countrywide Staffing Solutions Group, a Tennessee corporation (hereinafter referred to as "CSSG" or the "Company"), and Condustral, Inc. with a principal office located at 514 E. North Street, Greenville, SC 29601 (hereinafter referred to as "Client"). Collectively, CSSG and Client shall be hereinafter referred to as "the Parties."

WHEREAS, CSSG is a contract labor service (CLS) entity that wishes to outsource to Client one or more of the following functions: furnish Selected Staffing/Employees for client's normal business operations, staffing employee recruitment, job assignment, to obtain and provide workers' compensation insurance and/or employers liability insurance, payroll funding, and/or certain other functions.

WHEREAS, Client is a staffing entity who wishes to perform one or more of the above-referenced functions on an outsource basis on behalf of CSSG.

WHEREAS, Client and CSSG recognize that each will receive significant advantages from this Agreement.

NOW, THEREFORE, in consideration of the promises and mutual covenants contained herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

1. CSSG Services. CSSG (through one of its subsidiaries at its option) will perform the following with respect to Selected Staffing/Employees performing services for Client based on timely, accurate, and complete information and payment provided by Client:

a. Furnish and/or Provide Selected Staffing/Employees to perform the type of work described on Exhibit B under Client's supervision at the locations specified on Exhibit B;

b. Reserved/Deleted;

c. Pay, withhold, and transmit all payroll, federal, state, or local taxes that are, or may be, assessed upon labor or employment furnished under this agreement; provide unemployment insurance and workers' compensation benefits; and handle unemployment and workers' compensation claims involving Selected Staffing/Employees;

d. Provide employer's liability insurance in amounts of \$1,000,000 for each accident and \$1,000,000 for each disease;

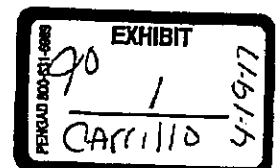
e. Establish and maintain an employee personnel file for each Assigned Employee and ensure that each personnel file meets all state and federal legal requirements, including all I-9 requirements; and

f. Perform all other administrative functions customarily performed by an employer for its employees to include but not be limited to recruiting, interviewing, selecting, hiring, training, and performing background checks as deemed necessary by CSSG.

g. CSSG agrees to provide or furnish, directly and/or through agents designated at the time of execution of this agreement, Client with Certificates of Insurance indicating compliance with and provision of all insurance coverage requirements provided in this agreement. Proof of insurance coverage and CSSG's Federal Tax ID Number will be submitted within 3 days of any request for same.

2. Client Obligations. Client shall:

a. Client shall make any and all strategic, operational and other business-related decisions regarding its business. Such decisions and related outcomes shall exclusively be the responsibility of Client and CSSG shall bear no



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responsibility or liability for any actions or inactions by Client or by any leased employee. Additionally, Client shall have sole and exclusive control over the day-to-day job duties of all leased employees and CSSG shall have no responsibility with regard to the leased employees' performance of such day-to-day job duties. Furthermore, CSSG shall have no control over the jobsite at which, or from which, leased employees perform their services. Control over the day-to-day duties of leased employees and over the job site at which, or from which, leased employees perform their services is solely and exclusively assigned to Client. Client expressly absolves CSSG of control over the day-to-day job duties of the leased employees and over the job site at which, or from which, leased employees perform their services. CSSG does not assume any responsibility for and makes no assurances, warranties, or guarantees as to the ability or competence of any leased employee. Client shall immediately report to CSSG all complaints, allegations or incidents of any misconduct or workplace safety violations, regardless of the source. This duty shall also include reporting all employment-related complaints, allegations or incidents of employment misconduct, including but not limited to sexual harassment matters. Client shall provide to CSSG complete and accurate disclosure of all circumstances surrounding such matters;

b. Provide Selected Staffing/Employees with a safe work site and provide appropriate information, training, and safety equipment with respect to any hazardous substances or conditions to which they may be exposed at the work site;

c. Submit timely, complete, and accurate payroll information (including gross wages earned, any deductions, time worked, leave/time off status, worker classification code, and overtime exempt status) for each Assigned Employee for each applicable payroll period at least three banking days prior to the date on which payroll is to be issued by CSSG. All information provided by Client to CSSG will be complete, accurate, and not misleading. Client is responsible for the security and transmission of information prior to actual receipt by CSSG;

d. Pay CSSG's Invoices in full by guaranteed certified/cashier's funds or wire transfer of funds upon receipt of the invoice documented with signed time tickets for the Client's job assignments. Client will be responsible for any and all ACH and/or wire transfer fees. If invoices are not paid immediately upon receipt, Client shall be subject to the payment terms as stipulated in Section 4 herein;

e. Timely report to CSSG any and all claims for benefits made or pursued by any Selected Staffing/Employees, whether such claim for benefits is due to an occupational injury, employment termination, or otherwise. Client acknowledges that they will be charged a claims fee for each claim reported that is based on an occupational injury. This claims fee shall be specified in the attached Schedule A.

3. Selected Staffing/Employees. The parties agree that all labor and/or employment performed by the Selected Staffing/Employees under this agreement shall be performed under the mutual direction and control of both parties as co-employers, as recited throughout this agreement, including that CSSG:

- (a) Reserves a right of direction and control over leased employees assigned to Client's location, but not to the extent of prescribing how the work shall be performed. Client retains sufficient direction and control over the leased employees as is necessary to conduct Client's business and without which Client would be unable to conduct its business, discharge any fiduciary responsibility that it may have, or comply with any applicable licensure, regulatory or statutory requirement of Client Company;
- (b) Assumes responsibility for the payment of wages to the leased employees without regard to payments by Client to the leasing company;
- (c) Assumes full responsibility for the payment of payroll taxes and collection of taxes from payroll on leased employees;
- (d) Retains authority to hire, terminate, discipline, and reassign the leased employees. However, Client has the right to accept or cancel the assignment of any leased employee;
- (e) Retains a right of direction and control over management of safety, risk and hazard control at the worksite or sites affecting its leased employees, including (1) responsibility for performing safety inspections of client equipment and premises, (2) responsibility for the promulgation and administration of employment and safety policies; and (3) responsibility for the management of workers' compensation claims, claims filings and related procedures,

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although Client Company acknowledges that CSSG in either providing or not providing such assistance and responsibility assumes no liability; and

(f) Gives written notice of the relationship between CSSG and Client to each leased employee it assigns to perform services at Client's worksite

4. Service Fees. Client shall be entitled to service fees from CSSG for performing one or more of the following functions: recruiting employees, performing certain administrative functions, payroll funding, and procuring CLS customers for CSSG. Upon Client signing this Agreement and Schedule A which is attached to and an integral part of this Agreement, Client accepts the rates to be charged. Client shall not make any agreement, promise, or other agreement with any CLS customer to extend credit for payment to Countrywide Staffing Solutions Group of payroll, payroll taxes, unemployment insurance, workers' compensation insurance or any administrative functions without express written consent of CSSG.

Either CSSG shall perform the CLS customer billing and collection function or CSSG may outsource this function to Client to be performed on its behalf. This will be agreed upon before the execution of this Agreement and a box will be checked by Client on Schedule A reflecting and confirming this arrangement. If CSSG performs the CLS customer billing and collection function CSSG shall pay Client on a weekly basis for all CLS customer payments received by Countrywide Staffing Solutions Group during the previous week. This weekly payment will be equal to the amount CSSG invoices and collects from CLS customers procured by Client for recruited employees on assignment, plus other expenses, if any, less Schedule A rates per workers' compensation class code, times the gross wages of recruited employees on assignment in that applicable week. CSSG shall pay Client every Friday after CSSG has debited electronically the account of the CLS customer or negotiated a check from a third party payor, provided the third-party payor has paid CSSG's invoices in full for the services provided. Such amounts paid to Client shall be less any NSF and/or delivery charges. If Client performs the CLS customer billing, collection and funding function on behalf of CSSG, CSSG will bill and collect from Client per pay period, and in advance, an amount equal to Schedule A rates per workers' compensation class code times the gross wages of recruited employees on assignment in that applicable pay period ("Payroll Funding"). In such case, the amount due to CSSG will be ACH'd by CSSG from Client on Tuesday for a Friday payroll. The line on Schedule A stating that Client will perform this function must be checked upon execution of this Agreement to reflect this arrangement and agreement. In either case whether it be CSSG or Client that performs the CLS customer billing and collection function, the CSSG name must appear predominantly on all billing invoices issues in any way to CLS customers.

The rates shown in Schedule A are subject to change by CSSG based upon various factors with any change requiring written agreement and acceptance by Client prior to taking effect. Rates for workers' compensation class codes not shown in Schedule A to the Agreement that are applicable to a recruited employee's services on assignment to Client procured CLS customer, shall be established by and between CSSG and Client before any such rates are applied or used under the Agreement.

If CSSG is performing the billing and collection functions and CSSG's accounts receivable balance with any CLS customer has a negative balance, CSSG shall not be required to pay to Client any service fee under the Agreement until such receivable account shows a positive balance.

5. CLS Customer Contracts. Deleted

6. Work Environment. CSSG and CSSG's workers' compensation carrier shall have the right to inspect the premises of all CLS customers upon reasonable notice during normal business hours to access and recommend safety procedures. CSSG is responsible for the establishment, circulation, and administration of employment and safety policies, coordinating the management of workers' compensation claims and procedures. CSSG shall have the right to cease providing recruited employees to a third party if, in the reasonable opinion of CSSG, after consultation with Client and a reasonable time to cure, CSSG believes that the third party's worksite or any portion thereof or any practice or equipment of the third party presents an undue risk of injury or death to Selected Staffing/Employees. CSSG shall have the right to refrain from providing recruited employees to such third party until, in the opinion of CSSG, the unsafe worksite, practice or equipment is rectified to such an extent that the undue risk of injury or death no longer exists. Alternatively, Client may continue relationship with such third party in its reasonable business discretion if it obtains other insurance coverages for the provision of its Selected Staffing/Employees, apart from those provided under this agreement, and holds CSSG harmless for the provision of any such personnel.

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7. **Effective date and Term.** This Agreement shall be effective on the date signed by the last party to execute this Agreement and remain in force for the term of one (1) year (the "Initial Term"). Following the Initial Term, this Agreement shall renew for additional one (1) year periods unless terminated by either party per the terms of this Agreement.

8. **Termination.** Either party may terminate this Agreement for any reason with 60 days written notice to the other party. This Agreement may also be terminated by CSSG if Client materially breaches this Agreement if Client does not cure such breach or take substantial steps to cure such breach after 10 days written notice by CSSG to Client. CSSG may also terminate this Agreement if CSSG reasonably determines that a material adverse change has occurred in the financial condition or the business operation of Client, or that Client cannot or will not pay its obligations in the ordinary course of business, if Client does not cure such breach or take substantial steps to cure such breach after 10 days written notice by CSSG to Client of such concern/determination. This Agreement may also be terminated, upon five (5) days' notice by either party, in the event of any federal or state legislation, regulatory action or judicial decision that, in the sole discretion of the other party, materially adversely affects its ability to perform under this Agreement. These rights shall not be in derogation of any rights either party may have under this Agreement. Upon termination by either party of this Agreement, necessary Client information will be given to Client by CSSG.

9. **Indemnification.** Each party agrees to indemnify, defend and hold harmless the other party, its officers, shareholders, non-recruited employees, directors and agents from and against any and all losses, liabilities, expenses (including court costs and attorneys' fees) and claims for damage of any nature whatsoever, whether known or unknown as though expressly set forth and described herein, which the other may incur, suffer, become liable for, or which may be asserted or claimed against the other as a result of the actual or alleged acts, errors or omissions of the first party, including without limitation any violation or breach by the first party, or any claims whatsoever arising out of actual or alleged violations of wage and hour laws, tort law, and/or any federal or state employment related regulation or law. In the event that each party is required to defend against any claim or prosecute any claim by the breach or default in any provision of this Agreement to enforce the terms of this Agreement, the prevailing party shall be awarded all reasonable costs pertaining thereto, including reasonable attorneys' fees and costs in addition to any other relief to which the prevailing party may be entitled. Client agrees that access to real or personal property at Clients or a CLS customer's site, to any person who may be handicapped or disabled that Client has ownership or some other control, shall be the sole and exclusive responsibility of the Client. The parties further agree to hold harmless, indemnify, and defend each other, their officers, shareholders, employees, and directors, from any losses, liabilities, or attorneys' fees and claims for damage, for the consequences of any such breaches under this Agreement attributable in whole or in part to said party.

10. **Guarantee.** The individual signing this Agreement on behalf of Client (Guarantor) acknowledges that this Agreement constitutes a valuable benefit to Guarantor and accordingly, as an inducement to CSSG to enter into this Agreement, personally guarantees all obligations of Client under this Agreement (as it may be amended from time to time with written notice to Guarantor) and will save, indemnify, and hold harmless CSSG from Client's failures to meet its obligations and any costs (including court/arbitration costs and reasonable attorneys' fees) of enforcing this guarantee. Upon Client's failure to meet any obligation, CSSG may recover immediately from Guarantor without having to make demand on Client, and any discharge (including, without limitation, in bankruptcy) of any sum due from Client to CSSG other than by full payment will not discharge Guarantor, nor will claims against CSSG or assertions of set-off constitute a defense to an obligation of Guarantor. CSSG may enforce this guarantee by arbitration or suit in Knox County, Tennessee as provided elsewhere herein and Guarantor consents to personal jurisdiction and venue accordingly. Guarantor consents to be personally served by sending service to Client's last known place of business or by other legally sanctioned method. No delay or failure to enforce the terms of this provision will constitute a waiver or require future waivers. This guarantee is irrevocable and will survive any termination of this Agreement.

11. **Credit Checks and Information.** Both parties agree that the other may use credit reports and information during and after the approval process of this Agreement and/or the collection of any debt created by this Agreement. If one party requests, the other party will inform the other whether a credit report was requested and, if so, the name and address of the consumer reporting agency used.

12. **Confidential Information.** Each party shall keep the other party's business secrets, including but not limited to customer, supplier, logistical, financial, research and development information, business model, confidential and shall not disclose such information to any third party during and after termination of this Agreement without the written consent of the other party. Each party agrees not to divulge to anyone, any confidential information of the other party, that comes to



his or her attention, except as absolutely necessary in the performance of his or her duties hereunder. Also each party agrees not to make any use of confidential information that is contrary to this Agreement.

13. Non-solicitation/non-circumvention by Countrywide Staffing Solutions Group. During the term of this Agreement and for a period of (1) one year after a termination of this Agreement, CSSG shall not, for itself, or any other entity, directly or indirectly, in any capacity, pirate, induce, solicit, or contact, CLS customers or recruited employees procured or recruited by Client for CSSG, or conduct business directly with the CSSG without Client being compensated per this Agreement, or to otherwise interfere with in any way any such business relationship.

14. Governing Law: Partial Invalidity. This Agreement and the respective rights and obligations of the parties hereto shall be governed by and determined solely in accordance with the laws of the State of Florida, without giving effect to its conflict of laws, principles or rules. If any provision of this Agreement shall be declared invalid under such laws, the validity of the other provisions shall remain in effect just as if the invalid portions had been omitted.

- a. In the event of any controversy or claim arising out of or relating to this Agreement or the breach or alleged breach hereof, each of us irrevocably agrees to submit the matter to mediation where such mediation shall be a condition precedent to any demand for arbitration. Each party shall bear their own costs and expenses for mediation. The costs of the mediator shall be borne equally by each party. The parties shall confer and agree upon a mutual mediator.
- b. Where mediation is unsuccessful, the parties shall submit the dispute to a binding arbitration to be administered by a single arbitrator selected from the list of panel arbitrators provided by the American Arbitration Association. Any arbitration proceeding shall be initiated by the complaining party serving a written demand for arbitration upon the other party. The written demand shall contain a detailed statement of the matter and facts supporting the demand and include copies of all related documents.
- c. The arbitration shall be conducted pursuant to the AAA arbitration rules and shall be administered by the AAA. The arbitrator shall be required to apply the substantive law of the State of Florida. The arbitrator shall make findings of fact and conclusions of law and shall have no authority to make any award which could not have been made by a Court that has jurisdiction over the parties.
- d. Any judgment obtained from the arbitration shall be binding and may be reduced to judgment in any Court having jurisdiction over the judgment debtor.

15. No Agency Relationship. Client shall not have the power or authority to execute any legal documents for or on behalf of CSSG or do anything to legally bind or obligate CSSG in any manner, apart from the provision of co-employment services by Selected Staffing/Employees under this Agreement. This Agreement does not in any way create an agency or employer relationship between CSSG and Client, other than as defined herein.

16. Non-solicitation/non-circumvention by Client. During the term of this Agreement and for a period of (1) one year after a termination of this Agreement, Client shall not, for itself, or any other entity, directly or indirectly, in any capacity, pirate, induce, solicit, contact, or respond to CSSG CLS customers or recruited employees not procured or recruited by Client for CSSG to terminate a business relationship with Client, or conduct business directly with the CSSG without Client being compensated per this Agreement, or to otherwise interfere with in any way any such business relationship.

17. Representations & Warranties. Each Party represents and affirms to the other that they each have the authority to execute, deliver, and perform under this Agreement; that there is no pending legal actions against either party that may interfere or prohibit either party from performing the contemplated services per this Agreement. Client hereby represents and warrants to CSSG that it is not subject to an agreement that would restrict Client from entering into this Agreement.

18. Assignment. Neither party may assign this Agreement or the benefit of this Agreement to any other entity without the written consent of the other party. Such consent shall not be unreasonably withheld.

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staffing solutions group

19. No Waiver. The failure by either CSSG or Client to insist upon strict performance of any of the provisions contained in this Agreement shall in no way constitute a waiver of any of its rights as set forth herein, at law or equity.

20. Entire Agreement, Amendment. This Agreement constitutes the entire understanding and agreement between the parties hereto. This Agreement may be modified or amended only by a written modification or amendment signed by both parties.

21. Rule of Construction. Since both parties hereto have had the opportunity to have this Agreement reviewed by counsel, the rule of construction regarding ambiguities to be construed against the drafter will not be applicable and is hereby voided.

22. Supremacy of the Agreement. This Agreement supersedes all previous Agreements or understandings between the parties hereto, and all other such Agreements or understandings, whether oral or written, shall become null and void as of the date of the execution hereof.

23. Successors. This Agreement shall be binding upon and insure to the benefit of the parties to this Agreement and their respective successors, assigns, and personal representatives.

24. Notices.

Each written notice provided for herein shall be given in writing and shall be mailed, in the case of a CSSG, to its principal offices and in the case of Client, to its principal offices. Such notice shall be considered given upon receipt when mailed by certified mail, return receipt requested, or by personal delivery.

25. Headings

The headings in the Agreement are intended for convenience or reference and shall not affect its interpretation.

26. No Third Party Beneficiaries

No rights of any third party are created by this Agreement and no person not a party to this Agreement may rely on any aspect of this Agreement notwithstanding any representation, written or oral, to the contrary.

[Signatures on Following Page]

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IN WITNESS WHEREOF, the Company has caused this Agreement to be executed by its duly authorized officer, and Broker has hereunto set its hand and seal, all as of the date(s) and year written below.

ACCEPTED AND APPROVED BY:

CountryWide Payroll & HR Solutions, Inc. DBA CountryWide Staffing Solutions Group (CSSG)

Name: [Signature]

Date: 3-26-15

Title: PMAS

Condustrlal, Inc. (Client)

Name: [Signature]

Date: 3-26-15

Title: PRCS/027

Exhibit A

No Loss Fund Program

State	W/C Code	wc	admin	suta	futa	FICA
DE	0808	11.49	1.125	3.72	1.50	7.65
DE	0809	10.06	1.125	3.72	1.50	7.65
DE	0813	9.18	1.125	3.72	1.50	7.65
FL	5183	6.01	1.125	3.24	0.60	7.65
FL	5190	6.51	1.125	3.24	0.60	7.65
FL	5221	6.88	1.125	3.24	0.60	7.65
FL	8742	0.54	1.125	3.24	0.60	7.65
FL	8810	0.28	1.125	3.24	0.60	7.65
GA	3632	5.79	1.125	3.24	1.80	7.65
GA	3724	6.46	1.125	3.24	1.80	7.65
GA	5190	5.39	1.125	3.24	1.80	7.65
GA	5221	6.75	1.125	3.24	1.80	7.65
GA	5608	2.12	1.125	3.24	1.80	7.65
GA	8810	0.24	1.125	3.24	1.80	7.65
MD	5148	8.33	1.125	3.12	0.60	7.65
MD	5437	10.67	1.125	3.12	0.60	7.65
MD	5608	1.64	1.125	3.12	0.60	7.65
MD	8217	7.19	1.125	3.12	0.60	7.65
MD	7380	7.17	1.125	3.12	0.60	7.65
MD	8742	0.39	1.125	3.12	0.60	7.65
MD	8810	0.18	1.125	3.12	0.60	7.65
MD	9015	4.08	1.125	3.12	0.60	7.65
MS	8292	2.95	1.125	3.24	1.80	7.65
NC	3632	4.07	1.125	1.44	1.80	7.65
NC	5148	9.62	1.125	1.44	1.80	7.65
NC	5183	6.82	1.125	1.44	1.80	7.65
NC	5190	6.60	1.125	1.44	1.80	7.65
NC	5221	6.00	1.125	1.44	1.80	7.65
NC	5535	10.45	1.125	1.44	1.80	7.65
NC	8282	5.53	1.125	1.44	1.80	7.65
NC	8742	0.58	1.125	1.44	1.80	7.65
NC	8810	0.25	1.125	1.44	1.80	7.65
SC	2305	2.85	1.125	2.41	2.40	7.65
SC	2881	3.35	1.125	2.41	2.40	7.65
SC	3365	11.89	1.125	2.41	2.40	7.65
SC	3632	4.93	1.125	2.41	2.40	7.65
SC	3724	6.23	1.125	2.41	2.40	7.65
SC	3808	7.31	1.125	2.41	2.40	7.65
SC	5022	12.00	1.125	2.41	2.40	7.65
SC	5148	8.00	1.125	2.41	2.40	7.65
SC	5183	5.82	1.125	2.41	2.40	7.65
SC	5190	7.01	1.125	2.41	2.40	7.65

*(TLD) correct as
8/1/14 agreed*

SC	5221	6.47	1.125	2.41	2.40	7.65
SC	5437	9.91	1.125	2.41	2.40	7.65
SC	5478	8.16	1.125	2.41	2.40	7.65
SC	5535	10.42	1.125	2.41	2.40	7.65
SC	5808	2.28	1.125	2.41	2.40	7.65
SC	8217	8.73	1.125	2.41	2.40	7.65
SC	7380	6.69	1.125	2.41	2.40	7.65
SC	7805	3.38	1.125	2.41	2.40	7.65
SC	8292	6.88	1.125	2.41	2.40	7.65
SC	8742	0.70	1.125	2.41	2.40	7.65
SC	8810	0.34	1.125	2.41	2.40	7.65
SC	8829	3.49	1.125	2.41	2.40	7.65
SC	8833	1.78	1.125	2.41	2.40	7.65
SC	9014	4.01	1.125	2.41	2.40	7.65
SC	9102	3.95	1.125	2.41	2.40	7.65
TN	3832	5.75	1.125	3.24	0.60	7.65
TN	5180	4.76	1.125	3.24	0.60	7.65
TN	5221	7.23	1.125	3.24	0.60	7.65
TN	7805	2.98	1.125	3.24	0.60	7.65
TN	8292	3.72	1.125	3.24	0.60	7.65
TN	8742	0.49	1.125	3.24	0.60	7.65
TN	8810	0.25	1.125	3.24	0.60	7.65
TN	9102	3.90	1.125	3.24	0.60	7.65
	Total					


 CORRECT AS AGREED

9 Tmgj

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Set-up Fee: \$2,859.00, due upon signing
Minimum fee: shall be calculated based on actual weekly production, payable in weekly installments, weeks 1-52

CSSG

CountryWide Payroll & HR Solutions, Inc. DBA
CountryWide Staffing Solutions Group

By: [Signature]
Name: Scott Hansen
Title: Assistant
Date: 3-26-15

Client

Condustrail, Inc.

By: [Signature]
Name: Terri Dickson
Title: President
Date: 3-26-15

March 24, 2015

Scott Hanson and Theodore G. Bryant
Countrywide HR

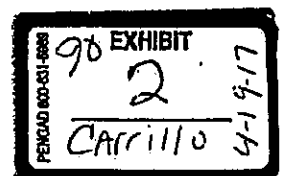
Re: Procedural Amendment to CONTRACT LABOR SERVICE AGREEMENT

Scott and/or Ted,

Pursuant to our discussions and revisions of the Agreement referenced above between Countrywide Payroll & HR Solutions, Inc. and Condustrail, Inc., this letter/memorandum will serve as a modification and/or amendment of the same, pursuant to paragraph 20 contained therein, as evidenced by the parties' signatures below, to be signed contemporaneously with the Agreement and incorporated therein by reference.

Accordingly, the parties agree that they will both use their commercially reasonable best efforts to ensure that the procedural instructions set out below shall be observed, maintained, and followed in performing the appropriate services under the CONTRACT LABOR SERVICE AGREEMENT between the undersigned parties:

1. Existing Condustrail employee's information (SS#, address, withholdings, etc.) will be provided to Countrywide in an electronic format that is compatible with CW's software requirements.
2. Future new hires of Condustrail will continue to complete Condustrail employment applications and Condustrail will also complete any personnel paperwork as needed for CW.
3. E-verify and any other background checks will be the sole responsibility of Condustrail and all expenses borne by Condustrail.
4. New employees will be entered directly into the CW system weekly, or if requested by CW, Condustrail will provide all new employee's info to CW in an electronic format that is compatible with CW's software requirements.
5. Condustrail will process payroll on a weekly basis and provide that weekly information to CW in an electronic format that is compatible with CW's software requirements.
6. It is agreed that the reporting of all payroll related taxes, (FUTA, SUTA, FICA, Medicare, etc.) will be reported under the current FEIN and specific state account numbers of Condustrail. This will avoid "SUTA dumping" issues and keep all tax entities static in reporting procedures.
7. Condustrail will maintain the current wage/tax basis of all existing employees and will not re-set those wage basis until January 2016 as is standard.



8. Once Condustral has processed payroll by Wednesday morning, Condustral will send a complete electronic file to CW by noon each Wednesday that will be employee specific with all payroll transactions shown and Condustral will include a recap of:
 - a. the amount of taxes withheld
 - b. employer matching taxes
 - c. SUTA, EUTA, FICA, MED
 - d. workers compensation premiums using CW rates
 - e. 1.25% fee of the gross payroll amount.
9. Once the file referenced in line item 7 above has been received by CW and confirmed as correct to Condustral via email, or, in the event of an error, revisions made by CW and returned to Condustral and thus re-confirmed as correct, Condustral will then wire that total amount to CW as instructed by CW within 4 hours of having received the confirmation of correctness by CW.
10. Condustral will process and withhold all employee deductions for health insurance, pay advances, etc. and remit those to the entity due on behalf of the employees.
11. Condustral will then pay all employee directly as "net-check"
12. CW agrees to report all required payroll tax reports and remit those monies on Condustral's behalf.
13. For USL&H projects that are covered by the workers compensation of Condustral and not covered under any of the policies of CW, Condustral will process that payroll with an agreed "no workers comp due". These employees will be processed as normal concerning all payroll taxes, exclusive of USL&H coverage.
14. All employees that work on any owner controlled insurance project (OCIP), or client controlled insurance program (CCIP) will be processed the same as those referenced in line item 13 above and incur no workers compensation premium. These employees will be processed as normal concerning all payroll taxes, exclusive of workers comp coverage.
15. In order to avoid employees receiving two W-2's for 2015, and the fact that all employees are agreed as being reported under Condustral FEIN and state tax account numbers, Condustral will produce W-2's for all employees for the current 2015 year. CW payroll administrator will work with Condustral's controller to insure all payroll records and filing tie to Form W-2's. After this year, we can revisit this scenario if requested by CW.

ACKNOWLEDGED AND AGREED

(Signature page follows)



CountryWide Payroll & HR Solutions, Inc. DBA CountryWide Staffing Solutions Group
(CSSG)

Name: [Signature] Date: 3-26-15

Title: Proa

Condustral, Inc. (Client)

Name: [Signature] Date: 3-26-15

Title: [Signature]

CLASS CODES

South Carolina Workers Compensation Class Codes

Home > South Carolina Workers Compensation Class Codes

SOUTH CAROLINA WORKERS COMPENSATION CLASS CODES

Need to find South Carolina workers compensation class codes? South Carolina uses the NCCI classification system. NCCI stands for *National Council on Compensation Insurance*. See the applicable list below. For current and authoritative South Carolina workers compensation codes, you will need to sign up to NCCI's [Riskworkstation](https://www.ncci.com/ServicesTools/Pages/RWVS.aspx) (<https://www.ncci.com/ServicesTools/Pages/RWVS.aspx>). South Carolina is under the state jurisdiction of NCCI, and uses NCCI's Statistical Plan for Workers Compensation and Employers Liability Insurance.

LOOKUP SOUTH CAROLINA WORKERS' COMP CODES

CLASSIFICATION SEARCH BOX: ENTER THE CODE NUMBER OR KEYWORD HERE

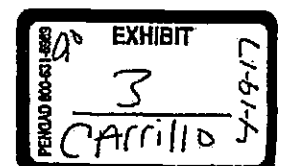
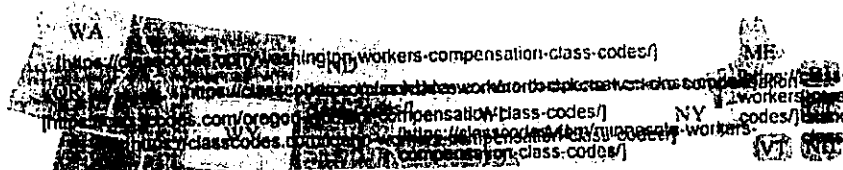
Search

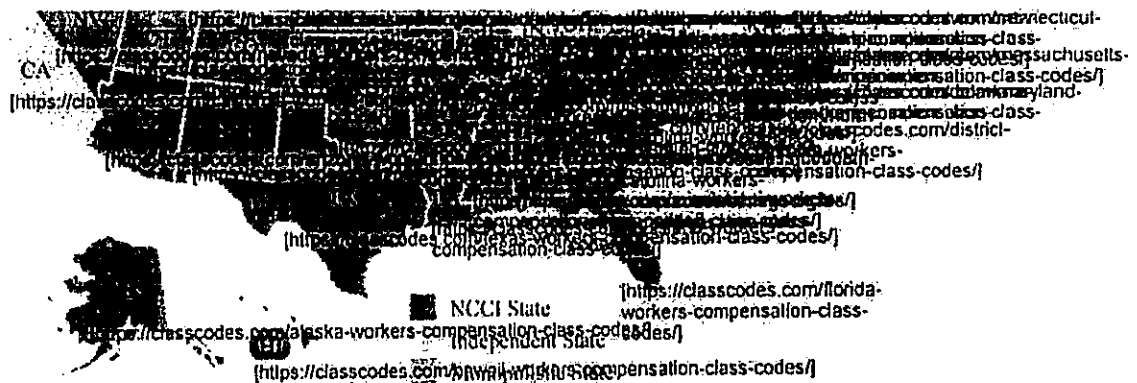


You can use the search box above to find South Carolina workers compensation codes. If you know the numeric code you are looking for, you can type it in, and the page for that code will be in the search results. If you do not know the numeric code that you are looking for, try searching "Workers compensation code [Keyword for the industry]". That search query will yield results for any workers compensation codes at which the keyword is mentioned in the phraseology of the class code.

Work Comp Classification: State-by-State Guide

Looking for an index of workers compensation codes for a state other than South Carolina? Use our state-by-state map below! Click on a state to view the correlating list of workers compensation class codes.





Disclaimer for this list of SC Work Comp Codes

These Classification Codes and Phraseology are NCCI Copyrighted materials, used with permission of NCCI © Copyright 1986-2016, National Council on Compensation Insurance, Inc. This is a representative list of NCCI Classification Codes and Phraseology which may be used for reference purposes only and may or may not be current. This list should not be relied on by any end users as current information, with current Classification Codes and Phraseology obtainable directly from NCCI. NCCI shall have no liability to any end user for the use or inability to use the Classification List and Phraseology provided on this website.

List of South Carolina Workers' Compensation Class Codes

This page contains an exhaustive South Carolina workers compensation code list, utilizing paginated tabs. Tab 0 contains the (Four-digit) SC workers compensation codes that begin with "0," Tab 1 contains SC workers compensation codes that begin with "1," Tab 2 contains SC workers compensation codes that begin with "2," and so forth. On mobile devices, tabs are shown on the bottom of the page.

0050

0005 Farm

0008 Farm

0016 Farm—Orchard or Grove & Drivers

0016 Turpentine Farm & Drivers.

0034 Farm

0035 Farm—Florist & Drivers

0036 Farm—Dairy & Drivers

0037 Farm

0042 Landscape Gardening & Drivers.

0042 Street or Road Construction—Beautification Work & Drivers

0050 Brush or Weed Control by Contractor—Chemical & Drivers

0050 Farm Machinery Operation—By Contractor & Drivers

8742 Salespersons or Collectors—Outside

8742 U.S.O. Operations—Travelers Aid Society

8745 News Agent or Distributor of Magazines or Other Periodicals—Not Retail Dealer & Salespersons, Drivers

8746 Automobile

8748 Mobile, Manufactured, Modular, or Prefabricated Home Dealers—Salespersons

8748 Truck Leasing—Long-Term—Sales Employees

8755 Labor Union—All Employees.

8799 Mailing or Addressing Company or Letter Service Shop—Clerical Staff

8800 Mailing or Addressing Company or Letter Service Shop

8803 Auditor, Accountant, or Computer System Designer or Programmer—Traveling

8805 Clerical Office Employees NOC—Coverage Under the Federal Employers' Liability Act (FELA)—Program II—State Act Benefits

8810 Clerical Office Employees NOC.

8810 Computer—System Designers or Programmers—Exclusively Office

8810 Public Library or Museum—Professional Employees & Clerical

8810 Racetrack Operation—Horse or Dog—Pari-Mutuel Clerks, Cashiers, and Clerical Office Employees

8814 Clerical Office Employees NOC—Coverage Under the Federal Employers' Liability Act (FELA)—Program I

8815 Clerical Office Employees NOC—Coverage Under the Federal Employers' Liability Act (FELA)—Program II—USL&HW Act Benefits

8820 Attorney—All Employees & Clerical, Messengers, Drivers.

8820 Law Office—All Employees & Clerical, Messengers, Drivers

8824 Retirement Living Centers—Health Care Employees

8825 Retirement Living Centers—Food Service Employees

8826 Retirement Living Centers—All Other Employees & Salespersons, Drivers

8829 Convalescent or Nursing Home—All Employees

8829 Home for Aged—All Employees

8829 Nursing or Convalescent Home—All Employees

8829 Rest Home—All Employees

8831 Artificial Insemination of Cattle—Professional Employees

8831 Hospital—Veterinary & Drivers

8831 Pet Grooming or Training & Drivers

8832 Dentist & Clerical.

8832 Physician & Clerical

8833 Asylum—Professional Employees

8833 Hospital—Professional Employees

8833 Sanitarium—Professional Employees

8835 Home, Public, and Traveling Healthcare—All Employees

8835 Homemaker Service—Physical Assistance

8842 Group Homes—All Employees & Salespersons, Drivers

8855 Banks and Trust Companies—All Employees, Salespersons, Drivers & Clerical

8856 Check Cashing Establishments—All Employees, Salespersons, Drivers & Clerical

8864 Social Services Organization—All Employees & Salespersons, Drivers

8868 College—Professional Employees & Clerical

8868 Religious Organization—Professional Employees & Clerical

8868 School—Professional Employees & Clerical

8869 Child Care Center—All Employees Including Clerical, Salespersons & Drivers

8869 Child Day Camp—All Employees Including Clerical, Salespersons & Drivers

8869 Day Nurseries—All Employees Including Clerical, Salespersons & Drivers

8871 Clerical Telecommuter Employees.

8901 Telecommunications Co.: Office or Exchange Employees & Clerical

9012 Building or Property Management—Property Managers and Leasing Agents & Clerical, Salespersons

9012 Condominiums, Cooperatives or Time-Shares—Property Managers and Leasing Agents & Clerical, Salespersons

9012 Mini-Storage Facilities or Flea Markets—Property Managers and Leasing Agents & Clerical, Salespersons

9012 Mobile Home or Trailer Parks—Property Managers and Leasing Agents & Clerical, Salespersons

9014 Chimney Cleaning—Residential—No Chimney Cleaning Above Ground Level & Drivers

9014 Exterminator & Drivers

9014 Furnace Cleaning—Vacuum Suction Method & Drivers

9014 Janitorial Services by Contractors—No Window Cleaning Above Ground Level & Drivers

9014 Mobile Power or Pressure Cleaning Service—No Power or Pressure Cleaning Above Ground Level & Drivers.

9015 Bathhouse—Beach

Reliant Payroll Solutions

Pg 31

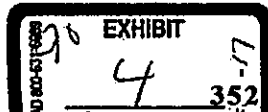
135 Fox Road Ste F
Knoxville, TN 37922

Condustral Inc.
514 E. North Street
Greenville, SC 29601
Stefanie Whiteside
(864) 235-3619

Invoice Date: 04/02/15
Check Date: 04/02/15
Batch Number: 012

Invoice 2001014-002
For the Pay Period Ending 03/28/15

Employee Name	WComp Code	Regular Hours	OT Hours	Other Hours	Pay Rate	Other Income	Gross Wages	Rate	Service Charge	Benefits	Taxes	Total Cost
Dufham, Carla C	SC8810	40.00			13.00		520.00	.0113	4.52		52.00	576.52
Khanks, Lesley A	SC8810	40.00			13.00		520.00	.0112	3.62		53.01	576.63
Ellison, Tonya M	SC8810	40.00			13.00		520.00	.0113	4.52		52.00	576.52
Gardner, Arthur	SC8810	8.00			20.50		204.00	.0113	9.22		26.50	239.74
Hernandez Bonari,	SC8810	40.00	14.00		13.00		610.00	.0113	6.89		73.07	690.96
Hester, Steven B	SC8810	36.00		1.00	21.00	0.800	809.30	.0113	3.15		87.25	900.20
Howell, Runner B	SC8810	38.00	5.00		16.50		726.00	.0113	8.22		88.97	825.16
James, Leticia	SC8810	40.00	1.00		12.00		552.00	.0113	6.24		71.67	629.91
Lee, Lisa B	SC8810	40.00			12.00		480.00	.0113	5.42		48.48	533.90
Millet, Cindy R	SC8810	40.00			12.00		500.00	.0113	5.65		45.00	550.65
Neal, Joseph C	SC8810	40.00	1.25		11.97	141.98	1046.84	.0113	11.83		12.19	1123.20
Palmer, Bernadette	SC8810	40.00			11.00	175.25	845.35	.0113	6.16		10.49	862.00
Reeder, Bruce W	SC8810	24.00			13.00	15.92	330.42	.0113	7.13		35.41	382.96
Stauder, Rachelle	SC8810	40.00			12.00		520.00	.0113	5.42		57.63	583.05
Steen Jr, Thomas M	SC8810	40.00			12.00		520.00	.0113	27.50		141.63	269.13
Steele, Holly	SC8810	40.00			12.00		520.00	.0113	9.57		51.64	581.21
Thompson, Colleen	SC8810	40.00			12.00	194.94	1755.46	.0113	12.84		112.00	1870.30
Stittner, Gregory	SC8810	24.00			14.00	65.58	199.08	.0113	3.58		40.19	119.85
Thompson, Kevin M	SC8810	40.00			10.00	159.87	1709.22	.0113	20.31		31.22	1831.55
Vaughan, Anthony D	SC8810	40.00			11.00		560.00	.0113	6.33		49.44	615.77
Welling Jr, Arthur	SC8810	40.00			24.00	244.77	3421.31	.0113	16.64		173.19	3611.14
Whiteside, Stefan	SC8810	40.00			12.00		1346.16	.0113	14.21		119.96	1566.33
Wilson, Kara L	SC8810	40.00			12.00	39.31	585.91	.0113	6.52		18.67	610.50
*** SC8810		1194.25	27.25	6.00		7171.10	36221.40	.0113	357.45		2654.77	39246.02
Atkins, Linda A	SC8820	22.45			10.00		324.50	.0113	2.54		35.27	262.31
Brewster, Veronica	SC8820	11.25			10.00		120.50	.0113	1.76		15.70	137.96
Byrd, Andrea	SC8820	16.10			10.00		180.00	.0113	1.41		25.34	166.75
Byrd, Patty	SC8820	27.45			10.00		349.00	.0113	4.23		33.11	386.34
Clayton, Amber	SC8820	12.40			10.00		120.00	.0113	1.42		11.24	132.66
Clayton, Ashley K	SC8820	22.10			10.00		210.00	.0113	1.60		17.21	228.81
Johnson, Barbara	SC8820	7.70			10.00		70.00	.0113	1.79		11.31	83.10
Lee, Lisa	SC8820	23.00			10.00		230.00	.0113	1.49		14.40	245.89
Locke, Tracy	SC8820	10.00			10.00		100.00	.0113	1.49		11.64	113.13
Shall, Kristi	SC8820	12.00			10.00		120.00	.0113	1.47		11.64	133.11
Stinson, Pyndra N	SC8820	17.00			10.00		170.00	.0113	1.47		11.64	193.11
*** SC8820		251.75					3493.10	.0113	50.48		421.60	4065.18
Briggs, Virginia	SC8830	8.00			10.00		80.00	.0113	1.42		11.64	93.06



Reliant Payroll Solutions

Pg 32

135 Fox Road Ste F
Knoxville, TN 37922

Condustrual Inc.
514 E. North Street
Greenville, SC 29601
Stefanie Whiteside
(864) 235-3619

Invoice Date: 04/02/15
Check Date: 04/02/15
Batch Number: 012

Invoice 2001014-002
For the Pay Period Ending 03/28/15

Employee Name	AKComp Code	Regular Hours	OT Hours	Other Hours	Pay Rate	Other Income	Gross Wages	Rate	Service Charge	Benefits	Taxes	Total Paid
Bricks, Freddie L	SCB333	16.00			22.10		353.60	.0112	3.95	105.60	125.15	125.15
Brown, Tiffany	SCB333	20.75			22.10		458.58	.0112	5.14	125.60	130.74	130.74
Coltson, Louise	SCB333	7.00			10.30		72.00	.0112	.79	10.17	80.91	80.91
Gilyard, Ryan	SCB333	23.75			22.10		524.00	.0112	5.87	145.44	151.31	151.31
Harrison, LeMora	SCB333	17.00			22.10		375.70	.0112	4.19	102.39	106.58	106.58
Jeffery, Jannie Ma	SCB333	24.00			22.10		530.40	.0112	5.87	145.44	151.31	151.31
Littlejohn, Charlie	SCB333	9.15			22.10		202.00	.0112	2.27	55.54	57.81	57.81
McGrath, Amanda P	SCB333	12.10			22.10		268.00	.0112	2.97	75.82	78.79	78.79
Morris, Sharna	SCB333	11.50			22.10		255.00	.0112	2.84	72.44	75.28	75.28
Parker, Melissaeann	SCB333	15.00			22.10		331.50	.0112	3.67	92.20	95.87	95.87
Pea, Lisa	SCB333	17.15			22.10		378.00	.0112	4.19	102.39	106.58	106.58
Rice, Cheryl D	SCB333	41.00	11.75		22.10		911.50	.0112	10.14	255.27	265.41	265.41
Ross, Tashia M	SCB333	42.50	1.00		22.10		940.00	.0112	10.44	265.50	275.94	275.94
Sellers, Julie	SCB333	11.00			22.10		243.00	.0112	2.68	68.31	70.99	70.99
Thell, Keri	SCB333	10.50			22.10		232.00	.0112	2.58	65.11	67.69	67.69
Simmons, Dyanne M	SCB333	10.00			22.10		221.00	.0112	2.44	61.42	63.86	63.86
Stansell, Joshua	SCB333	11.50			22.10		255.00	.0112	2.84	72.44	75.28	75.28
Wall, Pamela	SCB333	16.00			22.10		353.60	.0112	3.95	105.60	109.55	109.55
Ward, Angela	SCB333	8.10			22.10		179.00	.0112	1.99	50.27	52.26	52.26
Woods, Catina L	SCB333	35.00			22.10		773.50	.0112	8.31	210.86	219.17	219.17
Subtotal	SCB333	412.40	12.75				9443.74	.0112	103.71	1016.65	4969.43	4969.43
Bridges, Virginia	SCB333	7.00			22.10		154.70	.0112		9.35	82.05	82.05
Subtotal	SCB333	7.00					154.70	.0112		9.35	82.05	82.05
Dunlap, Jack A	TXB310	30.00			22.10	108.00	726.00	.0112	8.06	187.20	215.26	215.26
Dunlap, Justin F	TXB310	4.00			22.10		88.40	.0112		5.49	93.89	93.89
Subtotal	TXB310	44.00				108.00	814.40	.0112	8.06	192.69	209.15	209.15
Hicks, Robert E	TXB310	1.00			22.10	14.00	22.10	.0112		1.21	23.31	23.31
Hanks, Jody W	TXB310	42.00			22.10		928.20	.0112	10.38	210.00	1138.58	1138.58
Subtotal	TXB310	43.00				14.00	950.30	.0112	10.38	211.21	1161.89	1161.89
Totals		1791.15	24.50				20341.14	.0112	213.44	4346.40	7135.47	7135.47

Reliant Payroll Solutions

135 Fox Road Ste F
Knoxville, TN 37922

Condustrual Inc.
514 E. North Street
Greenville, SC 29601
Stefanie Whiteside
(864) 235-3619

Invoice Date: 04/02/15
Check Date: 04/02/15
Invoice Format: UC : ZB

Invoice 2001014-002
For the Pay Period Ending 03/28/15
Batch Number 012

Gross Wages	324,583.87
FICA	23,133.72
FUTA	1,008.38
SUI	9,568.18
WORKERS COMP	11,991.63
EE BENEFITS	
ADMIN FEE	3,667.87
PENSION	
ALL OTHER	

Sub Total:	373,953.65
Credit - Health Ins Pre	-2,745.00
Credit - Dental Ins Pre	-557.66
Credit - Phone Service Fe	-0.75
Credit - Advance	-263,200.32
Credit - Emp Loan	-154.00
Total Invoice:	107,295.92

Thank you!

If you have any questions contact: Shemayne
(877) 257-6662



INVOICE

Bill To:

Condustral Inc.
514 E. North Street
Greenville, SC 29601
Attn: Stefanie Whiteside

INVOICE NUMBER 1042016
INVOICE DATE January 4, 2016
TERMS DUE UPON RECEIPT

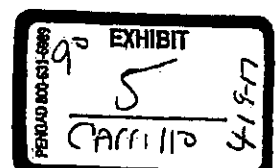
Please Remit Payment To:

CSSG
707 Meridham Boulevard Suite 250
Orlando, FL 32825

Payroll	Description	Billing Rate	AMOUNT
9986.00	GA	10.02	\$1,000.60
2798.66	MD	11.40	\$319.05
9285.37	SC 5479X	8.16	\$757.69
1187955.02	SC 6824F	12.31	\$146,237.26
3743.54	SC 7350F	14.97	\$560.41
	60-Day Early Termination Fee*		\$28,908.43
#####		Total	\$177,783.43 PAY THIS AMOUNT

* Calculated based upon average weekly admin for the period 10-29-15 to 12-17-15

THANK YOU FOR YOUR BUSINESS!





707 Mendham Boulevard, Suite 250, Orlando, FL 32825

Author's Direct

407.517.9414

ted.bryant@countrywidehr.com

Sent via Next-Day Mail

November 13, 2015

Eric Dawson
Sr. Vice-President & Counsel
Guarantee Insurance Company
401 E. Las Olas Blvd., Suite 1650
Fort Lauderdale, FL 33301

Re: Condustrual, Inc. - Coverage Confirmation

Dear Eric:

I am writing about our client, Condustrual, Inc. This company has been a client of CountrywideHR since March 28, 2015 and remain a client. I can also write they are one of our preferred clients.

As you know, CountrywideHR and its family of companies provide human resource outsourcing ("HRO") services. Our HRO business model calls for us to handle many aspects of our client's business operations including, in this matter, their insurance program. This also encompasses the workers' compensation insurance of the company's employees. Thus, Condustrual is under our umbrella and enjoys coverages under our workers' compensation insurance policy with several of our retained carriers including Guarantee Insurance Company.

Please contact me directly if you have any immediate questions or concerns.

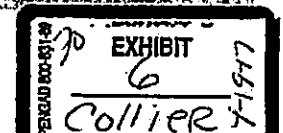
Sincerely,

Theodore G. Bryant
General Counsel - E.V.P.

TGB/lis

cc: Zachary A. Collier
Thomas M Sears, Jr., Esq.

We run your office. You run your business.



SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO.: 1514359

Rachel J. Turner,

Claimant,

vs.

SC Department of Corrections and/or
Condustrual, Inc., and/or Countrywide
Staffing Solutions,

Employer(s),

and

State Accident Fund and/or National Union
Fire Insurance Company and/or American
Zurich Insurance Company and/or
Guarantee Insurance Company,

Carrier(s) and/or the

South Carolina Workers' Compensation
Uninsured Employers' Fund,

Defendant(s).

* * * * *

TELEPHONIC

DEPOSITION OF:

GEORGE KASPARS

DATE TAKEN:

Thursday, July 6, 2017

TIME:

12:45 p.m. - 2:00 p.m.

PLACE:

707 Mendham Boulevard
Suite 250
Orlando, Florida 32825

REPORTED BY:

LAURA J. LANDERMAN, RMR, CRR, FPR
Notary Public, State of
Florida at Large

1 A P P E A R A N C E S:

2 WILLIAM R. HARBISON, ESQUIRE
3 Gallivan, White & Boyd, P.A.
4 1201 Main Street -- Suite 1200
5 Columbia, South Carolina 29201
6 wharbison@gwblawfirm.com

7 Appearing on behalf of Countrywide Staffing
8 Solutions and Guarantee Insurance Company,

9 T. JEFF GOODWYN JR., ESQUIRE (via telephone)
10 Goodwyn Law Firm, LLC
11 2519 Devine Street -- Suite A
12 Columbia, South Carolina 29205
13 jgoodwyn@goodwynlaw.com

14 Appearing on behalf of Condustrual, Inc.,

15 ERIN FARTHING, ESQUIRE (via telephone)
16 State Accident Fund
17 800 Dutch Square Boulevard -- Suite 160
18 Columbia, South Carolina 29210
19 efarthing@saf.sc.gov

20 Appearing on behalf of South Carolina
21 Department of Corrections and State
22 Accident Fund,

23 LISA C. GLOVER, ESQUIRE (via telephone)
24 SC Workers' Compensation UEF
25 800 Dutch Square Boulevard -- Suite 160
Columbia, South Carolina 29210
lglover@saf.st.gov

Appearing on behalf of the South
Carolina Workers' Compensation
Uninsured Employers' Fund,

ALSO PRESENT: Thomas Sears, General Counsel for
Condustrual, appearing telephonically
as party representative

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I N D E X

TESTIMONY OF GEORGE KASPARS

Direct Examination by Mr. Goodwyn	4
Cross-Examination by Mr. Harbison	52
Redirect Examination by Mr. Goodwyn	53

CERTIFICATE OF REPORTER	54

CERTIFICATE OF OATH	55

E X H I B I T S

Exhibit No. 1 (Notice of Taking Deposition)	7

1 THE REPORTER: Do you swear the testimony
2 you're about to give will be the truth, the whole
3 truth, and nothing but the truth, so help you God?

4 THE WITNESS: Yes, ma'am.

5 DIRECT EXAMINATION

6 BY MR. GOODWYN:

7 Q Mr. Kaspars, can you please spell your name
8 for the record?

9 A K-A-S-P-A-R-S, first name George, G-E-O-R-G-E.

10 Q Thank you. My name's Jeff Goodwyn, and I
11 represent Condrustrial and Medustrial in this case. My
12 understanding is you've been designated to respond to --
13 I understand you've been designated to answer certain
14 topics -- questions related to certain topics for
15 Countrywide.

16 MR. GOODWYN: Will, can you tell me which
17 topics on the deposition notice Mr. Kaspars is
18 being designated to respond to?

19 MR. HARBISON: Yes. 1, 2, 3, 5 and 6.

20 MR. GOODWYN: And Zach Collier will respond to
21 No. 4?

22 MR. HARBISON: Yeah, and I think you had
23 already started his deposition on that. And of
24 course, Jess Carillo, who we produced as a 30(b)(6)
25 deposition, has already responded to several of the

1 topics.

2 MR. GOODWYN: Right, and I'm going to ask

3 Mr. Kaspars some of those same questions.

4 MR. HARBISON: I understand.

5 BY MR. GOODWYN:

6 Q Mr. Kaspars, have you ever given a deposition
7 before?

8 A Yes, sir.

9 Q In what type of a situation was it?

10 A Similar, work comp case.

11 Q And you may be familiar with some of the
12 rules, but I'll be asking you questions. You'll be
13 responding. I don't think we're going to have too much
14 problem talking over each other because we're on the
15 phone, but try to make sure I finish my question before
16 you begin your answer.

17 You're not allowed to look to Mr. Harbison or
18 anyone else for answers. I'm just asking you what your
19 knowledge and understanding is as to these issues.

20 If you need a break during the deposition,
21 just let me know. We'll be happy to take a break, if
22 you need to use the restroom, get something to drink, or
23 take a break, whatever.

24 Do you have any questions before we get going?

25 A No, sir.

1 Q All right. What is your -- what is your
2 position with Countrywide?

3 A Currently, I am VP of business development.

4 Q And how long have you been in that position?

5 A Approximately a year and a half.

6 Q And what was your position before that?

7 A VP of risk management.

8 Q And how long were you in that position?

9 A Approximately a year and a half.

10 Q Was that the position you were in at the time
11 of Ms. -- of the negotiations of the contract with
12 Condustrial?

13 A Yes, sir.

14 Q All right. And before that, how long had you
15 been with Countrywide?

16 A Before the negotiations of the contract?

17 Q Before the position that you were in. What'd
18 you say? That you were vice president of what?

19 A Risk management.

20 Q Right. Before you were vice president of risk
21 management, were you with Countrywide in a different
22 capacity?

23 A Yes, sir.

24 Q And what were you -- what was your capacity
25 then?

1 A I was a sales manager.

2 Q And how long have you been with Countrywide
3 altogether?

4 A About three and a half years, I believe, it is
5 now.

6 Q Okay. And I understand you've been designated
7 to respond to these questions -- these topics listed in
8 the deposition notice. Let's just kind of go in order
9 here.

10 The first topic, the underwriting of the
11 Countrywide service agreement dated March 26, 2015,
12 between Countrywide and Condustrual, Inc. Are you
13 prepared to answer questions on that topic?

14 A Yes, sir.

15 Q Is there anyone else with Countrywide that you
16 think is more knowledgeable on that topic than you?

17 A No, sir.

18 Q And I understand you have a copy of the
19 deposition notice there?

20 A Yes, sir, in front of me.

21 MR. GOODWYN: Will, what exhibit number was
22 that marked?

23 THE REPORTER: Exhibit 1.

24 (Kaspars Exhibit No. 1 was marked.)

25 BY MR. GOODWYN:

1 Q Do you have a copy of the service agreement
2 that should be marked Exhibit 1 to Jeff Carillo's
3 deposition?

4 A Yes, sir. That's here in front of me as well.

5 Q All right. On the back page or I guess page
6 7, not the back page, but page 7, do you see the
7 signatures there?

8 A Yes, sir.

9 Q Who signed on behalf of Countrywide?

10 A It looks like Scott Hanson, president.

11 Q All right. Was Scott Hanson the president of
12 Countrywide at the time?

13 A Yes, sir.

14 Q And I'm assuming he had authority to sign the
15 agreement on behalf of Countrywide?

16 A Yes, sir.

17 Q All right. On the next page, I guess it would
18 be page 8, pages 8 and 9, have a list of states and WC
19 codes and some other columns there. Do you see that?

20 A Yes, sir.

21 Q Is this -- is it typical to have this type
22 of -- these types of pages in an agreement with a
23 company like Condustrual?

24 A Yes, sir.

25 Q And what are these pages? What do these pages

1 and columns represent?

2 A The cost for each classification.

3 Q You're talking about the workers' compensation
4 premium cost for each classification of job?

5 A No, sir, because it includes other things
6 other than just workers' compensation.

7 Q Other than workers' compensation, what else
8 does it include?

9 A Administration, SUTA, FUTA, FICA?

10 Q All right. And SUTA, FUTA and FICA, those are
11 all government taxes?

12 A Yes, sir.

13 Q And those -- never mind.

14 Those appear to be a fixed amount for each
15 state; is that correct?

16 A Yes, sir.

17 Q And it looks like the administrative fee is
18 the same regardless of the code, correct?

19 A Yes, sir.

20 Q All right. Now, the WC column there, what is
21 that?

22 A That is the cost for workers' compensation
23 being charged to the client company.

24 Q All right. So for that first code there, it's
25 the state of Delaware code 0808, and it says WC 1149.

1 Do you see that?

2 A Yes, sir.

3 Q What is that -- is that 11 dollars and 49
4 cents per thousand dollars' worth of payroll?

5 A Per hundred.

6 Q Per hundred dollars' worth of payroll?

7 A Yes, sir.

8 Q Okay. So that's the same thing just depending
9 on the different codes as you go down from state to
10 state?

11 A Yes, sir.

12 Q All right. And where do the numbers in that
13 WC column come from?

14 A We enter those in based on numbers that were
15 provided from our carriers.

16 Q All right. So Countrywide would have
17 completed all the figures in that WC column, correct?

18 A Yes, sir.

19 Q All right. If you turn to page 9, I'm looking
20 at the South Carolina codes?

21 A Yes, sir.

22 Q Do you see the two codes South Carolina 8829
23 and 8833?

24 A Yes, sir.

25 Q What are those codes? What type of jobs are

1 those codes?

2 A It doesn't reference what type of jobs they
3 are.

4 Q It doesn't say it in there, but would an
5 underwriter of Countrywide, would they have had to have
6 looked up what jobs those codes refer to in order to
7 quote the premium?

8 A Yes, sir.

9 Q All right. And I'll represent to you those
10 are -- those are the nursing codes in the directory.
11 And if you look at Exhibit 3 --

12 MR. HARBISON: Objection to the form. I
13 think -- I think one is nursing or convalescent
14 home, according to your exhibit, and one's
15 professional employees, hospital professional
16 employees.

17 MR. GOODWYN: All right, yeah.

18 BY MR. GOODWYN:

19 Q If you look at Exhibit 3, Mr. Kaspars. Do you
20 have that in front of you?

21 MR. HARBISON: Just a second, Jeff.

22 A Yes, sir, I do.

23 Q All right. If you would turn to the page that
24 at the top it says page 37 of 45.

25 A Yes, sir.

1 Q What does code 8829 refer to?

2 A According to this, there's several:
3 Convalescent or nursing homes, all employees; home for
4 aged, all employees; nursing or convalescent homes; all
5 employees; rest homes, all employees, class code 8829.

6 Q What about 8833? What does that refer to?

7 A It doesn't appear 8833 is on this page so I'm
8 going to look at the next page?

9 Q Yeah, I think it is on the next page.

10 A 8833: Asylum professional employees; hospital
11 professional employees; sanitarium professional
12 employees, class code 8833.

13 Q All right. So is it fair to say that
14 Countrywide was aware that Condustrual had nursing
15 medical staff that it was asking Countrywide to provide
16 workers' compensation coverage for at the time this
17 agreement was entered into?

18 A Yes, sir.

19 Q Okay. What involvement did you have, if any,
20 in the negotiation of the service agreement that's
21 marked as Exhibit 1?

22 MR. HARBISON: Objection, Jeff. I think
23 that's topic four, isn't it?

24 MR. GOODWYN: Yeah, that is. If he didn't
25 have any involvement, that's fine; but if he did, I

1 think I'm entitled to ask him about it.

2 MR. HARBISON: Jeff, we designated Zach for
3 that.

4 MR. GOODWYN: I mean, if he was involved in
5 the negotiations, he certainly can respond on
6 behalf of -- to Exhibit 4. I mean, he might be
7 more knowledgeable than Zach or have knowledge Zach
8 doesn't have.

9 MR. HARBISON: Jeff, it's a 30(b)(6)
10 deposition. You designated the topics. Zach was
11 designated on topic four. He's been testifying
12 about that. So that's outside the scope of his
13 topic.

14 MR. GOODWYN: If he has knowledge on it, I
15 think I'm entitled to ask. Sometimes it takes more
16 than one person to -- that you have to designate
17 more than one person.

18 MR. HARBISON: Well, we chose to designate
19 Zach to testify to that, but I'll go ahead and let
20 the witness answer just to move it along.

21 A The only --

22 Q Mr. Kaspars --

23 A Go ahead, sir.

24 Q No, go ahead.

25 A Can you repeat the question again, sir?

1 Q Yeah. What involvement, if any, did you have
2 in the negotiation of the service agreement that's
3 marked as Exhibit 1?

4 A Establishing rates for the codes.

5 Q Okay. So you were the underwriter?

6 A No, sir.

7 Q I guess maybe explain to me, then, what your
8 role was and what an underwriter's role would have been
9 in -- in computing and coming up with these rates for
10 the workers' compensation agreement.

11 A Determining the markups that we would use.

12 Q So that was your role?

13 A It was a joint role.

14 Q Between you and the underwriter?

15 A Yes, sir.

16 Q All right. Who was the underwriter?

17 A Melanie Vananda.

18 Q Can you spell that for us?

19 A M-E-L-A-N-I-E, last name V-A-N-A-N-D-A.

20 Q All right. So did you and Melanie have to go
21 through each one of these codes and figure out what type
22 of job it was and then submit that to your carriers and
23 then come up with a markup for this contract?

24 A No, sir.

25 Q All right. What'd you do, then?

1 A The underwriter would typically review all of
2 the class codes provided, the information provided for
3 underwriting purposes, and then I would review the work
4 done to make sure that it fit within our guidelines of
5 our company.

6 Q And who actually came up with the numbers for
7 the WC column?

8 A She would.

9 Q And would you review them?

10 A Yes, sir.

11 Q Okay. Did you or Melanie ever ask Condustrual
12 or ask somebody from Countrywide to ask Condustrual if
13 there were any independent contractor nurses that
14 were -- that Condustrual used?

15 A Can you repeat the question, sir?

16 Q To your knowledge, did you or anyone on behalf
17 of Countrywide ever ask Condustrual if there are any
18 nursing staff that was considered to be an independent
19 contractor?

20 A No, sir.

21 Q Were you aware that Condustrual had some
22 nursing staff that was considered by them to be an
23 independent contractor?

24 A No, sir.

25 Q If you had been aware that there were some

1 staff that was considered to be an independent
2 contractor, how would that have affected the
3 underwriting of the -- of this contract?

4 A We would not have been able to enter into
5 contract with 1099 employees.

6 Q Are you saying you would not have entered into
7 an agreement with Condustrual at all?

8 A No, with the 1099 employees. We would not be
9 able to enter into an agreement with 1099 employees.

10 Q And I'm talking about the agreement with
11 Condustrual. Would you have still entered into the
12 service agreement even if you knew there were some
13 independent contractors that Condustrual used?

14 A We would not be able to enter into agreement
15 with 1099 employees.

16 Q Again, I'm not asking you if could enter into
17 agreements with 1099 employees. I'm asking you had
18 Countrywide known there were independent contractor
19 nurses, with Condustrual, how would that have affected
20 the service agreement marked as Exhibit 1?

21 A I didn't manage the service agreement beyond
22 what I explained to you.

23 Q How about as it affected your underwriting of
24 the service agreement?

25 A I would not be able to enter into agreement

1 with 1099 employees.

2 Q Again, how would that have affected the
3 contract? Would the contract have been any different
4 had you known that there were some 1099 nurses that
5 Condustrual used?

6 MR. HARBISON: I'm sorry. Can you repeat the
7 question?

8 Q Sure. Would the service agreement marked as
9 Exhibit 1, would it have exchanged at all had you known
10 that there were 1099 nurses that Condustrual used?

11 A I don't believe our service agreement ever
12 changes, sir. It's the same standardized contract we
13 provide to everyone.

14 Q Well, yeah, and I understand that, but what
15 about the rate? That's got to be different for each
16 contract, correct?

17 A We would not be able to enter into an
18 agreement with 1099 employees.

19 Q I heard you the first seven times. What I'm
20 asking you is would the rates have changed had you known
21 that there were 1099 nursing staff that Condustrual
22 used?

23 MR. HARBISON: I think this has been asked and
24 answered.

25 MR. GOODWYN: It's been asked but it has not

1 been answered. I'll call the commissioner and get
2 her to compel an answer, but this is not a
3 responsive answer.

4 MR. HARBISON: Do you want to phrase -- he
5 asked you -- just answer the best of your
6 knowledge. If I may rephrase your ques -- go ahead
7 and rephrase your question one more time about
8 would they --

9 BY MR. GOODWYN:

10 Q Would the rates in the agreement have been
11 changed had --

12 MR. HARBISON: Well, I think the original
13 question was would they have entered into a service
14 agreement with Condustrual.

15 BY MR. GOODWYN:

16 Q No, that's not the question. I understand --
17 I understand the answer that you-all -- you would not
18 have entered into any type of an agreement with
19 independent contractors, and I'm not asking that
20 question.

21 I'm asking would this agreement, Exhibit 1,
22 have been any different, the rates or any other terms
23 have been any different had Countrywide known that
24 Condustrual had independent contractor nurses?

25 MR. HARBISON: I think it's been asked and

1 answered, but go ahead.

2 A I don't understand the question.

3 MR. HARBISON: Jeff, if I may, he's saying
4 that they wouldn't have written the contract for
5 any independent contractors, so, therefore, he
6 can't give rate information.

7 MR. GOODWYN: Well, if that's his answer, then
8 he could say that.

9 THE WITNESS: That's my answer, sir. Yes, I
10 can't write business for independent contractors,
11 so I can't change the agreement that I've given.

12 BY MR. GOODWYN:

13 Q Sure, sure. So are you saying had you known
14 there were some independent contractor nurses, this
15 agreement would not have changed at all you're saying?

16 A No, I don't believe it would have changed at
17 all. No, sir.

18 Q And are you saying this agreement only applies
19 to the employees?

20 A That's correct.

21 Q Fair enough. Can you take a look at Exhibit 2
22 for me?

23 MR. HARBISON: That's Carillo 2?

24 MR. GOODWYN: Right.

25 BY MR. GOODWYN:

1 Q All right. This appears to be an amendment to
2 the contract that was marked as Exhibit 1?

3 A Yes.

4 Q Okay. And that also looks like it's signed
5 the same day. Is that also Scott Hanson's signature?

6 A Yes, sir.

7 Q So is it your understanding that the entire
8 agreement between Countrywide and Condustrual is
9 Exhibit 1 with the amendment shown in Exhibit 2?

10 A Yes, sir.

11 Q Okay. All right. Let's move on to topic
12 three. Are you prepared to answer questions related to
13 the client auditing process Countrywide used to audit
14 its clients for workers' compensation?

15 A Yes, sir.

16 Q Tell me, generally speaking, does Countrywide
17 audit its clients' workers' compensation agreements on a
18 regular basis?

19 A On a regular basis? That's sort of a broad
20 statement, sir.

21 Q Well, maybe you tell me, then. How frequently
22 are clients audited?

23 A We try and audit our clients on an annual
24 basis. Some may be sooner. Some may not. It all
25 depends -- it all depends on the client.

1 Q All right. But you shoot for once a year?

2 A We try to, yes, sir.

3 Q Okay. And describe to me what that auditing
4 process involves.

5 (Brief telephone interruption)

6 Q Mr. Kaspars, before I get you to answer that
7 question, can you tell me what's a good address for you?

8 A Home address?

9 Q Yeah.

10 A 4233 Stratford Court, Spring Hill, Florida
11 34606.

12 Q Thank you. And how old are you?

13 A 46.

14 Q And tell me a little bit about your education.
15 How far did you go in school?

16 A One year of college.

17 Q Did you obtain any degrees or certificates?

18 A No, sir.

19 Q All right. I think I was asking you about the
20 auditing process, and you were telling me that
21 Countrywide aims to audit each client once a year,
22 sometimes it's not always, but that's what you shoot
23 for, correct?

24 A Yes, sir.

25 Q And tell me what all the auditing process

1 involves.

2 A We typically like to try and visit the
3 clients, take a look at some of the work site locations,
4 make a determination if the location and the class codes
5 assigned would make sense, maybe audit the amount of
6 employees in the payroll that was declared for the
7 locations to make sure they all coincide.

8 Q Okay.

9 A Sometimes we do some telephonic audits as well
10 where we may ask a client for the information just be
11 provided electronically to us.

12 Q Okay. Anything else?

13 A No. That's typically the main processes that
14 we would use.

15 Q All right. And if it's discovered that class
16 codes don't match up or there are certain employees that
17 aren't reported, what -- what do you do then?

18 A We would have to notify the client and the
19 carrier.

20 Q Okay. Do you go and assess a backcharge or an
21 additional charge for the misclassifications or the
22 unreported employees?

23 A That's a carrier determination for assessment
24 of premium.

25 Q Okay. Is it -- is it -- I guess let me ask it

1 this way. Of all the audits you do, about what
2 percentage would you say are there -- is an assessment
3 made for additional premium? Just a ballpark.

4 MR. HARBISON: Let me just object to
5 relevance, but go ahead. You can answer.

6 A Can you repeat the question again, sir?

7 Q Yeah. Approximately what percentage would you
8 estimate of the clients that are audited are assessed an
9 additional premium?

10 A I don't know if I would actually have a figure
11 or be able to give you an assessment.

12 Q Just from your experience, is it more than
13 half?

14 A No, I don't believe so.

15 Q Do you think is it less than 10 percent?

16 A I don't believe so.

17 Q So somewhere between 10 percent and a half of
18 the audits would result in an assessment?

19 A Possibly, yes.

20 Q Okay. And I'm not holding you to that. I'm
21 just trying to get a ballpark.

22 In this particular case, was Condustrual
23 audited during the term of this service agreement?

24 A No.

25 Q Do you know why it wasn't?

1 A We had not reached a full term of our
2 agreement.

3 Q So you're saying you would not have audited
4 them before one full year in the agreement?

5 A No, I did not say that.

6 Q Okay. What did you mean by you hadn't reached
7 the full term of the agreement, then?

8 A I told you we try and visit each client
9 annually. We had not reached the full term of our
10 agreement with Condustrual.

11 Q What do you mean by "full term"?

12 A We had not executed an entire term of the
13 contract, one year.

14 Q And so you're saying you would not have
15 conducted an audit until the first year was complete?

16 A No, I didn't say that.

17 Q Then I don't know what you mean when you say
18 you didn't conduct an audit because you haven't gotten
19 through the first term of the agreement, which is a
20 year. Can you try to explain that for me?

21 A There were still several months at the time of
22 the termination of agreement left in the one-year term,
23 so I can't say that it would have been done at a year,
24 but I can't say that we wouldn't have done it the week
25 after. I --

1 Q And who -- go ahead.

2 A I wouldn't be able to determine when it would
3 be done. Some of the determinations are made by the
4 carrier.

5 Q Yeah, that was my next question. Who
6 determines when the audits are conducted?

7 A There are various aspects of who determines.

8 Q Who are the potential people that could
9 determine when the audits are conducted?

10 A I would have been one internally. The carrier
11 would be.

12 Q Okay. So you could make the call on your own
13 to go ahead and audit a client and then the carrier
14 could also ask you to go ahead and have them audited?

15 A Yes, sir.

16 Q Okay. But as of the termination of the
17 agreement with Condustrual, neither you nor the carrier
18 had decided to audit Condustrual; is that correct?

19 A That's correct.

20 Q All right. Had an audit been conducted and
21 had it been discovered that Condustrual used independent
22 contractor nurses, how would that have affected the
23 agreement? Or maybe the better question would be would
24 an assessment have been made?

25 MR. HARBISON: Objection to the form. Go

1 ahead and answer.

2 A Can you repeat the question, sir?

3 Q Sure. Had an audit been conducted and during
4 the audit it was discovered that Condustrual used
5 independent contractor nurses, would that have resulted
6 in an assessment?

7 MR. HARBISON: Objection to the form. Go
8 ahead and answer.

9 A No, it would not have.

10 Q Why not?

11 A We deter -- or we found out that Rachel Turner
12 was not an employee or an independent contractor yet did
13 not choose to do anything about the contract at that
14 point.

15 Q Okay. So specifically, I mean, obviously
16 Countrywide found out at some point that Condustrual was
17 using independent contractor nurses, correct?

18 A Correct.

19 Q And did that -- did that information come to
20 light because of Rachel Turner's workers' compensation
21 claim?

22 A Yes, sir, that's correct.

23 Q Okay. If Rachel Turner is found to be an
24 employee of Condustrual, would Countrywide then go back
25 and make an assessment against Condustrual?

1 A That would probably be the carrier's decision.

2 ~~Q~~ But they could. The carrier could go back and
3 assess?

4 A Absolutely they could.

5 Q Okay. And what is your understanding that if
6 Rachel Turner is found to be an employee of Condustrual,
7 would the workers' compensation coverage provided by
8 Guarantee apply?

9 MR. HARBISON: Objection to the form. And I'm
10 sorry. What topic are we on? And I think you're
11 asking for a legal conclusion as well, but --

12 MR. GOODWYN: It goes back to topic six, could
13 relate to the audit.

14 MR. HARBISON: Topic six doesn't have to do
15 anything with the audit.

16 MR. GOODWYN: I think this is related to the
17 audit, the audit process.

18 MR. HARBISON: That's topic three, Jeff.

19 MR. GOODWYN: Yeah.

20 MR. HARBISON: You said topic six.

21 MR. GOODWYN: Topic three or six.

22 MR. HARBISON: Yeah, I don't see how that
23 relates to topic three. You're asking for a legal
24 conclusion from a witness.

25 MR. GOODWYN: I'm asking him from his

1 experience --

2 MR. HARBISON: If you want to keep it to the
3 auditing, I mean, I think that's fair, but he's
4 answered those questions.

5 BY MR. GOODWYN:

6 Q Let me just rephrase you like this, then. Let
7 me just rephrase it and ask you like this. If an audit
8 reveals employees that were unknown at the time of the
9 agreement or previously unreported, Countrywide and/or
10 the carrier would have the option of assessing the
11 employer, correct?

12 MR. HARBISON: I think that's asked and
13 answered. Go ahead.

14 A I believe they would have the availability to
15 do that.

16 Q Okay. All right. I'm looking now at
17 Exhibit 4. Do you have that?

18 A Yes, sir.

19 Q All right. What is this document?

20 A It appears to be a payroll register invoice.

21 Q Okay. And at the bottom of that first page of
22 Exhibit 4, do you see there's -- the workers' comp code
23 SC 8829?

24 A Yes, sir.

25 Q And those are employees classified under that

1 code that are being reported?

2 A Yes, sir.

3 Q And again on the next page, there's a list of
4 employees under code SE 8833. Do you see those?

5 A Yes, sir.

6 Q And on the next page, there's a summary where
7 it looks like 11,991 dollars and 63 cents was paid for
8 workers' compensation premiums for that pay period?

9 A Yes, sir.

10 Q All right. Can you take a look at Exhibit 5
11 for me?

12 A Yes, sir.

13 Q What is this document?

14 A It appears to be an invoice.

15 Q All right. It's a Countrywide invoice?

16 A Yes, sir.

17 Q To Condustrual?

18 A Yes, sir.

19 Q What is being invoiced?

20 A That I'm not sure.

21 Q What -- what is it that -- right here on the
22 three items in the middle that under "Description" that
23 says SC and then has some codes after that, those three
24 line items, do you see that?

25 A Yes, sir.

1 Q Are those classifications of jobs or --

2 MR. HARBISON: Objection to relevance, but go
3 ahead.

4 A It appears they are classifications.

5 Q Does this appear to be a standard invoice that
6 would be sent to Condustrual?

7 MR. HARBISON: Again, objection to relevance.
8 Go ahead.

9 A I wouldn't know. I don't work in payroll. It
10 does not look like the invoice previous.

11 Q All right. Do you have any idea what these
12 charges are for?

13 A No.

14 Q Would they be standard charges or the audit
15 premiums, some kind of upcharge?

16 MR. HARBISON: Objection to form and to -- if
17 you could restate your question. I think it had
18 two questions in that one. And also relevance.

19 BY MR. GOODWYN:

20 Q Is this a standard -- are these standard
21 charges or are these upcharges or assessments?

22 A I don't know what the charges are. It doesn't
23 specify.

24 Q There is one here that says 60-day early
25 termination fee for 28,908 dollars and 43 cents.

1 A Yes, sir, that does.

2 MR. HARBISON: Again, I think this is -- I'm
3 just going to object because it's outside the scope
4 of the topics that you asked him to cover. This
5 has to deal with the termination of the service
6 agreement, and that's not in the scope of these six
7 topics.

8 MR. GOODWYN: I think this appears to be part
9 of the audit -- audit bill. I'm trying to clear up
10 what's related to an audit and what's not.

11 MR. HARBISON: This is non -- just a second.
12 Again, objection. I think you're misstating what I
13 think he earlier test -- not intentionally
14 misstating, but he earlier testified he didn't do
15 an audit.

16 BY MR. GOODWYN:

17 Q What are the charges for, then?

18 MR. HARBISON: Objection. I think he's
19 testified that he doesn't know what this document
20 is or what these charges are.

21 BY MR. GOODWYN:

22 Q Tell me this, then. What -- why was the
23 agreement terminated before the full year?

24 MR. HARBISON: Objection to the form again and
25 outside the scope of his topic.

1 MR. GOODWYN: I think it has something to do
2 with either the audit or the decision not to
3 provide coverage.

4 MR. HARBISON: Jeff, you're on a fishing
5 expedition. He testified that he didn't -- they
6 did not do an audit, and there's nothing in your
7 topics that talk about termination agreements or
8 why anything was terminated. And then relevance as
9 to termination of the agreement was after the
10 Rachel Turner claim.

11 BY MR. GOODWYN:

12 Q Let me ask you this, then. Why was -- why was
13 Rachel Turner -- or why was coverage not provided for
14 the Rachel Turner claim?

15 A On the basis she was an independent
16 contractor.

17 Q All right. If she's found to be an employee,
18 coverage could potentially apply; is that right?

19 MR. HARBISON: Objection to form, calls for
20 speculation and legal conclusion.

21 Q You can answer.

22 A The carrier could determine.

23 Q What's that?

24 A The carrier could determine that.

25 Q Could determine that there's coverage if she's

1 found to be an employee?

2 A Yes. They could determine that.

3 Q Who made the decision not to provide the
4 defense for Condustrual? Was that Countrywide or was
5 that Guarantee?

6 MR. HARBISON: Are you talking about -- you're
7 talking about the decision about coverage for the
8 topic? Is that what you mean?

9 BY MR. GOODWYN:

10 Q My understanding was that was kind of included
11 in that decision not to provide coverage. Was that
12 Countrywide's decision or was that Guarantee's decision?

13 A I believe it was Guarantee's decision.

14 Q All right. So I'm assuming you wouldn't have
15 any knowledge about the reasons for that decision?

16 MR. HARBISON: Objection. I think he just
17 testified that she was -- they decided not to cover
18 because she was an independent contractor.

19 Q Well, that's the decision not to provide a
20 defense, but it sounds like it was Guarantee's decision,
21 correct?

22 A I believe so, yes, sir.

23 Q All right. Let me ask you some questions,
24 then, about topic six. That topic is the insurance
25 carrier or carriers that cover Condustrual and its

1 clients for 2015, and if more than one carrier was used,
2 the dates the carriers were changed and the reason for
3 the change.

4 Are you prepared to answer questions related
5 to that topic?

6 A Yes, sir.

7 Q All right. When was Guarantee brought on as a
8 carrier for Condustrual's employees?

9 MR. HARBISON: Objection to the form. And if
10 you want me to state my objection, I'll be glad to.

11 MR. GOODWYN: I mean, I -- I don't know how
12 else you want me to phrase it.

13 BY MR. GOODWYN:

14 Q When was the first date that Guarantee began
15 covering Condustrual's employees?

16 A Guarantee did not cover Condustrual employees.

17 Q Okay. Are you saying they covered Countrywide
18 employees?

19 A Yes, sir.

20 Q And what is your understanding of the
21 relationship between Condustrual's employees and how
22 they were supposed to get workers' compensation
23 coverage?

24 A They were provided to Countrywide as
25 Countrywide employees.

1 Q All right. And so people that were with
2 Condustrual were not actually Condustrual employees.
3 They were Countrywide employees?

4 A The ones provided to Countrywide, yes.

5 Q Okay. And Countrywide then obtained workers'
6 compensation coverage for those people?

7 A Yes, sir.

8 Q All right. So when -- and I'm going to -- I'm
9 going to refer to the people that were used by
10 Condustrual as Condustrual's staff. I don't want to use
11 the word "employee" for Countrywide -- for Condustrual
12 staff because I think you're saying that these people
13 were actually Countrywide employees.

14 For the staff at Condustrual, did Countrywide
15 obtain a workers' compensation policy specifically for
16 Condustrual staff, or was it a policy that covered staff
17 from Condustrual and other Countrywide clients?

18 MR. HARBISON: Objection to the form. Go
19 ahead.

20 A No. The coverage was provided for Countrywide
21 employees.

22 Q Okay. So that would include more than just
23 Condustrual staff, correct?

24 A That's correct, sir.

25 Q All right. When was Guarantee -- when did

1 coverage with Guarantee begin for Countrywide staff
2 including the -- Countrywide employees which would
3 include Condustrual staff?

4 A It would not include Condustrual staff. It's
5 only for Countrywide employees.

6 Q Right. I'm just trying to say but Countrywide
7 employees included the staff at Condustrual, correct?

8 MR. HARBISON: Jeff, if you're asking about
9 coverage, do you want me to tell you the date just
10 to kind of cut to the chase?

11 MR. GOODWYN: Yeah, I mean, I want to make
12 sure we're talking about the same thing.

13 MR. HARBISON: The Guarantee insurance policy
14 for Countrywide began in effect on June 30th, 2015.

15 BY MR. GOODWYN:

16 Q Is that your understanding of when the
17 Guarantee policy started?

18 A Yes, sir. That is when the Guarantee policy
19 started.

20 Q And who was the carrier for Countrywide
21 employees, which would include the Condustrual staff
22 before --

23 MR. HARBISON: Objection --

24 Q -- before June 30, 2015?

25 MR. HARBISON: Objection to the form. Go

1 ahead and answer.

2 A The carriers prior for Countrywide employees
3 would have been Sunzs and Berkley.

4 Q Can you spell that? Sunz, S-U-N-S?

5 A S-U-N-Z Insurance Company, I believe, is their
6 legal entity name. And then I believe it's Riverport
7 Berkley. I think they're a subsidiary of W.R. Berkley.

8 Q Okay. What were the dates of coverage for
9 Sunz Insurance Company?

10 MR. HARBISON: Just a second, Jeff. You're
11 breaking up. Hold on. All right.

12 A Sunz insurance coverage periods for 2015 would
13 be 1/1/15 through 7/2/15 with a renewal policy on 7/2/15
14 through 12/31/15.

15 Q Okay. What about the Riverport Berkley
16 policy?

17 A The Riverport Berkley policy would have been
18 coverage from 1/1/15 through 5/26/15.

19 Q All right. It looks like there's some overlap
20 in the coverages. It looks like the Sunz and Berkley --
21 or Riverport policies ran -- both ran from January 1st,
22 2015, through May 26, 2015. Is that -- is that how you
23 read it?

24 A There were two policies during the same time
25 period, yes, sir.

1 Q Can you explain why there are two policies for
2 the same time period?

3 A They cover different states and operations.

4 Q Which policy would have covered the
5 Condustrual staff?

6 A There's a possibility that both policies were
7 covering Condustrual staff based on location.

8 Q Do you know which policies covered South
9 Carolina employees?

10 A That would have been the Berkley policy.

11 Q All right. And did the Sunz policy cover any
12 South Carolina staff?

13 A No, sir. It does not have South Carolina as a
14 coverage state.

15 Q All right. Was there any workers'
16 compensation coverage between May 26, 2015, and June 30,
17 2015?

18 MR. HARBISON: You're referring to for
19 Countrywide, correct, Jeff?

20 Q For Countrywide in South Carolina?

21 A No.

22 Q All right. Was Condustrual charged premiums
23 for workers' compensation coverage during that period?

24 A I would believe they would have been.

25 Q Was that money refunded to Condustrual since

1 there was no workers' compensation coverage during that
2 period?

3 A I would not know if it was refunded.

4 Q Should it have been?

5 MR. HARBISON: Objection. I think that falls
6 out of the scope of his topic of number six. I
7 think your number six topics reads -- yeah, it
8 doesn't.

9 MR. GOODWYN: Fair enough.

10 BY MR. GOODWYN:

11 Q What about do you know if Travelers provided
12 any workers' compensation coverage for Countrywide
13 during the service agreement with Condustrual?

14 A Can you repeat the question, sir?

15 Q I'm asking you if Travelers provided any
16 workers' compensation coverage for any Countrywide
17 employees that would have also been Condustrual staff?

18 A No. Travelers would not have covered
19 Condustrual staff. It's only Countrywide employees.

20 Q All right. Do you know why the Riverport
21 Berkley policy ended May 26, 2015?

22 A It was cancelled.

23 Q By who?

24 A By Riverport Berkley.

25 Q Do you know why it was cancelled?

1 A Underwriting reasons.

2 Q What type of underwriting reasons?

3 A That I don't know.

4 Q Who does know?

5 MR. HARBISON: Objection to form. I think
6 that goes outside the scope of your topic six. You
7 asked when the dates the carriers were changed and
8 the reason for the change.

9 BY MR. GOODWYN:

10 Q Reason for the change. This goes right to the
11 heart of that. Why was there a change? That's what I'm
12 asking.

13 A Because the policy was cancelled.

14 Q Right. Why was it cancelled? You said
15 underwriting reasons. I'm asking you what --

16 MR. HARBISON: That's outside the scope. You
17 asked the reason for the change, and he's answered
18 that.

19 MR. GOODWYN: He gave me a very general
20 answer. I'm asking for more specifics. I think
21 I'm entitled to do.

22 MR. HARBISON: He's asked and answered with
23 underwriting.

24 BY MR. GOODWYN:

25 Q What underwriting reason? What was the reason

1 for the cancel? I mean --

2 MR. HARBISON: Again, relevance through this
3 whole line of questioning. And I maintain that
4 from the original deposition, you know, that the
5 only time period in the issue is for Rachel
6 Turner's alleged date of accident of September 5,
7 2015, when we have repeatedly confirmed that
8 Guarantee Insurance Company had a workers'
9 compensation insurance policy in place for
10 Countrywide.

11 MR. GOODWYN: We've had a hearing on this and
12 the commissioner ordered that this topic be
13 responded to.

14 MR. HARBISON: I've allowed him to answer.
15 He's answered every question.

16 MR. GOODWYN: I think I'm allowed to ask for
17 more specifics.

18 MR. HARBISON: And he said he didn't know,
19 Jeff. You're badgering the witness.

20 MR. GOODWYN: And I asked him who does know.

21 MR. HARBISON: Jeff, it's outside the scope of
22 the topic and it's irrelevant to start with, but
23 that's --

24 MR. GOODWYN: Well, again, the commissioner
25 has already determined that it's relevant.

1 MR. HARBISON: You should have framed your
2 topics differently. You asked the reason for the
3 change. He said --

4 MR. GOODWYN: For underwriting reasons.

5 MR. HARBISON: -- because they cancelled the
6 policy so they changed to a new carrier.

7 MR. GOODWYN: Exactly. And I'm asking him who
8 knows the reason for the change. Who knows the
9 reason for the cancellation.

10 MR. HARBISON: No. You're misphrasing your
11 question. Why don't you read your topic to me,
12 topic number six.

13 MR. GOODWYN: I think I'm entitled to ask
14 about this -- about this area. If you want to go
15 back to the commissioner after she's already
16 ordered that --

17 MR. HARBISON: She didn't order it, Jeff. We
18 agreed to let you question him about this, and he's
19 answered it. And I know you like to file these
20 motions. What more do you want? He said
21 underwriting reasons and they moved on. What
22 relevance does that have to this?

23 MR. GOODWYN: I'm asking him who --

24 MR. HARBISON: In your motion -- when you
25 moved for an order compelling the answer, you said

1 you just wanted to find out whether -- and I looked
2 at this yesterday. You wanted to find out whether
3 any policies could still be in place. That's what
4 you represented to the commissioner.

5 MR. GOODWYN: Well, let me ask it this way,
6 then.

7 MR. HARBISON: And there are no other policies
8 in place other than the Guarantee policy.

9 MR. GOODWYN: That's what you argued to the
10 commissioner, and she said, no, I'm going to grant
11 the motion.

12 BY MR. GOODWYN:

13 Q Let me ask it this way: The underwriting
14 reasons that you reference for the reasons that that
15 policy was cancelled, did that have anything to do with
16 any of Condustrual's staff?

17 A That I don't know.

18 Q Who would know that?

19 MR. HARBISON: Again, relevance, and if it --
20 feel free to ask if it had to do with the Rachel
21 Turner claim.

22 MR. GOODWYN: I'm asking him who -- I mean, if
23 he doesn't know, who with Countrywide, first of
24 all, would know about these -- about the reason for
25 the policy cancellation? Did it have something to

1 do with --

2 MR. HARBISON: Jeff, that's not in your topic,
3 and you didn't argue that to the commissioner. You
4 argued -- you asked what was the reason for the
5 change in underwriting.

6 MR. GOODWYN: Yes, exactly. It's a very
7 general answer, and I'm trying to get to the heart
8 of the reasoning.

9 MR. HARBISON: He said he doesn't know. He
10 said it was underwriting.

11 MR. GOODWYN: And I'm asking him who knows.
12 If he doesn't know -- is he the person most
13 knowledgeable at Countrywide on this topic or is
14 there somebody more knowledgeable than him?

15 MR. HARBISON: I think he -- that's not the
16 standard for Rule 30(b)(6).

17 MR. GOODWYN: Yes, it is. You can't just put
18 somebody up there that doesn't know anything.

19 MR. HARBISON: He does know. He testified
20 what this is to. I guess Berkley --

21 MR. GOODWYN: If there is somebody more
22 knowledgeable than him, we're entitled to have that
23 guy come and testify.

24 THE WITNESS: There is nobody at Countrywide
25 more knowledged on the topic than I am.

1 BY MR. GOODWYN:

2 Q I'm sorry. Say that again.

3 A There is no one at Countrywide more knowledged
4 on that topic than I am.

5 Q No one at Countrywide knows why the Riverport
6 policy was cancelled May 26, 2015, other than
7 underwriting reasons?

8 A That was the answer we were given from
9 Berkley.

10 Q And did you question them as to what -- what
11 underwriting reasons they were talking about so you
12 could avoid that in the future?

13 MR. HARBISON: Same objection. Go ahead.
14 Jeff, could you just explain, because this is de
15 bene esse, what's the relevance? Again, I've let
16 you -- I've given you as much leeway as I can. I
17 mean, it's not part of his topic.

18 MR. GOODWYN: I guess it's right on --

19 MR. HARBISON: You've asked him seven
20 different times now, at least.

21 MR. GOODWYN: Right. And I'm asking him did
22 he ask Riverport for any more detail as to what
23 these underwriting details were?

24 THE WITNESS: No.

25 BY MR. GOODWYN:

1 Q And how much notice did you receive from
2 Riverport before the cancellation date of May 26, 2015?

3 A That I don't have in front of me. I don't
4 have that information available.

5 Q Do you recall about how long it was?

6 A I believe it was somewhere between 30 and 45
7 days.

8 Q Do you know why coverage was not in place to
9 replace that policy on May 26, 2015?

10 A It took us some time to replace the coverage.

11 Q Did you let Countrywide clients knows that
12 there was no coverage in place for a period?

13 A That I don't know what was notified to the
14 clients.

15 MR. GOODWYN: All right. Can we take a short
16 little break?

17 MR. HARBISON: Sure.

18 (A 6-minute recess was had.)

19 MR. GOODWYN: Just a few more questions,
20 Mr. Kaspars.

21 BY MR. GOODWYN:

22 Q At the time of Rachel Turner's injury in
23 September of 2015, was payroll information reported to
24 any other carrier other than Guarantee?

25 A Can you repeat the question?

1 Q Yeah. At the time of Rachel Turner's injury,
2 September 5th, 2015, were there any other carriers other
3 than Guarantee that were receiving payroll information
4 or premiums for Condustrual staff?

5 MR. HARBISON: Objection to the form. If you
6 can just restate the question.

7 Q Yeah. At the time of Rachel Turner's injury
8 on September 5, 2015, were there any other workers'
9 compensation carriers that Countrywide was reporting
10 premiums to?

11 A Yes.

12 Q All right. Who?

13 A Sunz Insurance Company and Guarantee Insurance
14 Company.

15 Q Okay. And I believe -- did Sunz Insurance
16 Company cover any Condustrual staff outside of South
17 Carolina?

18 A Outside of South Carolina, yes, I believe they
19 may have.

20 Q Okay. And if they didn't, would Guarantee
21 have covered them?

22 A Yes.

23 Q And were those the only two carriers in
24 September 2015?

25 A Yes.

1 Q Okay. What about were there any other
2 carriers earlier in 2015 other than Riverport, Sunz and
3 Guarantee?

4 MR. HARBISON: One more time. Can you say
5 that again?

6 Q Yeah. Were there any other carriers for
7 workers' compensation for Countrywide earlier than 2015
8 other than Sunz, Guarantee and Riverport?

9 MR. HARBISON: By Riverport you mean Berkley
10 too?

11 MR. GOODWYN: Right.

12 A Yes, I believe there were other carriers.

13 Q Okay. Who were they?

14 MR. HARBISON: Are you talking about South
15 Carolina or --

16 Q Yeah, let's talk about South Carolina.

17 A For South Carolina, no.

18 Q Okay. I believe you testified that Guarantee
19 and Riverport Berkley were the only carriers covering
20 workers' compensation for Countrywide in 2015?

21 A No.

22 MR. HARBISON: In South Carolina.

23 Q In South Carolina. I'm sorry if I left that
24 off.

25 A Yes. In South Carolina, yes, they were the

1 only two carriers.

2 Q And I think you've given those dates of
3 coverages.

4 Can you turn to Exhibit 2 for me?

5 A Yes, sir.

6 Q Hang on one second. Look at paragraph 10 of
7 the addendum of what's marked as Exhibit 2. Do you see
8 that?

9 A Yes, sir.

10 Q All right. What does it say?

11 A "Condustrual will process and withhold all
12 employee deductions for health insurance, pay advances,
13 and remit those to the entity due on behalf of the
14 employees."

15 Q All right. And look at paragraph 15. Can you
16 read that for us?

17 A "In order to avoid employees receiving two
18 W-2s for 2015 and the fact that all employees are agreed
19 as being reported under Condustrual F-E-I-N and state
20 tax account numbers, Condustrual will produce W-2s for
21 all employees for the current 2015 year. Countrywide
22 payroll administrator will work with Condustrual's
23 controller to ensure all payroll records and filings
24 tied to the form W-2s. After this year, we can revisit
25 the scenario if requested by Countrywide."

1 Q All right. So the Countrywide staff received
2 W-2s from Condustrual for 2015 or should have, at least,
3 according to this agreement, correct?

4 MR. HARBISON: Objection. Again, this goes
5 outside the scope of the six topics. He's not in
6 payroll or W-2s.

7 MR. GOODWYN: Yeah, but it's part of the
8 agreement. I mean, I'm talking about the
9 underwriting of the agreement.

10 MR. HARBISON: This doesn't have anything to
11 do with underwriting.

12 MR. GOODWYN: It's part of the agreement. I
13 mean, he's testified that the --

14 MR. HARBISON: Jeff, if you wanted to depose
15 someone on payroll and W-2s, you've had this
16 document forever. You should have done that.

17 MR. GOODWYN: I think I'm entitled to follow
18 up. He's testified that the Countrywide -- or the
19 Condustrual staff was Countrywide employees, and
20 I'm questioning him on that. It sure looked like
21 they're Condustrual employees if they're getting
22 W-2s from Condustrual.

23 MR. HARBISON: Same objection, but go ahead
24 and answer.

25 A I've stated that I only had knowledge of the

1 codes in the agreement.

2 Q All right. It sounds like, at least your
3 understanding, that the Condustrial staff was supposed
4 to be a Countrywide employee; is that correct?

5 (Brief pause.)

6 MR. HARBISON: Okay. We can hear you now.

7 THE WITNESS: Can you repeat the question
8 again, sir?

9 MR. GOODWYN: Yeah. Hang on one second.

10 BY MR. GOODWYN:

11 Q It sounds like at least you were working under
12 the assumption that the Condustrial staff was
13 Countrywide employees under this agreement; is that
14 fair?

15 MR. HARBISON: Are you talking about --
16 objection to form. Are you talking about the
17 underwriting process? Go ahead.

18 Q Yeah. I mean, just throughout your
19 underwriting process, you --

20 A Based on No. 15, sir, it appears they're W-2
21 employees, yes.

22 MR. GOODWYN: Okay. I think that's all I
23 have, then.

24 MR. HARBISON: Erin?

25 MS. FARTHING: Nothing here.

1 MR. HARBISON: Lisa?

2 MS. GLOVER: No questions.

3 MR. HARBISON: Okay. Just a few follow-up
4 questions.

5 - - - - -

6 CROSS-EXAMINATION

7 BY MR. HARBISON:

8 Q Mr. Kaspars, Mr. Goodwyn asked you a couple of
9 questions about Carillo Exhibit No. 1 and the codes 8829
10 and 8833. Do you remember that?

11 A Yes, sir.

12 Q And I think we thought they may be nursing and
13 medical professional codes?

14 A Correct, sir.

15 Q And you're aware, aren't you, that in addition
16 to having 1099 nurses, Condustrual also had a few nurses
17 that they treated as W-2 nurses?

18 A That is correct.

19 Q Now, in your review of everything, did
20 Condustrual ever disclose to Countrywide that they had
21 approximately 130 independent contractor nurses?

22 A No, sir.

23 Q And so these codes, 8829 and 8833, could have
24 been Condustrual's W-2 nurses; is that correct?

25 A They would have been W-2 nurses.

1 Q Okay. And did Condustrial ever provide
2 Countrywide with the location of the Kirkland prison
3 facility in Colombia, South Carolina?

4 A No, sir.

5 Q And in your review of the documents, did
6 Condustrial ever provide you with Rachel Turner's
7 payroll information?

8 A No, sir.

9 Q Did Condustrial -- excuse me. Did Countrywide
10 ever charge a premium on Rachel Turner?

11 A No, sir.

12 Q Did Countrywide ever collect a premium on
13 Rachel Turner?

14 A No, sir.

15 Q And just so we're clear, under the Guarantee
16 Insurance Company policy, Countrywide is the named
17 insured?

18 A That is correct.

19 MR. HARBISON: Okay. Those are all the
20 questions I have.

21 MR. GOODWYN: I've got a couple follow-ups,
22 then.

23 - - - - -

24 REDIRECT EXAMINATION

25 BY MR. GOODWYN:

1 Q You testified that Condustrial did not inform
2 Countrywide that they were 1099 nurses, correct? Is
3 that correct?

4 A That's correct.

5 Q Did Countrywide ever ask Condustrial if they
6 had any 1099 nurses?

7 A Not that I'm aware of.

8 Q Are you contending that Condustrial tried to
9 conceal these nurses from Countrywide?

10 MR. HARBISON: Objection to the form. I think
11 you're being argumentative.

12 MR. GOODWYN: I'm just asking him if he thinks
13 Condustrial tried to conceal them or was it just
14 nobody asked and nobody answered?

15 MR. HARBISON: I think you're asking for
16 speculation also about what Condustrial was doing.

17 MR. GOODWYN: I'm asking him what his
18 interpretation of it was.

19 THE WITNESS: Can you repeat the question,
20 sir?

21 BY MR. GOODWYN:

22 Q Are you contending that Condustrial concealed
23 or tried to conceal the fact that they had 1099 nurses
24 from Countrywide?

25 MR. HARBISON: Objection to the form again.

1 A I did not state anyone concealed anything.

2 Q Okay. That's fair enough.

3 MR. GOODWYN: All right. I think that's all I
4 have, then.

5 MR. HARBISON: That's all I have. Thank you.
6 I'm going to go out and get Zach real quickly, if
7 that's okay.

8 MR. GOODWYN: Okay.

9 (The proceedings were concluded at 2:00 p.m.)

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CERTIFICATE OF REPORTER

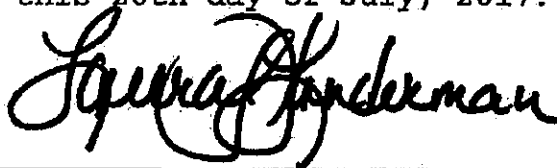
STATE OF FLORIDA:

COUNTY OF ORANGE:

I, LAURA J. LANDERMAN, R.M.R., C.R.R., F.P.R., do hereby certify that I was authorized to and did stenographically report the foregoing deposition of GEORGE KASPARS; that a review of the transcript was not requested; and that the foregoing transcript, pages 1 through 55, are a true and complete record of my stenographic notes.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorneys or counsel connected with the action, nor am I financially interested in the outcome of the action.

Signed this 20th day of July, 2017.



LAURA J. LANDERMAN, R.M.R., C.R.R., F.P.R.

CERTIFICATE OF OATH

STATE OF FLORIDA

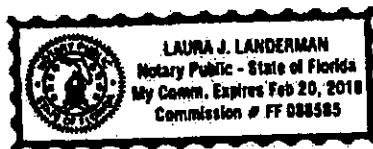
COUNTY OF ORANGE:

I, LAURA J. LANDERMAN, R.M.R., C.R.R., F.P.R.,
Notary Public, State of Florida at Large, do hereby
certify that GEORGE KASPARS personally appeared before
me this 7th day of July and was duly sworn/affirmed.

WITNESS my hand and official seal this 20th day of
July, 2017.



LAURA J. LANDERMAN, R.M.R., C.R.R., F.P.R.



SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO.: 1514359

Rachel J. Turner,

Claimant,

vs.

SC Department of Corrections and/or
Condustrual, Inc. and/or Countrywide
Staffing Solutions,

Employer(s),

and

State Accident Fund and/or National Union
Fire Insurance Company and/or American
Zurich Insurance Company and/or
Guarantee Insurance Company,

Carrier(s) and or the,

South Carolina Workers' Compensation
Uninsured Employers' Fund,

Defendant(s).

**TO: WILLIAM R. HARBISON, ESQUIRE ATTORNEY FOR COUNTRYWIDE STAFFING
AND GUARANTEE INSURANCE COMPANY:**

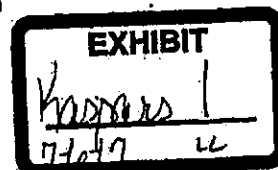
**RULE 30(b)(6) TELEPHONIC
DEPOSITION NOTICE OF THE
REPRESENTATIVE OF COUNTRYWIDE
STAFFING SOLUTIONS
(De Bene Esse)**

YOU WILL PLEASE TAKE NOTICE that pursuant to South Carolina Rule of Civil Procedure 30(b)(6) and for the purposes therein authorized, Employer, Condustrual, Inc., will take the telephonic deposition of a Designee of Countrywide Staffing Solutions on July 6, 2017 at 12:30 p.m. to be held at 707 Mendham Blvd., Suite 250 in Orlando, FL 32825, before a notary public or some other officer authorized by law to administer oaths.

The deponent is instructed to designate one or more witnesses to testify regarding the following areas of inquiry. The person(s) specified must be an officer, director, managing agent, or other person duly authorized to speak on the deponent(s) behalf.

Please produce the person(s) who have the most information or knowledge about the following areas of inquiry:

1. The underwriting of the Countrywide Service Agreement dated March 26, 2015 between Countrywide and Condustrual, Inc.



2. The rates charged for the various workers' compensation codes (W/C Codes) listed in the Countrywide Service Agreement dated March 26, 2015 between Countrywide and Condustral, Inc.
3. The client auditing process Countrywide uses to audit its client's workers' compensation policies.
4. The negotiating and execution of the Countrywide Service Agreement dated March 26, 2015 between Countrywide and Condustral, Inc.
5. The reasons for the decision to not provide coverage for the Rachel Turner claim.
6. The insurance carrier(s) that covered Condustral and its clients for 2015 and if more than one carrier was used, the dates the carriers were changed and the reason for the change.

The designee is instructed to bring to the taking of its deposition a complete copy of any and all records in his or her possession, custody, access or control not already produced in previous discovery.

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By:

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Attorney for Condustral, Inc.

Columbia, South Carolina
June _____, 2017

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
COLUMBIA, SOUTH CAROLINA
WCC FILE NO. 1514359

EMPLOYEE/CLAIMANT: RACHEL J. TURNER

EMPLOYER: SC DEPARTMENT OF CORRECTIONS - KIRKLAND
MEDUSTRIAL HEALTHCARE STAFFING SERVICE
CONDUSTRIAL, INC.
COUNTRYWIDE STAFFING SOLUTIONS GROUP, INC.

CARRIER: STATE ACCIDENT FUND
GUARANTEE INSURANCE COMPANY
SOUTH CAROLINA UNINSURED EMPLOYERS' FUND

SOUTH CAROLINA WORKERS' COMPENSATION HEARING

PURSUANT TO NOTICE OF WORKERS' COMPENSATION
HEARING, THE WITHIN HEARING WAS TAKEN ON THE 24TH DAY
OF JULY, 2017, COMMENCING AT THE HOUR OF 10:23 A.M., IN
COLUMBIA, SOUTH CAROLINA, BEFORE THE HONORABLE MELODY
L. JAMES, ATTENDED BY COUNSEL AS FOLLOWS:

TIMMI A. PARRISH
VERBATIM REPORTER

ORIGINAL

TIMMI A. PARRISH
COURT REPORTING SERVICES
POST OFFICE BOX 551
ROEBUCK, SC 29376
864-921-8743

APPEARANCES

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ELLEN H. GOODWIN, ESQUIRE, OF THE FIRM
GALLIVAN, WHITE & BOYD, PA
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ATTORNEY FOR MEDUSTRIAL HEALTHCARE STAFFING
SERVICE AND CONDUSTRIAL, INC.,

LISA C. GLOVER, ESQUIRE, OF THE
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POST OFFICE BOX 210039
COLUMBIA, SOUTH CAROLINA 29211

ATTORNEY FOR THE SOUTH CAROLINA UNINSURED
EMPLOYERS' FUND.

ALSO ATTENDING: MS. JANET E. RHODES, ESQUIRE
MR. THOMAS M. SEARS, JR., ESQUIRE

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1 PURSUANT TO NOTICE OF HEARING, THE WITHIN HEARING
2 WAS TAKEN BY THE ABOVE-NAMED COURT REPORTER, A NOTARY
3 PUBLIC FOR THE STATE OF SOUTH CAROLINA, IN COLUMBIA,
4 SOUTH CAROLINA.

5 * * * * * * * * * * * * * * *

6 **BY COMMISSIONER JAMES:**

7 TODAY IS JULY THE 24TH, 2017. WE ARE HERE ON
8 WCC FILE NUMBER 1514359. THIS IS THE MATTER OF
9 RACHEL TURNER VERSUS THE SOUTH CAROLINA DEPARTMENT
10 OF CORRECTIONS, COUNTRYWIDE STAFFING SOLUTIONS
11 GROUP, MEDUSTRIAL HEALTHCARE STAFFING SERVICE,
12 CONDUSTRIAL, INCORPORATED, AS WELL AS THE SOUTH
13 CAROLINA UNINSURED EMPLOYERS' FUND AND THE STATE
14 ACCIDENT FUND, AS WELL AS THE GUARANTEE INSURANCE
15 COMPANY.

16 LET ME MAKE SOME CLARIFICATIONS WITH REGARDS TO
17 THE ASSOCIATION OF THE PARTIES AND THE ATTORNEYS
18 THAT ARE HERE PRESENT FOR THOSE PARTIES. THE
19 CLAIMANT, MS. RACHEL TURNER, IS REPRESENTED BY
20 STEPHEN SAMUELS. THE SOUTH CAROLINA DEPARTMENT OF
21 CORRECTIONS AND THE STATE ACCIDENT FUND ARE
22 REPRESENTED BY ERIN FARTHING. COUNTRYWIDE STAFFING
23 SOLUTIONS GROUP AND GUARANTEE INSURANCE GROUP ARE
24 REPRESENTED BY MR. WILL HARBISON, ALONG WITH ELLEN
25 GOODWIN. PRESENT ON BEHALF OF MEDUSTRIAL HEALTHCARE

1 STAFFING SERVICE AND CONDUSTRIAL, INCORPORATED, IS
2 MR. JEFF GOODWYN. I'M JUST GOING TO ASK THE PARTIES
3 IF ANYBODY HAVE ANY CHANGES WITH WHAT I'VE JUST
4 STATED AS TO THE REPRESENTATION? THANK YOU. MS.
5 LISA GLOVER IS HERE ON BEHALF OF THE SOUTH CAROLINA
6 WORKERS' COMPENSATION UNINSURED FUND. ANYTHING
7 ELSE? ALL RIGHT.

8 WE ARE HERE WITH REGARDS TO A DATE OF ACCIDENT
9 THE CLAIMANT INDICATES OCCURRED ON SEPTEMBER THE
10 5TH, 2015. SHE IS REQUESTING A FINDING OF
11 COMPENSABILITY, AS SHE CONTENDS THAT SHE WAS AN
12 EMPLOYEE OF CONDUSTRIAL OR MEDUSTRIAL. THE PARTIES
13 ARE GOING TO GO INTO SOME SPECIFICS LATER ON WITH
14 REGARDS TO THESE TWO DESIGNATIONS. BUT, AT ANY
15 RATE, SHE INDICATES THAT SHE WAS EMPLOYED, SHE WAS
16 INJURED ON AN EVENT THAT TOOK PLACE ON THAT DATE AND
17 TIME, AND THAT SHE IS ENTITLED TO TEMPORARY TOTAL
18 FROM THE DATE OF INJURY FORWARD AS WELL AS MEDICAL
19 FROM THE DATE OF INJURY AND ALSO CONTINUING. SHE IS
20 REQUESTING SPECIFICALLY THAT THE AUTHORIZED TREATING
21 PHYSICIAN BE DESIGNATED AS DR. WESTERKAM AND ANYBODY
22 THAT HE REFERS HER TO WITH REGARDS TO TREATMENT.

23 ALL OF THE DEFENDANTS DENY THE COMPENSABILITY
24 OF THIS MATTER, AND THERE IS A LARGE ISSUE WITH
25 REGARDS TO WHETHER SHE -- THEY CONTEND IS A LARGE

1 ISSUE AND THAT SHE IS NOT AN EMPLOYEE, THAT SHE IS
2 AN INDEPENDENT CONTRACTOR. I BELIEVE THAT IS ALL
3 DEFENDANTS' POSITION.

4 THE AVERAGE WEEKLY WAGE AND COMPENSATION RATE
5 WILL BE, ALSO, IN CONTEST. THE CLAIMANT INDICATES
6 THAT THE AVERAGE WEEKLY WAGE SHOULD BE \$1,130.45,
7 WITH A CORRESPONDING COMPENSATION RATE OF \$753.67.
8 THE DEFENDANTS CONTEND THAT IF SHE IS AN EMPLOYEE
9 THAT PURSUANT TO CASE LAW AND VARIOUS EXPENSES ON
10 HER TAX RETURN THAT HER AVERAGE WEEKLY WAGE SHOULD
11 BE \$333.29 WITH AN AVERAGE -- EXCUSE ME -- WITH A
12 COMPENSATION RATE OF \$222.22. AS FAR AS HER
13 TEMPORARY TOTAL, IF SHE IS AN EMPLOYEE, THEY
14 INDICATE THAT THERE WAS AN OFFER OF LIGHT DUTY AND
15 THAT SHOULD THERE BE ANY WORK EXCUSES -- THEY
16 CONTEND THAT THERE ARE NONE IN THE RECORD, BUT
17 SHOULD SHE HAVE BEEN PLACED OUT OF WORK, THEY
18 CONTEND, PURSUANT TO POLLACK AND OTHER CASE LAW,
19 THAT SHE SHOULD NOT RECEIVE TEMPORARY TOTAL.

20 THERE IS ALSO A LARGE ISSUE WITH REGARDS TO
21 COVERAGE IN THIS MATTER, WHICH IS -- HAS A LOT OF, I
22 WOULD SAY, MOVING PARTS WITH REGARDS TO THE PARTIES
23 INVOLVED IN THAT, SO I WILL LET THEM COVER THAT.
24 BUT COUNTRYWIDE AND GUARANTEE INSURANCE COMPANY
25 CONTEND THAT THEY DO NOT HAVE COVERAGE WITH REGARDS

1 TO MEDUSTRIAL/CONDUSTRIAL EMPLOYEES, OR SPECIFICALLY
2 THIS PARTICULAR EMPLOYEE, AND, OF COURSE,
3 MEDUSTRIAL/CONDUSTRIAL TAKES THE OPPOSITE OPINION.
4 WE ALSO HAVE -- WHICH THE PARTIES HAVE
5 CHARACTERIZED, AND MAY CHARACTERIZE DIFFERENTLY IN
6 THEIR ARGUMENTS, AND MAYBE THEIR POSITIONS ARE
7 FLESHED OUT IN THE RECORD, BUT WE ALSO HAVE THE
8 STATE ACCIDENT FUND WITH THE DEPARTMENT OF
9 CORRECTIONS, WHICH THE CLAIMANT WOULD CONTEND IS AN
10 UPSTREAM IF THERE IS NOT COVERAGE AND THAT THEY
11 WOULD BE RESPONSIBLE FOR THE CLAIM. THE STATE
12 ACCIDENT FUND AND THE DEPARTMENT OF CORRECTIONS
13 INDICATE THAT THEY WILL PRESENT ARGUMENTS THROUGH
14 SOME CERTIFICATES OF INSURANCE THAT SHOULD IT REACH
15 THEM, THEY DENY THAT IT SHOULD, BUT IT ACTUALLY
16 SHOULD -- THE COVERAGE SHOULD BE WITH THE UNINSURED
17 EMPLOYERS' FUND OR -- EXCUSE ME. THEY CONTEND THAT
18 IT SHOULDN'T REACH THEM AND THAT THE DEPARTMENT OF
19 CORRECTIONS DOES NOT HAVE A VALID CERTIFICATE OF
20 INSURANCE THAT WOULD TRANSFER THE LIABILITY BACK TO
21 THEM.

22 I'M GOING TO LET YOU ALL FLESH THAT OUT.
23 THERE'S A LOT GOING ON HERE. I WOULD SAY THERE IS
24 ALSO ANOTHER ISSUE THAT'S BEEN RAISED.
25 CONDUSTRIAL/MEDUSTRIAL HAS RAISED A DUTY-TO-DEFEND

1 ISSUE, AND THERE IS SOME QUESTION THAT WAS RAISED IN
2 THE PRETRIAL AS TO WHETHER THERE IS JURISDICTION OR
3 NOT TO RULE ON THAT ISSUE, BUT THAT IS ONE OF THE
4 ISSUES THAT IS REQUESTED TO BE RULED UPON.

5 SO, AS I HAVE IT, THE ISSUES THAT ARE REALLY
6 BEFORE ME ARE EMPLOYEE OR INDEPENDENT CONTRACTOR AND
7 WHO THE EMPLOYMENT IS IF SHE IS AN EMPLOYEE, AVERAGE
8 WEEKLY RATE AND COMPENSATION RATE, TEMPORARY TOTAL,
9 MEDICAL TREATMENT, OFFER OF LIGHT DUTY, THE COVERAGE
10 ISSUE, THE DUTY TO DEFEND JURISDICTION, ALSO THE
11 ISSUE OF WHETHER THERE IS A CERTIFICATE OF INSURANCE
12 SHOULD IT REACH THAT LEVEL.

13 SO, I'M GOING TO LET EACH ONE OF YOU FLESH THIS
14 OUT BECAUSE THERE'S A LOT MORE THAN WHAT I JUST
15 STATED. MR. SAMUELS, IF YOU WILL GO INTO THE ISSUES
16 AS YOU SEE THEM, SIR.

17 **BY MR. SAMUELS:**

18 THANK YOU, YOUR HONOR. MAY IT PLEASE THE
19 COMMISSION. YOUR HONOR, THIS CASE INVOLVING MY
20 CLIENT, RACHEL TURNER, ARISES OUT OF A HOSTAGE
21 INCIDENT ON SEPTEMBER 5TH, 2015. AS A QUICK OUTLINE
22 OF THE FACTS AND WHAT THE EVIDENCE WILL SHOW, MS.
23 TURNER WORKED FOR A COMPANY CALLED CONDUSTRIAL.
24 THERE IS GOING TO BE MENTION IN THE RECORD OF THE
25 NAME MEDUSTRIAL, AND I BELIEVE THE PARTIES HAVE MADE

1 IT CLEAR THAT MEDUSTRIAL IS A PART OF OR A DIVISION
2 OR A TRADE NAME OF CONDUSTRIAL, BUT THEY ARE --
3 MEDUSTRIAL AND CONDUSTRIAL ARE THE SAME ENTITY.
4 HOWEVER, MUCH OF THE DOCUMENTS INDICATE AND WILL SAY
5 MEDUSTRIAL. CONDUSTRIAL IS A COMPANY WHICH PROVIDES
6 TWO TYPES OF LABOR. THEY PROVIDE CONSTRUCTION
7 WORKERS TO LARGE PROJECTS. THEY ALSO HAVE ABOUT 130
8 NURSES WHO WORK FOR THEM, SOME OF WHOM THEY CLASSIFY
9 AS EMPLOYEES, BUT MOST OF WHOM THEY CLASSIFY -- I
10 WOULD CONTEND, MISCLASSIFY AS INDEPENDENT
11 CONTRACTORS. A LARGE NUMBER OF THESE NURSES ARE
12 PLACED INSIDE STATE AGENCIES THAT PROVIDE MEDICAL
13 TREATMENT, SUCH AS THE DEPARTMENT OF MENTAL HEALTH
14 AND THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS.
15 IN THIS PARTICULAR CASE, MS. TURNER WAS PLACED
16 INSIDE THE DEPARTMENT OF CORRECTIONS.

17 THE ACTUAL INCIDENT THAT BROUGHT THIS CLAIM,
18 SEPTEMBER 5TH, 2015, MS. TURNER AND A NURSE DIRECTLY
19 EMPLOYED BY THE DEPARTMENT OF CORRECTIONS, KRISTIN
20 HILDEBRAND, WERE WORKING IN THE INFIRMARY WHEN THEY
21 WERE TAKEN HOSTAGE BY TWO INMATES. THE -- I'LL LET
22 THE WITNESSES DESCRIBE WHAT HAPPENED, BUT ULTIMATELY
23 MS. TURNER WAS FREED FIRST BECAUSE SHE WAS BADLY
24 INJURED, AND MS. HILDEBRAND STAYED BEHIND, VERY
25 COURAGEOUSLY, UNTIL ULTIMATELY THE DEPARTMENT OF

1 CORRECTIONS TEAM BASICALLY BROKE DOWN THE WALL AND
2 GOT INSIDE THE ROOM TO RESCUE HER. MS. TURNER
3 SUFFERED PHYSICAL INJURY. SHE WAS PHYSICALLY
4 ASSAULTED, AS WELL AS A VERY SEVERE CASE OF POST-
5 TRAUMATIC STRESS DISORDER. SHE HAS BEEN DISABLED
6 SINCE THE ASSAULT WITHIN THE MEANING OF THE ACT.

7 THE PRIMARY ISSUE IN THE CASE IS WHETHER MS.
8 TURNER IS AN EMPLOYEE OR AN INDEPENDENT CONTRACTOR.
9 IF SHE IS FOUND TO BE AN INDEPENDENT CONTRACTOR,
10 THEN HER CLAIM FAILS ALTOGETHER. IF SHE IS FOUND TO
11 BE AN EMPLOYEE, THEN SHE WOULD BE AN EMPLOYEE OF
12 CONDUSTRIAL. AND AS CONDUSTRIAL MAY BE UNINSURED,
13 SHE COULD ALSO PROCEED EQUALLY AGAINST THE
14 DEPARTMENT OF CORRECTIONS AS A STATUTORY EMPLOYER.
15 FRANKLY, AS MR. HARBISON POINTED OUT IN PRETRIAL,
16 PER THE SHATTO CASE SHE COULD ACTUALLY BE THE DIRECT
17 EMPLOYEE OF CONDUSTRIAL -- DEPARTMENT OF
18 CORRECTIONS.

19 NOW, WHAT THE EVIDENCE WILL SHOW IS THAT MS.
20 TURNER, WHEN SHE WAS HIRED BY CONDUSTRIAL, SHE
21 FILLED OUT AN EMPLOYEE APPLICATION; SHE FILLED OUT A
22 NUMBER OF DOCUMENTS, INCLUDING A W-4, WHICH MEANS
23 THEY SHOULD HAVE PAID HER ON A W-2, WITHHOLDING
24 TAXES. SHE FILLED OUT NUMEROUS DOCUMENTS STATING
25 THAT SHE COULD BE TERMINATED, THAT SHE WAS AN AT-

1 WILL EMPLOYEE, AND A GREAT MANY FACTORS THAT WOULD
2 MAKE HER TO BE AN EMPLOYEE. AS CONDUSTRIAL WOULD
3 POINT OUT, SHE ALSO FILLED OUT AND SIGNED A DOCUMENT
4 THAT STATED THAT SHE UNDERSTOOD SHE WAS AN
5 INDEPENDENT CONTRACTOR. WE WOULD CONTEND PORTIONS
6 OF THAT DOCUMENT ARE UNENFORCEABLE. IN ANY CASE, IT
7 IS NOT DISPOSITIVE IN A CASE LIKE THIS BECAUSE THE
8 COMMISSION HAS TO LOOK AT MANY, MANY FACTORS AS TO
9 DETERMINE WHETHER SOMEBODY IS AN EMPLOYEE VERSUS AN
10 INDEPENDENT CONTRACTOR. I THINK IF IT WAS THAT EASY
11 TO MAKE PEOPLE BE INDEPENDENT CONTRACTORS, THERE
12 WOULDN'T BE ANY EMPLOYEES, BECAUSE FOR AN EMPLOYER,
13 NOT HAVING TO PROVIDER WORKERS' COMPENSATION
14 INSURANCE, NOT HAVING TO PAY AN ADDITIONAL 7.5
15 PERCENT IN PAYROLL TAXES, NOT HAVING TO PROVIDE
16 HEALTH CARE, VACATION, RETIREMENT, NOT HAVING TO PAY
17 OVERTIME IS AN ENORMOUS COST SAVINGS. IN THIS CASE,
18 CONDUSTRIAL'S NURSING PAYROLL IS PROBABLY SOMETHING
19 LIKE \$8,000,000. SO THOSE ADDITIONAL COSTS WOULD
20 CERTAINLY MAKE A GREAT DIFFERENCE. IT'S VERY --
21 IT'S UNDERSTOOD WHY THEY HAVE THIS INCENTIVE TO WANT
22 TO MISSCLASSIFY THEIR NURSES AS EMPLOYEES -- AS
23 INDEPENDENT CONTRACTORS RATHER THAN EMPLOYEES.

24 BUT ONE THING WE KNOW IS THE FACTS HERE ARE
25 VERY CLOSE TO THE FACTS IN THE SHATTO CASE, AND THE

1 EVIDENCE IS GOING TO SHOW THAT NOT ONLY WAS THERE A
2 GREAT DEAL OF AMBIGUITY AND CONFUSION AND MS. TURNER
3 SIGNED MANY DOCUMENTS THAT WOULD INDICATE SHE WAS AN
4 EMPLOYEE RATHER THAN AN INDEPENDENT CONTRACTOR, BUT
5 ALSO THAT SHE WAS TREATED AS AN EMPLOYEE.

6 IN TERMS OF THE EMPLOYEE/INDEPENDENT CONTRACTOR
7 CASE, THE WILKINSON VERSUS PALMETTO STATE
8 TRANSPORTATION COMPANY IS THE OTHER CONTROLLING
9 CASE. AND THE THING THAT WILKINSON DID IS THEY TOOK
10 THE FOUR FACTORS THAT HAD ORIGINALLY BEEN, IF YOU
11 COULD -- IF THE CLAIMANT COULD PROVE ONE OF THOSE
12 FACTORS, IT WAS DISPOSITIVE ENOUGH TO BE AN
13 EMPLOYEE. IN THIS CASE, IN THE WILKINSON CASE, THEY
14 GAVE ALL FOUR FACTORS EQUAL WEIGHT. THE INTERESTING
15 THING ABOUT THE WILKINSON CASE IS THERE WERE TWO
16 PARTS OF THAT THAT WERE IMPORTANT TO THE SUPREME
17 COURT WHEN THEY OVERRULED THE COURT OF APPEALS, AND
18 ONE OF THOSE WAS THAT THEY WERE COMFORTABLE TREATING
19 WILKINSON AS AN EMPLOYEE BECAUSE HE WAS NOT LEFT
20 WITHOUT A REMEDY, BECAUSE PART OF THE DEAL THAT
21 WILKINSON HAD WITH PALMETTO STATE TRANSPORT WAS THAT
22 HE WAS PROVIDED AN OCCUPATIONAL ACCIDENT POLICY,
23 WHICH THE SUPREME COURT HELD WAS EQUIVALENT TO
24 HAVING WORKERS' COMPENSATION. THAT IS NOT THE CASE
25 HERE. THIS IS A CASE WHERE MS. TURNER, WITHOUT

1 WORKERS' COMP, HAS NO REMEDY. SHE IS RELYING UPON
2 WORKERS' COMPENSATION. WE WOULD CONTEND THAT THE
3 DIFFERENT FORMS SHE SIGNED ARE VERY MISLEADING AND
4 REASONABLY LED HER TO BELIEVE THAT SHE WOULD BE PAID
5 ON A W-2, SHE WOULD HAVE TAXES WITHHELD, THAT SHE
6 WOULD BE TREATED AS AN EMPLOYEE, AND SHE WOULD HAVE
7 WORKERS' COMPENSATION INSURANCE.

8 OF THE FACTORS, THE FOUR FACTORS SET OUT IN THE
9 WILKINSON CASE, IN TERMS OF FURNISHING OF EQUIPMENT,
10 AS IN THE SHATTO CASE MS. TURNER BASICALLY PROVIDED
11 HER OWN UNIFORMS, BUT EVERYTHING ELSE WAS PROVIDED,
12 ACTUALLY, BY THE DEPARTMENT OF CORRECTIONS, AND
13 THAT'S CONSISTENT WITH AN EMPLOYMENT RELATIONSHIP,
14 THAT THE EMPLOYER, OR THE STATUTORY EMPLOYER IN THIS
15 CASE, BUT ACTUALLY THE PLACE OF WORK BECAUSE GIVEN
16 THE NATURE OF HOW SHE WAS PLACED WITH THAT STATUTORY
17 EMPLOYER. IN THIS CASE THEY PROVIDED ALL THE
18 MEDICINE, ALL THE TOOLS; THEY MADE THE CAPITAL
19 INVESTMENT, AND EVERYTHING. THERE WAS NO INDICIA IN
20 THAT FACTOR OF HER HAVING A BUSINESS OR BEING AN
21 INDEPENDENT BUSINESS PERSON.

22 THE SECOND ISSUE IS THE RIGHT TO FIRE. THE
23 EVIDENCE WILL SHOW THAT THROUGH THE DOCUMENTS THAT
24 MS. TURNER WAS MADE TO SIGN, DOCUMENTS PROVIDED TO
25 HER THAT SHE WAS REQUIRED TO SIGN AS A CONDITION OF

1 EMPLOYMENT BY CONDUSTRIAL, EXPLICITLY GAVE
2 CONDUSTRIAL THE RIGHT TO TERMINATE HER AS AN AT-WILL
3 EMPLOYEE.

4 IN TERMS OF METHOD OF PAYMENT, THERE ARE A
5 COUPLE OF DIFFERENT WAYS TO LOOK AT IT THAT MAY BE
6 MORE BALANCED. ONE OF THE THINGS IS THAT MS. TURNER
7 WAS PAID BY THE HOUR, AND THE SUPREME COURT HAS SAID
8 THAT EVIDENCE OF PAYMENT ON A TIME BASIS RATHER THAN
9 ON A COMPLETED JOB BASIS IS STRONG EVIDENCE OF THE
10 RIGHT OF CONTROL AND STRONG EVIDENCE OF THE
11 EMPLOYMENT RELATIONSHIP. WE'LL ACKNOWLEDGE THAT SHE
12 WAS ACTUALLY PAID ON A 1099 AND THAT NO TAXES WERE
13 WITHHELD, AND WHEN SHE TOOK HER 1099 AND OTHER
14 DOCUMENTATION TO HER TAX PREPARER, HER TAX PREPARER
15 FILED IT ON A 1099. BUT SHE DIDN'T HAVE ANY CHOICE
16 IN THAT. SHE FILLED OUT A W-4 TO EXPECT TO BE PAID
17 ON A W-2. BUT WHAT SHE GOT PAID ON WAS STRICTLY
18 CONTROLLED BY THE EMPLOYER. IT'S, THEREFORE, UNFAIR
19 AND UNREASONABLE WHEN SHE HAS NO CHOICE IN THIS
20 MATTER TO CONSIDER THAT A WILLING DECISION ON HER
21 PART TO BE PAID IN THAT MANNER.

22 THERE IS ALSO DIRECT EVIDENCE OF THE RIGHT TO
23 CONTROL BY THE EMPLOYER. THAT, AGAIN, IS SHOWN BY
24 THE DOCUMENTS IN WHICH SHE SIGNED, BUT THERE'S ALSO
25 TESTIMONY ABOUT THE RULES AND REGULATIONS AND

1 POLICIES OF THE DEPARTMENT OF CORRECTIONS THAT SHE
2 WAS REQUIRED TO COMPLY WITH, WHICH GO WELL BEYOND
3 MERE REGULATORY CONTROL. WE, THEREFORE, YOUR HONOR,
4 THINK THAT THOSE FACTORS ARE GOING TO WEIGH HEAVILY
5 AS FAR AS MS. TURNER BEING FOUND TO BE AN EMPLOYEE.

6 IN TERMS OF OTHER ISSUES, ON THE AVERAGE WEEKLY
7 WAGE, WE CONTEND THE AVERAGE WEEKLY WAGE IS GOING TO
8 BE BASED ON WHAT SHE WAS ACTUALLY PAID BY THE
9 EMPLOYER, CONDUSTRIAL. AT TAB "DD" OF OUR APA
10 SUBMISSIONS, WE HAVE COMPILED AN EXHIBIT BASED ON
11 HER PAYROLL RECORDS. HER PAYROLL RECORDS ARE ALSO
12 IN THE RECORD, AND THEY WILL SHOW SHE HAD AN AVERAGE
13 WEEKLY WAGE OF \$1,130.45, WITH A RESULTING
14 COMPENSATION RATE OF \$753.67. THE MERE FACT THAT
15 HER EMPLOYER MISCLASSIFIED HER DOES NOT CHANGE THE
16 ANALYSIS. SHE IS STILL PAID IN TERMS OF AN AVERAGE
17 WEEKLY WAGE WHAT SHE IS PAID BY HER EMPLOYER. HER
18 TAXES, TAX RETURNS, DO NOT CHANGE THAT. IN FACT,
19 MANY OF THE DEDUCTIONS SHE TOOK AS A -- IN HER TAX
20 RETURN ARE DEDUCTIONS THAT ONE COULD TAKE AS AN
21 EMPLOYEE. AND FOR AUTHORITY ON THAT, YOUR HONOR, I
22 WOULD REFER YOU TO PUBLICATION 529 OF THE INTERNAL
23 REVENUE SERVICE, STATING THAT CERTAIN THINGS, FOR
24 EXAMPLE, UNIFORMS OF NURSES, ARE SPECIFICALLY
25 ALLOWED TO BE DEDUCTIBLE. SO THOSE ARE THINGS SHE

1 COULD DEDUCT AS AN EMPLOYEE AS WELL HAD SHE FILED
2 HER TAXES AS AN EMPLOYEE. IT DOES NOT CHANGE THE
3 ANALYSIS. WHAT A PERSON IS PAID BY THE EMPLOYER IS
4 WHAT THEIR AVERAGE WEEKLY WAGE IS.

5 WE ARE SEEKING TEMPORARY TOTAL FROM THE DAY
6 AFTER THE INCIDENT AND CONTINUING ON A RUNNING
7 AWARD. THE INCIDENT OCCURRED ON SEPTEMBER 5TH,
8 2015. IN TERMS OF HER ENTITLEMENT TO TEMPORARY
9 TOTAL, WE WOULD NOTE, YOUR HONOR, THAT AT PAGE 28 OF
10 THE CLAIMANT'S APA SUBMISSIONS, THAT DR. RYAN HESS
11 WROTE, QUOTE, "PLEASE ALLOW MS. TURNER TO RETURN TO
12 WORK WITH NO LIFTING GREATER THAN TEN TO TWENTY
13 POUNDS," END QUOTE. THAT RESTRICTION WAS NEVER
14 LIFTED AND CONTINUED. DR. WESTERKAM, IN MAY OF
15 2017, APPLIED SIMILAR RESTRICTIONS.

16 WE WOULD ALSO NOTE THAT AT TREATMENT FROM
17 PALMETTO BEHAVIORAL DAY TREATMENT THERE IS A NOTE
18 DATED OCTOBER 21ST, 2015, AT PAGE 38 OF THE
19 CLAIMANT'S APA SUBMISSIONS, AND THIS STATES, QUOTE,
20 "PATIENT INQUIRED IF SHE WOULD BE ABLE TO GET A NOTE
21 TO GIVE TO HER EMPLOYER EXCUSING HER FROM WORK. A
22 LICENCED MEDICAL SOCIAL WORKER TOLD PATIENT THAT
23 PROGRAM THERAPIST COULD PROVIDE A NOTE SIGNED BY THE
24 DOCTOR," END QUOTE. SO THERE IS EVIDENCE THAT FOR
25 PSYCHOLOGICAL REASONS SHE WAS UNABLE TO WORK. WE'D

1 ALSO NOTE THAT AT PAGE 41 THERE IS A STATEMENT IN
2 THAT MEDICAL RECORD, QUOTE, "DUE TO INCIDENT ON 9-5-
3 15 PATIENT HAS NOT WORKED SINCE THAT DATE," END
4 QUOTE. I ALSO BELIEVE, YOUR HONOR, THAT THE
5 TESTIMONY FROM MS. TURNER WILL SHOW THAT SHE WAS
6 UNABLE TO WORK DURING ANY OF THIS TIME. IN FACT, IN
7 MANY WAYS WAS UNABLE TO FUNCTION AT ALL.

8 I RECOGNIZE THAT CONDUSTRIAL CONTENDS THAT THEY
9 OFFERED EMPLOYMENT SUITABLE TO HER CAPACITY ON
10 SEPTEMBER 24TH, 2015. I THINK THE EVIDENCE WILL
11 SHOW THAT THIS WAS A SOMEWHAT CYNICAL ATTEMPT TO
12 MITIGATE THEIR DAMAGES IN THE EVENT THIS CASE GOT TO
13 A HEARING. THIS WAS AT A TIME WHEN MS. TURNER WAS
14 IN EXTREMELY DESPERATE STRAITS, NOT DOING WELL AT
15 ALL, NOT TAKING CARE OF HERSELF, NOT DOING ANYTHING,
16 AFRAID TO LEAVE HER HOUSE. AND THE EMPLOYER KNEW
17 THAT SHE WAS CLAIMING WORKERS' COMP. THEY WERE
18 ANGRY THAT SHE WAS CLAIMING WORKERS' COMP. THEY HAD
19 ALREADY BEEN ANGRY WITH HER BECAUSE A YEAR BEFORE
20 SHE HAD GONE TO THEM ASKING TO BE PAID OVERTIME, AND
21 THEY REFUSED THAT AS WELL. THEY PAID SOME OVERTIME
22 BUT NOT ALL THE OVERTIME.

23 IN TERMS OF MEDICAL TREATMENT, YOUR HONOR, WE
24 ARE SEEKING CONTINUING PSYCHOLOGICAL AND PSYCHIATRIC
25 TREATMENT, AS WELL AS PAYMENT OF HER PREVIOUS

1 MEDICAL BILLS. WE ARE SEEKING CONTINUING PHYSICAL
2 MEDICAL TREATMENT WITH DR. WESTERKAM, THE AUTHORIZED
3 TREATING PHYSICIAN, AND IN THE EVENT THAT DR.
4 WESTERKAM IS NOT ABLE OR NOT WILLING TO PROVIDE ALL
5 OF THAT TREATMENT, TO ANY MEDICAL PROVIDER THAT DR.
6 WESTERKAM REFERS MS. TURNER.

7 THERE IS ONE LAST BIT OF EVIDENCE I WANTED TO
8 CALL TO YOUR ATTENTION, AND THAT, YOU HONOR, IS A
9 CONTRACT BETWEEN THE DEPARTMENT OF CORRECTIONS AND
10 CONDUSTRIAL. THAT CONTRACT, YOUR HONOR, IS FOUND AT
11 TAB "G," PAGE 253 OF THE CLAIMANT'S SUBMISSIONS, AND
12 THAT CONTRACT SPECIFICALLY PROVIDES THAT -- IT
13 ACTUALLY SAYS MEDUSTRIAL, BUT AS I MENTIONED
14 EARLIER, MEDUSTRIAL AND CONDUSTRIAL ARE THE SAME
15 THING. THAT CONTACT SPECIFICALLY PROVIDES THAT
16 CONDUSTRIAL SIGNED THE CONTRACT WITH THE DEPARTMENT
17 OF CORRECTIONS IN WHICH THEY SAID THEY WOULD PROVIDE
18 EMPLOYEES AS NURSES AND ALL RNS AND LPNS ARE
19 EMPLOYEES OF CONDUSTRIAL AND NOT OF THE DEPARTMENT
20 OF CORRECTIONS, AND IT REQUIRED THAT THEY WERE TO
21 PROVIDE WORKERS' COMPENSATION COVERAGE TO ALL OF
22 THEIR NURSES. WE WOULD CONTEND THAT MS. TURNER IS A
23 THIRD-PARTY BENEFICIARY IN THAT CONTRACT. THAT
24 CONTRACT CERTAINLY INDICATES THE EXPECTATION OF THE
25 DEPARTMENT OF CORRECTIONS THAT THEY SHOULDN'T HAVE

1 TO BE HERE TODAY BECAUSE THE CONTRACT WITH THE
2 DEPARTMENT OF CORRECTIONS AND CONDUSTRIAL PROVIDED
3 THAT THE NURSES WOULD BE COVERED BY WORKERS'
4 COMPENSATION INSURANCE.

5 I WILL RESERVE FURTHER REMARKS, YOUR HONOR,
6 AFTER HEARING FROM THE OTHER ATTORNEYS. THANK YOU.

7 **BY THE COMMISSIONER:**

8 ALL RIGHT. MR. GOODWYN, ON BEHALF OF
9 MEDUSTRIAL AND CONDUSTRIAL.

10 **BY MR. GOODWYN:**

11 YES, YOUR HONOR. MAY IT PLEASE THE COMMISSION.
12 I REPRESENT CONDUSTRIAL AND MEDUSTRIAL, WHICH, OF
13 COURSE, WE CONTEND IS THE SAME ENTITY. I DON'T KNOW
14 IF COUNTRYWIDE IS GOING TO TAKE THE POSITION THAT
15 MEDUSTRIAL IS ACTUALLY A SEPARATE ENTITY. TO THE
16 EXTENT THEY DO, IT'S CONDUSTRIAL'S POSITION THAT
17 MEDUSTRIAL IS JUST A MONOLITH OR A DIVISION OF
18 CONDUSTRIAL, THAT ALL THE REVENUES, ANY AMOUNTS PAID
19 TO EMPLOYEE NURSES OR 1099 NURSES WERE ALL UNDER THE
20 CONDUSTRIAL UMBRELLA. THEY WERE ALL A 1099, W-2
21 UNDER THE CONDUSTRIAL NAME; THAT MEDUSTRIAL IS NOT A
22 SEPARATE LEGAL ENTITY THAT WOULD BE REQUIRED TO HAVE
23 WORKERS' COMPENSATION COVERAGE.

24 AS TO THE INDEPENDENT CONTRACTOR ISSUE, IF YOU
25 LOOK AT THE SHATTO CASE AND THE OTHER CASES

1 INVOLVING THE FACTORS THAT NEED TO BE LOOKED AT AS
2 FAR AS WORKERS' -- AS FAR AS THE
3 EMPLOYEE/INDEPENDENT CONTRACTOR GOES, DIRECT
4 EVIDENCE OF THE RIGHT OR EXERCISE IN CONTROL,
5 CONDUSTRIAL HAD NO RIGHT TO CONTROL MS. TURNER AT
6 ALL. THEY SIMPLY WERE A MEANS FOR NURSES LIKE MS.
7 TURNER TO BE ABLE TO FIND A SHIFT TO WORK SOMEWHERE.
8 THE FURNISHING OF EQUIPMENT, CONDUSTRIAL FURNISHED
9 NO EQUIPMENT WHATSOEVER. THEY WERE REQUIRED TO HAVE
10 ANY OF THEIR OWN EQUIPMENT. THEY HAD THEIR OWN
11 STETHOSCOPE. THEY HAD THEIR OWN CLOTHES AND THE
12 APPROPRIATE FOOTWEAR. THAT'S BASICALLY WHAT SHE
13 SAID SHE HAD TO BRING. CONDUSTRIAL DIDN'T PROVIDE
14 ANY OF THAT. METHOD OF PAYMENT, SHE WAS PAID BY THE
15 SHIFT. SHE WAS -- THESE WERE 12-HOUR SHIFTS. EVERY
16 SHIFT THAT SHE COMPLETED, SHE GOT PAID FOR THAT
17 SHIFT. AND THE RIGHT TO FIRE, CONDUSTRIAL DIDN'T
18 HAVE THE RIGHT TO FIRE MS. TURNER. SHE COULD TAKE
19 OR LEAVE ANY JOB THAT SHE WANTED. SHE HAD NO --
20 CONDUSTRIAL COULDN'T MAKE HER TAKE A SHIFT. THEY
21 COULDN'T TELL HER SHE HAD TO TAKE ANY SHIFT OR ANY
22 NUMBER OF SHIFTS PER MONTH. THIS WAS PURELY -- A
23 TRUE INDEPENDENT CONTRACTOR SITUATION AS FAR AS
24 CONDUSTRIAL GOES. THE -- AND YOU'LL HEAR MORE
25 TESTIMONY ABOUT THIS, WHAT -- THIS SITUATION EVOLVED

1 BECAUSE THESE NURSES, THESE LPNs, THEY DIDN'T WANT
2 TO BE EMPLOYEES ANYWHERE. THEY WANTED THE
3 FLEXIBILITY TO TAKE SHIFTS WHEN THEY WANTED, TO TAKE
4 VACATION WHEN THEY WANTED, TO BE ABLE TO SCHEDULE
5 THEIR WEEKS. IN FACT, MS. TURNER EVEN IS EXPECTED
6 TO TESTIFY -- SHE TESTIFIED AT HER DEPOSITION SHE
7 COULDN'T HAVE BEEN AN EMPLOYEE SOMEWHERE ELSE
8 BECAUSE SHE COULD NOT AFFORD TO BE FORCED TO WORK
9 CERTAIN HOURS. SHE HAD TO HAVE THE FLEXIBILITY FOR
10 HER CHILDREN. SO SHE NEEDED THIS INDEPENDENT
11 CONTRACTOR SITUATION. THERE ARE MANY OTHER NURSES
12 LIKE HER. CONDUSTRIAL IS NOT THE ONLY GAME IN TOWN.
13 THEY HAVE COMPETITORS WHO ALSO HAVE THESE
14 INDEPENDENT CONTRACTOR NURSES WORKING FOR THE
15 DEPARTMENT OF CORRECTIONS. THESE NURSES LIKE IT
16 THAT WAY. THEY GET PAID A HIGHER RATE BECAUSE
17 EMPLOYEES HAVE TO GET -- WOULD GET PAID LESS BECAUSE
18 THE EMPLOYER IS PAYING FOR INSURANCE AND TAXES. ALL
19 THE THINGS THAT SHE DEDUCTED ON HER TAXES IS WHAT, A
20 LOT OF IT, THE EMPLOYER WOULD HAVE TO TAKE ON, SO
21 THEY WOULD HAVE TO PAY THEM LESS. SO FROM
22 CONDUSTRIAL'S POINT OF VIEW, SHE IS PURELY AN
23 INDEPENDENT CONTRACTOR. THEY CAN'T MAKE HER DO
24 ANYTHING. THEY DON'T TAKE OUT THE TAXES; THEY DON'T
25 BUY THE INSURANCE; THEY DON'T BUY HER CLOTHES AND

1 MATERIALS. THEY SIMPLY SAY THESE ARE SOME SHIFTS
2 AVAILABLE IF YOU WANT TO TAKE THEM, AND IF YOU WANT
3 TO GO TO, IN THIS CASE, SCDC AND WORK A SHIFT,
4 GREAT.

5 THE -- I THINK STEPHEN'S -- YEAH, I THINK BOTH
6 YOU AND STEPHEN HAVE RAISED GOOD POINTS WITH RESPECT
7 TO THE TAXES. I THINK ONE THING THAT'S IMPORTANT
8 IS, LIKE YOU SAID, THESE OWNERS OF THE COMPANIES,
9 THEY SAY THEY HAVE TO SPEND THIS MONEY TO MAKE THEIR
10 MONEY. THAT'S -- SO THEY SHOULDN'T BE ABLE TO
11 INCLUDE THAT IN THEIR AVERAGE WEEKLY WAGE. THAT'S
12 WHAT MS. TURNER IS DOING. SHE IS SAYING I HAVE TO
13 SPEND THIS MONEY TO GO MAKE THIS MONEY. SHE WOULD
14 NOT -- WHILE SHE MAY BE ABLE TO DEDUCT UNIFORMS IF
15 SHE'S AN EMPLOYEE, SHE CERTAINLY WOULDN'T BE ABLE TO
16 DEDUCT HER MILEAGE TO AND FROM WORK. I'VE BEEN AN
17 EMPLOYEE FOR MANY, MANY YEARS. I'VE NEVER BEEN ABLE
18 TO DEDUCT MY MILEAGE JUST DRIVING TO AND FROM MY
19 OFFICE. I DON'T EVEN KNOW WHAT DEPLETION IS. SHE
20 PAID FOR INSURANCE, WHICH SHE SHOULD HAVE BEEN.
21 SHE'S AN INDEPENDENT CONTRACTOR. SHE SAID SHE WAS.
22 THAT WOULD NOT BE DEDUCTIBLE. THAT WOULD BE
23 SOMETHING THE EMPLOYER WOULD BEAR IF SHE WERE AN
24 EMPLOYEE. BUT SHE GETS TO DEDUCT THAT. LEGAL AND
25 PROFESSIONAL SERVICES, THAT WOULDN'T BE DEDUCTIBLE.

1 OFFICE EXPENSES, SHE'S CLAIMING TO HAVE AN OFFICE.
2 A NURSE -- EMPLOYEE NURSES DON'T GET TO DEDUCT HOME
3 OFFICE EXPENSES. THIS OTHER BUSINESS PROPERTY, I
4 THINK THAT -- I THINK THE TESTIMONY WAS THAT WAS A
5 COMPUTER THAT SHE HAD BOUGHT SO SHE COULD
6 COMMUNICATE WITH CONDUSTRIAL. SO, SHE DEDUCTS 2,000
7 A YEAR. SHE IS SAYING I HAVE TO SPEND THAT MONEY.
8 THAT CERTAINLY WOULDN'T BE DEDUCTIBLE AS AN
9 EMPLOYEE. REPAIRS OR MAINTENANCE, I'M ASSUMING
10 THAT'S FOR HER CAR. I DON'T KNOW WHAT ELSE IT WOULD
11 BE, BUT IT CERTAINLY DOESN'T SOUND LIKE AN EXPENSE
12 THAT AN EMPLOYEE WOULD BE ABLE TO DEDUCT. AND
13 SUPPLIES, I'M NOT SURE WHAT THAT IS. IF IT'S
14 SOMETHING -- MAYBE IT IS SOMETHING LIKE A UNIFORM
15 THAT SHE WOULD HAVE TO BUY. I DON'T KNOW. AND THEN
16 TAXES AND LICENSES, AGAIN, SHE'S -- SHE HAS TO
17 MAINTAIN THAT. MAYBE THAT'S SOMETHING SHE CAN
18 DEDUCT, IF IT WOULD BE DEDUCTIBLE AS AN EMPLOYEE.
19 THAT'S LIKE \$249. MEALS AND ENTERTAINMENT,
20 EMPLOYEES DON'T GET TO DEDUCT THEIR LUNCH. WHEN
21 THEY HAVE TO GO PAY FOR LUNCH, THAT'S NOT
22 DEDUCTIBLE. AND THEN UTILITIES, I'M ASSUMING THAT'S
23 FOR HER HOUSE. EMPLOYEES DON'T GET TO DEDUCT WHAT
24 THEY PAY IN UTILITIES FOR THEIR HOUSE. SO, ANYWAY,
25 THERE'S A LOT HERE THAT SHE IS GETTING THE BENEFIT

1 OF THAT SHE WOULDN'T IF SHE'S AN EMPLOYEE. WE THINK
2 THAT THIS 11,808 NUMBER IS PRETTY CLOSE. AGAIN,
3 STEPHEN REFERS TO THIS 529 DOCUMENT. WE CAN LOOK
4 AND SEE WHAT REALLY IS DEDUCTIBLE, BUT IT'S
5 CERTAINLY NOT FAIR FOR HER TO GET THE HIGHER HOURLY
6 RATE THAT INDEPENDENT CONTRACTORS GET BUT NOT ALSO
7 BE FORCED TO LIVE WITH THE DEDUCTIONS YOU SAID IT
8 COSTS YOU TO MAKE THIS MONEY.

9 ONE CORRECTION I THINK I NOTICED, WHEN YOU WERE
10 STATING YOUR POSITION OR JUST KIND OF SUMMING UP AT
11 LEAST WHAT OUR POSITIONS WERE, I BELIEVE YOU STATED
12 THAT COUNTRYWIDE'S POSITION WAS THAT THEY DON'T
13 INSURE ANY OF CONDUSTRIAL'S EMPLOYEES. MY
14 UNDERSTANDING IS THAT THEIR POSITION IS THAT THEY
15 ABSOLUTELY DO COVER ALL OF CONDUSTRIAL'S EMPLOYEES,
16 BUT THEY ARE ARGUING THAT THEY DON'T COVER RACHEL
17 TURNER BECAUSE SHE WASN'T REPORTED TO THEM AS AN
18 EMPLOYEE. IT'S OUR POSITION THAT IF SHE IS FOUND TO
19 BE AN EMPLOYEE OF CONDUSTRIAL, THEN CERTAINLY THEY
20 ARE COVERED UNDER GUARANTEE'S POLICY. WE DIDN'T --
21 YOU'LL HEAR A FAIR AMOUNT OF TESTIMONY THAT IN THE
22 NEGOTIATIONS FOR THIS CONTRACT THERE WAS A MEETING
23 BETWEEN THE PRESIDENTS OF THE COMPANIES. THESE 1099
24 NURSES WERE DISCLOSED. SCDC, THAT LOCATION, AND THE
25 FACT THAT THEY WORKED FOR THE PRISON SYSTEM WAS

1 DISCLOSED. IT WAS DISCLOSED THAT THEY WERE
2 INDEPENDENT CONTRACTORS, AND THEY SAID, "WELL, IF
3 THEY'RE INDEPENDENT CONTRACTORS, YOU DON'T NEED TO
4 REPORT THEM TO US. THAT'S NOT -- THAT'S NOT
5 SOMETHING YOU NEED TO REPORT BECAUSE THEY'RE NOT
6 EMPLOYEES. WE'RE ONLY COVERING THE EMPLOYEES."
7 HOWEVER, IF THE COMMISSION FINDS THAT SHE IS AN
8 EMPLOYEE, THEN CERTAINLY THE COVERAGE WOULD APPLY.
9 AND IF THE COMMISSION TAKES JURISDICTION OVER THE
10 DUTY-TO-DEFEND ISSUE, WE WOULD CERTAINLY CONTEND
11 THAT THEY HAVE A DUTY TO DEFEND THE CLAIM, AND THEY
12 NEED TO REIMBURSE COUNTRYWIDE -- OR, EXCUSE ME,
13 CONDUSTRIAL FOR ALL ITS LEGAL EXPENSES AND COSTS
14 ASSOCIATED WITH THEIR REFUSAL TO DEFEND THE CLAIM.

15 AGAIN, I WOULD DIRECT THE COMMISSION'S
16 ATTENTION TO PARAGRAPH THREE OF THIS COUNTRYWIDE
17 SERVICE AGREEMENT. IT CLEARLY STATES THAT
18 COUNTRYWIDE AND CONDUSTRIAL ARE CO-EMPLOYERS. SO
19 ANY EMPLOYEE THAT'S FOUND TO BE OF CONDUSTRIAL IS
20 ALSO AN EMPLOYEE OF COUNTRYWIDE, OR COUNTRYWIDE IS
21 ITS EMPLOYER. THAT ALONE, I THINK, IS ENOUGH. I
22 THINK, AS I STATED IN THE PRETRIAL CONFERENCE, THE
23 WAY THESE COVERAGE ISSUES ARE SUPPOSED TO WORK IS
24 THAT IF SOMEBODY ALLEGES -- IF THE CLAIMANT ALLEGES
25 TO BE AN EMPLOYEE, THEN THE CARRIER HAS TO DEFEND

1 THE CLAIM. IF THE CLAIMANT IS ULTIMATELY FOUND TO
2 BE AN EMPLOYEE, THEY CAN GO BACK AND BACK CHARGE IF
3 THEY THINK THEY NEED TO. IF IT'S PAYROLL THAT
4 WASN'T REPORTED, THEY CAN BACK CHARGE. I THINK THE
5 TESTIMONY WILL BE THAT GUARANTEE REGULARLY DOES
6 THESE AUDITS; THEY REGULARLY BACK CHARGE. THEY'VE,
7 IN FACT, BACK CHARGED CONDUSTRIAL IN THIS CASE.
8 THEY'VE AUDITED AND BACK CHARGED. SO, CERTAINLY,
9 POSSIBLE IT'S DONE. IT'S DONE EVERY DAY. COMPANIES
10 ARE AUDITED AND BACK CHARGED ALL THE TIME. BUT
11 SIMPLY TO SAY THAT THEY DON'T HAVE COVERAGE IS
12 AGAINST EVERY WORKERS' COMPENSATION COVERAGE RULE
13 THAT I'VE EVER HEARD OF.

14 WE CERTAINLY OBJECT TO DR. WESTERKAM BEING
15 NAMED THE AUTHORIZED TREATING PHYSICIAN. WE RETAIN
16 THE RIGHT TO DIRECT THE MEDICAL TREATMENT. AS YOU
17 KNOW, THIS IS A DENIED CLAIM. IF THE CLAIM IS FOUND
18 COMPENSABLE, WE WOULD CERTAINLY ASK THAT WE BE
19 ALLOWED TO DIRECT THE MEDICAL TREATMENT.

20 AS FAR AS THE T.T.D. ISSUE GOES, WE THINK MR.
21 SAMUELS' CHARACTERIZATION OF THIS OFFER-TO-WORK
22 LETTER AS SOME KIND OF CYNICAL ATTEMPT TO PRESERVE A
23 CLAIM IS RIDICULOUS. THERE IS NO EVIDENCE
24 WHATSOEVER THAT THAT'S THE CASE. THIS WAS AN HONEST
25 EFFORT TO GET HER BACK TO WORK. SHE -- YOU KNOW, WE

1 UNDERSTOOD THAT SHE MAY NOT WANT TO GO BACK TO THE
2 PRISON SYSTEM AFTER THE HOSTAGE SITUATION, SO WE
3 OFFERED HER SOMETHING OUTSIDE THE PRISON SYSTEM.
4 SHE JUST REFUSED TO DO IT. IT WAS A GOOD-FAITH
5 EFFORT TO TRY TO GET HER BACK TO WORK, AND THERE IS
6 NO EVIDENCE OTHERWISE. WE THINK SHE'S CAPABLE OF
7 RETURNING TO WORK. THE MEDICAL EVIDENCE DOESN'T
8 SUGGEST THAT SHE CAN'T RETURN TO WORK. THERE'S NO
9 OUT-OF-WORK NOTE, AND WE THINK SHE COULD HAVE AND
10 SHOULD HAVE BEEN WORKING THIS ENTIRE TIME.

11 WE THINK THERE CERTAINLY IS A NUMBER OF
12 CREDIBILITY ISSUES THAT WE WILL BRING TO LIGHT OVER
13 THE COURSE OF THE HEARING. THAT WILL -- I THINK
14 THAT'S GOING TO CERTAINLY BE A BIG ISSUE IN THE
15 CASE. AGAIN, I RESERVE THE RIGHT TO ADD TO THAT
16 AFTER I HEAR FROM MR. HARBISON.

17 **BY THE COMMISSIONER:**

18 ALL RIGHT. MR. HARBISON, ON BEHALF OF
19 COUNTRYWIDE AND GUARANTEE?

20 **BY MR. HARBISON:**

21 THANK YOU, COMMISSIONER. AGAIN, INITIALLY,
22 COMMISSIONER, THE CENTRAL, I THINK, CORE ISSUE IS,
23 INDEED, WHETHER THE CLAIMANT IS AN INDEPENDENT
24 CONTRACTOR OR -- AND, THEREFORE, EXCLUDED UNDER THE
25 ACT -- OR AN EMPLOYEE. I DON'T THINK I'M OVER

1 EXAGGERATING WHEN I SAY I THINK YOU'RE GOING TO HEAR
2 OVERWHELMING EVIDENCE THAT SHOWS THAT SHE SHOULD BE
3 -- OR ESSENTIALLY WAS AN INDEPENDENT CONTRACTOR
4 EXCLUDED FROM THE ACT. AMONG OTHER THINGS, SHE
5 COMPLETED SEVERAL INDEPENDENT CONTRACTOR
6 APPLICATIONS, INDEPENDENT CONTRACTOR AGREEMENTS.
7 WHILE STEPHEN POINTED OUT THAT SHE COMPLETED A W-4,
8 HE DIDN'T POINT OUT THAT WAS IN 2013. ONE YEAR
9 LATER, IN 2014, AFTER SHE COMPLETED YET ANOTHER
10 INDEPENDENT CONTRACTOR AGREEMENT, SHE COMPLETED A
11 W-9. HE -- SHE REPEATEDLY FILED TAX RETURNS AS AN
12 INDEPENDENT CONTRACTOR/SOLE PROPRIETOR. THE
13 SUGGESTION THAT SHE WAS FORCED TO DO THAT AND COULD
14 NOT CHANGE THAT, WE JUST DON'T THINK IS PLAUSIBLE.
15 I THINK YOU CAN ALWAYS TELL THE TAX PEOPLE THAT YOU
16 WANT TO CHANGE YOUR FILING. YOU CAN'T REPRESENT TO
17 THE GOVERNMENT ONE THING WHEN IT'S JUST NOT TRUE.
18 EACH YEAR SHE RECEIVED A 1099 THAT SAID, QUOTE,
19 "NON-EMPLOYEE," CLOSE QUOTE, COMPENSATION. SHE HAD
20 THE ABILITY TO TURN DOWN SHIFTS. THEY MADE NO
21 WITHHOLDINGS FOR HER. SHE PROVIDED HER OWN
22 UNIFORMS. THERE ARE NUMEROUS SUBMISSIONS BY MS.
23 TURNER IN HER DEPOSITION THAT SHE CHOSE THIS
24 ARRANGEMENT SO SHE COULD BE MORE FLEXIBLE. THUS, I
25 THINK EVERYONE AGREES THAT SHE WENT THROUGH A VERY

1 TOUGH ORDEAL HERE, BUT WE THINK THERE IS
2 OVERWHELMING EVIDENCE THAT SHOWS THAT SHE'S AN
3 INDEPENDENT CONTRACTOR EXCLUDED FROM THE ACT. AND I
4 WON'T REITERATE WHAT JEFF SAID, BUT HE WENT OVER
5 SOME OF THE FACTORS WHICH WE THINK ESTABLISH THAT.

6 ALTERNATIVELY, IF YOU FIND THAT SHE IS AN
7 EMPLOYEE COVERED UNDER THE ACT, WE CONTEND THAT SHE
8 SHOULD BE FOUND TO BE EITHER AN EMPLOYEE OF THE
9 SOUTH CAROLINA DEPARTMENT OF CORRECTIONS OR
10 MEDUSTRIAL. AS I'VE OUTLINED IN MY PREHEARING
11 BRIEF, THE PARTIES HAVE -- WELL, ONE OR TWO OF THE
12 PARTIES HAVE MISTAKENLY REFERRED TO US -- AND THEY
13 HAVE INDICATED SOME CONFUSION ABOUT THE MODEL BY
14 WHICH MY CLIENT OPERATES. THERE IS A P.E.O. MODEL,
15 PROFESSIONAL ORGANIZATION MODEL, THAT IS COVERED
16 UNDER THE STATUTES, AND THEN THERE IS AN EMPLOYER OF
17 RECORD MODEL. WHILE A P.E.O. BECOMES A CLIENT'S CO-
18 EMPLOYER, AN E.O.R., EMPLOYER OF RECORD, MODEL, THEY
19 BECOME THE SOLE EMPLOYER OF RECORD. WE ENTERED INTO
20 THIS SERVICE AGREEMENT WITH CONDUSTRIAL, THROUGH
21 WHICH WE, MY CLIENT, AGREED TO FURNISH AND PROVIDE
22 SELECTED STAFFING EMPLOYEES. WE PROVIDED OUR
23 EMPLOYEES TO THEM. MY CLIENT NEVER HIRED MS. TURNER
24 AS AN EMPLOYEE, NEVER HEARD OF MS. TURNER. WE NEVER
25 HIRED HER AS AN INDEPENDENT CONTRACTOR. WE NEVER

1 TOOK THE RISK TO HIRE HER AS AN INDEPENDENT
2 CONTRACTOR, TO THINK THAT SOMEHOW SHE, YOU KNOW,
3 WOULD SOMEHOW FALL UNDER US. WE HAD NO RELATIONSHIP
4 WITH HER WHATSOEVER EITHER AS HIRING HER AS OUR
5 EMPLOYEE OR AS OUR INDEPENDENT CONTRACTOR. I DON'T
6 THINK SHE HAD EVER EVEN HEARD OF MY CLIENT.
7

8 ALSO, THE INSURANCE POLICY AT ISSUE WAS ISSUED
9 BY GUARANTEE INSURANCE COMPANY IN JUNE OF 2015. THE
10 POLICY WAS ISSUED TO COUNTRYWIDE STAFFING SOLUTIONS
11 GROUP AS AN EMPLOYER OF RECORD. IT WAS NOT ISSUED
12 TO CONDUSTRIAL. IT WAS NOT ISSUED TO MEDUSTRIAL.
13 THEY ARE NOT A NAMED PARTY -- OR NAMED INSURED UNDER
14 THE POLICY. SO, WE DON'T COVER THEIR EMPLOYEES. WE
15 ONLY COVER OUR EMPLOYEES OF RECORD. AGAIN, WE
16 COVERED A NUMBER OF W-2 EMPLOYEES THAT WE FURNISHED
17 BACK TO CONDUSTRIAL. WE COVERED THEM UNDER A
18 WORKERS' COMPENSATION POLICY. BUT WE NEVER AGREED
19 TO COVER ANY 1099 EMPLOYEES. THERE WERE 130
20 INDEPENDENT CONTRACTOR NURSES OUT THERE FROM
21 CONDUSTRIAL THAT WE KNEW NOTHING ABOUT. WE DID KNOW
22 ABOUT TEN OR SO W-2 NURSES OUT THERE IN THE UPSTATE
23 THAT THEY TREATED AS W-2 EMPLOYEES, BUT WE DIDN'T
24 KNOW ABOUT THESE 1099 NURSES. CONDUSTRIAL HAS
25 CONSTRUCTION ON THIS SIDE, AND THEN THEY HAVE
MEDUSTRIAL AS A DIVISION. MEDUSTRIAL DOES THE

1 NURSING. UNDER MEDUSTRIAL THEY'VE GOT ABOUT TEN
2 NURSES IN THE UPSTATE THEY TREAT AS W-2 EMPLOYEES.
3 THEY MAKE THEIR WITHHOLDINGS. THEY DO EVERYTHING --
4 THEY REQUIRE THEM TO TAKE SHIFTS. THEY TREAT THEM
5 AS ANY OTHER EMPLOYER WOULD. MEDUSTRIAL HAD THESE
6 130 INDEPENDENT CONTRACTOR NURSES OUT THERE THAT
7 THEY DIDN'T REPORT TO MY CLIENT, BUT ALSO THEY
8 DIDN'T -- THEY TREATED AS INDEPENDENT CONTRACTORS.
9 THEY LET THEM TURN DOWN SHIFTS, DIDN'T REQUIRE THEM
10 TO TAKE VACATION PAY, THOSE KIND OF THINGS. IT IS
11 UNDISPUTED THAT CONDUSTRIAL NEVER REPORTED ANY
12 PAYROLL ON THESE NURSES TO MY CLIENT, NEVER PAID ANY
13 PREMIUM, AND MY CLIENTS NEVER CHARGED THEM ANY
14 PREMIUMS ON THESE 1099 NURSES. SO, SHOULD YOU FIND
15 HER TO BE AN EMPLOYEE OF MEDUSTRIAL/CONDUSTRIAL, WE
16 BELIEVE WE'RE NOT REMOTELY RESPONSIBLE FOR THAT.

17 ALTERNATIVELY, AS STEPHEN POINTED OUT, MR.
18 SAMUELS POINTED OUT, I THINK YOU CAN FIND THAT SHE
19 CLEARLY IS EITHER A STATUTORY EMPLOYEE OR AN
20 EMPLOYEE OF THE DEPARTMENT OF CORRECTIONS. TO THE
21 EXTENT ANYONE HAD CONTROL OVER HER, QUITE FRANKLY,
22 THE DEPARTMENT OF CORRECTIONS HAD THE MOST PROBABLY.
23 THEY HAD THE MOST INTERACTION AND DEGREE OF CONTROL
24 OVER HER. THE -- AND I THINK IT WOULD MEET THE
25 STATUTORY EMPLOYER TEST. PROVIDING HEALTH CARE TO

1 INMATES WOULD ESSENTIALLY BE PART OF THEIR -- WHAT
2 THE DEPARTMENT OF CORRECTIONS DOES AS PART OF ITS
3 BUSINESS AND ITS OPERATIONS.

4 I DID WANT TO BACK UP. I'M SORRY; I MEANT TO
5 MENTION THE AVERAGE WEEKLY WAGE AND COMPENSATION
6 RATE ISSUE. WE AGREE WITH THE AVERAGE WEEKLY WAGE
7 AND COMPENSATION RATE THAT COUNSEL FOR CONDUCTRIAL
8 MENTIONED. WE RELY IN PART ON THE *STEPHEN V. AVINS*
9 CASE, WHICH WE WOULD BRING YOUR ATTENTION TO AND
10 WHICH I MENTIONED IN THE PREHEARING CONFERENCE.
11 AGAIN, IN THAT THEY HELD THAT -- THE COURT HELD THAT
12 EXPENSES INCURRED IN PRODUCING REVENUE SHOULD BE
13 DEDUCTED FROM THAT WHICH THE EMPLOYEE RECEIVES FROM
14 THE EMPLOYER. IN *STEPHEN* THE SUPREME COURT SAID
15 THAT THE CLAIMANT SHOULD NOT BE ALLOWED TO COUNT AS
16 INCOME CAR AND TRUCK EXPENSES. WELL, HERE SHE IS
17 ATTEMPTING TO COUNT THOSE EXPENSES AS INCOME TO THE
18 TUNE OF \$11,000. IN *STEPHEN* THEY SAID THAT YOU
19 SHOULD NOT BE ABLE TO COUNT OFFICE EXPENSES AS PART
20 OF YOUR INCOME. WELL, HERE THAT'S WHAT MS. TURNER
21 IS TRYING TO DO, \$1,700 FOR WHATEVER OFFICE EXPENSES
22 SHE HAD. *STEPHEN*, THEY SAID THAT YOU SHOULDN'T BE
23 ABLE TO COUNT MEALS AND ENTERTAINMENT. HERE THAT'S
24 EXACTLY WHAT THE CLAIMANT IS TRYING TO DO. IT JUST
25 SEEMS TO ME THAT IT WOULD BE UNFAIR TO TREAT HER

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2 THE DEPARTMENT OF CORRECTIONS DOES AS PART OF ITS
3 BUSINESS AND ITS OPERATIONS.

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7 AND COMPENSATION RATE THAT COUNSEL FOR CONDUCTRUAL
8 MENTIONED. WE RELY IN PART ON THE *STEPHEN V. AVINS*
9 CASE, WHICH WE WOULD BRING YOUR ATTENTION TO AND
10 WHICH I MENTIONED IN THE PREHEARING CONFERENCE.
11 AGAIN, IN THAT THEY HELD THAT -- THE COURT HELD THAT
12 EXPENSES INCURRED IN PRODUCING REVENUE SHOULD BE
13 DEDUCTED FROM THAT WHICH THE EMPLOYEE RECEIVES FROM
14 THE EMPLOYER. IN *STEPHEN* THE SUPREME COURT SAID
15 THAT THE CLAIMANT SHOULD NOT BE ALLOWED TO COUNT AS
16 INCOME CAR AND TRUCK EXPENSES. WELL, HERE SHE IS
17 ATTEMPTING TO COUNT THOSE EXPENSES AS INCOME TO THE
18 TUNE OF \$11,000. IN *STEPHEN* THEY SAID THAT YOU
19 SHOULD NOT BE ABLE TO COUNT OFFICE EXPENSES AS PART
20 OF YOUR INCOME. WELL, HERE THAT'S WHAT MS. TURNER
21 IS TRYING TO DO, \$1,700 FOR WHATEVER OFFICE EXPENSES
22 SHE HAD. *STEPHEN*, THEY SAID THAT YOU SHOULDN'T BE
23 ABLE TO COUNT MEALS AND ENTERTAINMENT. HERE THAT'S
24 EXACTLY WHAT THE CLAIMANT IS TRYING TO DO. IT JUST
25 SEEMS TO ME THAT IT WOULD BE UNFAIR TO TREAT HER

1 DIFFERENTLY THAN THE CLAIMANT WAS TREATED BY THE
2 SUPREME COURT IN *STEPHEN*. HE WAS -- MR. STEPHEN IN
3 THAT CASE WAS A SUBCONTRACTOR WHO FILED AS A SOLE
4 PROPRIETOR AND AGREED TO COME UNDER THE WORKERS'
5 COMPENSATION ACT THROUGH HIS UPSTREAM EMPLOYER.
6 HERE -- AND THEY SAID, WELL, IN THAT CASE, IF YOU'RE
7 GOING TO DO THAT, YOU'RE NOT ALLOWED TO COUNT YOUR
8 DEDUCTIONS TOWARDS YOUR INCOME. HERE WE HAVE AN
9 INDEPENDENT CONTRACTOR WHO FILED, JUST LIKE MR.
10 STEPHEN, AS A SOLE PROPRIETOR/INDEPENDENT
11 CONTRACTOR. IF SHE'S FOUND AS AN EMPLOYEE, LIKE
12 STEPHEN, SHE'S FOUND TO COME UNDER THE WORKERS'
13 COMPENSATION ACT. BUT THE SAME PRINCIPLES STILL
14 APPLY FOR NOT ALLOWING SOMEONE TO DEDUCT -- OR TO
15 COUNT DEDUCTIONS AS INCOME. I WOULD POINT OUT, I
16 DON'T THINK SHE PAID -- OTHER THAN ABOUT \$2,000 IN
17 SELF-EMPLOYMENT TAX, I DON'T THINK SHE PAID ANY
18 INCOME TAXES IN 2013, 2014, OR 2015. IN FACT, SHE
19 ACTUALLY GOT AN EARNED INCOME TAX CREDIT. SO, TO
20 ALLOW HER TO HAVE WHAT APPEARS TO BE CLOSE TO THE
21 MAXIMUM COMPENSATION RATE, WHEN SHE TURNS AROUND AND
22 REPRESENTS TO THE FEDERAL GOVERNMENT THAT SHE'S AN
23 INDEPENDENT CONTRACTOR AND GETS AN EARNED INCOME TAX
24 CREDIT AND PAYS NO TAXES, WE THINK IS TOTALLY
25 UNFAIR. THE WORKERS' COMP ACT, IN 42-1-40,

1 REPEATEDLY MENTIONED THAT SOMETHING HAS TO BE FAIR
2 TO ALL PARTIES ON THIS ISSUE. IT HAS TO BE
3 EQUITABLE AND JUST TO ALL. YOU HAVE TO COME UP WITH
4 A FAIR APPROXIMATION OF THE AVERAGE WEEKLY WAGE
5 THAT'S FAIR TO EVERYBODY. AND THAT JUST, I BELIEVE,
6 -- WE WOULD CONTEND IS NOT FAIR TO THE DEFENDANTS
7 SHOULD YOU FIND HER TO BE AN EMPLOYEE.

8 LET'S SEE. OH, WITH RESPECT TO DUTY TO DEFEND,
9 WE WOULD RESPECTFULLY CONTEND THAT THE COMMISSION
10 DOESN'T HAVE THE AUTHORITY OR JURISDICTION TO DO
11 THAT. IT'S NOT GIVEN TO THE COMMISSION BY STATUTE.
12 I WOULD THINK THAT WOULD PROBABLY BE SOMETHING THAT
13 WOULD HAVE TO BE RAISED ON THE CIVIL SIDE IN CIVIL
14 ACTION.

15 WE AGREE WITH THE POSITION THAT WAS STATED BY
16 COUNSEL FOR CONDUSTRIAL ON THE LIGHT-DUTY ISSUE. I
17 THINK IT'S GOING TO BE UNDISPUTED THAT WE OFFERED
18 DUTY -- OR CONDUSTRIAL OFFERED DUTY IMMEDIATELY
19 AFTER THIS ALLEGED WORK ACCIDENT IN A SAFE
20 ENVIRONMENT, SOMEWHERE FAR AWAY FROM THE PRISON. TO
21 CLAIM THAT IT WAS A CYNICAL ATTEMPT IS -- HAS NO
22 BASIS FOR IT. WHEN STEPHEN CITED SOME ALLEGED
23 SUPPORT FOR WORK EXCUSES, WHAT I HEARD WAS THE
24 CLAIMANT REQUESTING WORK EXCUSES BUT NEVER ACTUALLY
25 GETTING ANYTHING IN WRITING REGARDING A WORK EXCUSE.

1 THE ONE THAT HE DOES RELY ON IS DR. HESS. THAT WAS
2 A ONE-TIME ORTHOPEDIC EVALUATION THAT WAS COMPLETELY
3 NORMAL, AND SHE NEVER ATTEMPTED TO GO BACK TO DR.
4 HESS. STEPHEN -- THERE WERE NEVER ANY ARRANGEMENTS
5 FOR HER TO GO BACK TO DR. HESS FOLLOWING THAT LIGHT-
6 DUTY EXCUSE.

7 NOTABLY, I DON'T KNOW WHETHER WE WOULD BE
8 WILLING TO STIPULATE TO THIS OR NOT, BUT THE
9 DEPARTMENT OF CORRECTIONS, IF THEY'RE NOT LIABLE AS
10 AN EMPLOYER, THEY CERTAINLY COULD BE LIABLE AS A
11 STATUTORY EMPLOYER. THEY DID NOT HAVE A VALID
12 CERTIFICATE OF INSURANCE. I THINK THAT'S GOT TO BE
13 UNDISPUTED. WE HAVE THOROUGHLY INVESTIGATED THAT
14 THROUGH DISCOVERY IN THIS CASE. IF THEY WON'T
15 STIPULATE TO THAT, IT WILL COME OUT IN EVIDENCE,
16 THAT THERE WAS NOT ONE IN PLACE. THEY DID NOT HAVE
17 A CERTIFICATE OF INSURANCE IN PLACE AT THE TIME OF
18 THIS ALLEGED ACCIDENT, CERTAINLY NOT ONE THAT WAS
19 VALID. THEREFORE, I DON'T THINK THEY WOULD HAVE ANY
20 INSULATION FROM LIABILITY UNDER 42-1-415. AND
21 THAT'S IT, COMMISSIONER. THANK YOU.

22 **BY THE COMMISSIONER:**

23 THE DEPARTMENT OF CORRECTIONS AND STATE
24 ACCIDENT FUND, MS. FARTHING.

25 **BY MS. FARTHING:**

1 THANK YOU, COMMISSIONER. I THINK AT THIS
2 POINT, BETWEEN YOUR STATEMENT WHEN WE INITIALLY WENT
3 ON THE RECORD AND THE STATEMENTS OF THE PARTIES, I
4 THINK THAT THE RESPECTIVE POSITIONS OF THE CLAIMANT
5 AND THE DEFENDANTS ARE ON RECORD AT THIS POINT. I'M
6 NOT GOING TO REGURGITATE THE SAME ARGUMENTS, IN
7 PARTICULAR WITH REGARD TO THE COMP RATE, BACK
8 T.T.D., DIRECTION OF MEDICAL CARE, ALL THAT. I
9 THINK THAT'S PRETTY FIRMLY ON THE RECORD AS FAR AS
10 WHAT THE DEFENDANTS' POSITION IS.

11 AS TO THE RELATIONSHIP BETWEEN THE DEPARTMENT
12 OF CORRECTIONS AND MS. TURNER, MS. TURNER WAS ONLY
13 AT THE DEPARTMENT OF CORRECTIONS DOING THIS WORK
14 THROUGH THE CONTRACT BETWEEN MEDUSTRIAL/CONDUSTRIAL
15 AND THE DEPARTMENT OF CORRECTIONS. THAT CONTRACT
16 CLEARLY AND UNEQUIVOCALLY SETS FORTH THAT THESE
17 INDIVIDUALS WILL NOT BE EMPLOYEES OF THE SOUTH
18 CAROLINA DEPARTMENT OF CORRECTIONS. MS. TURNER,
19 THROUGH THE COURSE OF BOTH THE DEPOSITIONS THAT HAVE
20 BEEN TAKEN AND THROUGH THE MEDICAL RECORDS AND
21 THROUGH OTHER DOCUMENTATION FILED BOTH IN THIS CLAIM
22 AND ANOTHER CLAIM THAT SHE HAS PENDING UNDER THE
23 FAIR LABOR STANDARD ACT, HAS BEEN VERY CLEAR THAT
24 SHE NEVER THOUGHT THAT SHE WAS AN EMPLOYEE OF THE
25 DEPARTMENT OF CORRECTIONS AND, IN FACT, DIDN'T WANT

1 TO BE AN EMPLOYEE OF THE DEPARTMENT OF CORRECTIONS.
2 SHE WAS ASKED IF SHE WOULD BE INTERESTED IN
3 APPLYING. SHE DIDN'T WANT TO. IN HER DEPOSITION
4 SHE SPECIFICALLY TESTIFIED THAT SHE LIKED THE
5 AUTONOMY AND THE FLEXIBILITY OF WORKING THERE
6 THROUGH THIS CONTRACT VERSUS BEING AN EMPLOYEE.

7 AS FAR AS THE CERTIFICATE OF INSURANCE ISSUE,
8 THE CONTRACT IS BOTH ATTACHED TO OUR PREHEARING
9 BRIEF AND ALSO EXHIBIT "G" TO THE CLAIMANT'S
10 PREHEARING BRIEF. THE COVER LETTER TO THE CONTRACT
11 SPECIFICALLY ASKED FOR THEM TO PROVIDE PROOF OF
12 INSURANCE AS SET FORTH UNDER THE CONTRACT. THE
13 CONTRACT REQUIRED BOTH WORKERS' COMP INSURANCE AND
14 LIABILITY INSURANCE. IN 2010 A CERTIFICATE OF
15 INSURANCE WAS PROVIDED THROUGH A.M.S. STAFF LEASING,
16 WHICH INDICATED CONDUSTRIAL AS THE INSURED AND THE
17 CERTIFICATE HOLDER AS THE DEPARTMENT OF CORRECTIONS.
18 IT SPECIFICALLY PROVIDED THAT IT PROVIDED WORKERS'
19 COMP AND EMPLOYER'S LIABILITY COVERAGE AND PROVIDED
20 IN THE DESCRIPTION OF OPERATIONS, QUOTE, "THIS
21 CERTIFICATE REMAINS IN EFFECT PROVIDED THE CLIENT'S
22 ACCOUNT IS IN GOOD STANDING WITH A.M.S. STAFF
23 LEASING." AT THAT POINT, PER THE CONTRACT, IT WAS
24 MEDUSTRIAL'S OBLIGATION TO PROVIDE THE PROOF OF
25 INSURANCE AND ALSO, UNDER PART FIVE OF THAT

1 CONTRACT, TO MAINTAIN EVIDENCE OF INSURANCE COVERAGE
2 WITHIN THE PERSONNEL FILES MAINTAINED OF EACH
3 INDIVIDUAL SENT PURSUANT TO THAT CONTRACT. I THINK
4 IT'S A LITTLE DISINGENUOUS TO PROVIDE A CERTIFICATE
5 OF INSURANCE IN 2010 AND THEN TO PROVIDE ADDITIONAL
6 CERTIFICATES OF INSURANCE IN DECEMBER OF 2015 AND
7 ONWARD AND THEN TRY AND BASICALLY ATTACH LIABILITY
8 TO US BECAUSE OF A FAILURE TO PROVIDE A CERTIFICATE
9 OF INSURANCE THEY KNEW THEY WERE SUPPOSED TO DO --
10 OR THAT THEY WERE SUPPOSED TO PROVIDE. THE EVIDENCE
11 IN THIS CLAIM CLEARLY SETS FORTH THAT THEY KNEW THEY
12 WERE SUPPOSED TO PROVIDE CERTIFICATES OF INSURANCE.
13 AS FAR AS THE DEPARTMENT OF CORRECTIONS KNEW, THE
14 RELATIONSHIP WITH A.M.S. AND CONDUSTRIAL WAS
15 CONTINUING WELL PAST 2010 AND THAT THIS INSURANCE
16 COVERAGE, PER THE FIRST PAGE OF DEFENDANT'S EXHIBIT
17 "D," WAS STILL CONTINUING AND APPLICABLE.

18 WE WOULD CONTEND THAT WE HAVE ENOUGH IN THE
19 RECORD TO SATISFY THE REQUIREMENTS OF 42-1-415.
20 ALTERNATIVELY, WE WOULD CONTEND THAT SHOULD MS.
21 TURNER BE FOUND TO BE AN EMPLOYEE, THAT ANY
22 LIABILITY OF DEPARTMENT OF CORRECTIONS IS SECONDARY
23 TO THAT OF MEDUSTRIAL AND BY WAY OF THE RELATIONSHIP
24 BETWEEN MEDUSTRIAL AND -- OR CONDUSTRIAL AND
25 COUNTRYWIDE, BETWEEN THOSE TWO.

1 AS FAR AS THE SHATTO CASE, THERE'S A NUMBER OF
2 DISTINGUISHING FACTORS BETWEEN THE SHATTO CASE AND
3 THE CURRENT CASE. THE STAFFING AGENCY, AT THE TIME
4 THAT THIS CASE GOT TO THE COURT OF APPEALS AND THE
5 SUPREME COURT, WAS NO LONGER A PARTY TO THE ACTION.
6 THEIR RELATIONSHIP, THEIR EMPLOYMENT RELATIONSHIP
7 AND THEIR RESPONSIBILITY WAS NOT AT ISSUE. THE ONLY
8 CONSIDERATION FOR THE COURT WAS THE CLAIMANT AND THE
9 HOSPITAL WHERE SHE WAS PROVIDED AS A LEASED
10 EMPLOYEE. I BELIEVE, ACTUALLY, SHE WAS REFERENCED
11 AS A BORROWED SERVANT IN THAT CASE BECAUSE SHE WAS
12 NOT -- IN THE PRESENT CLAIM ANOTHER STRONG
13 DISTINGUISHING FACTOR IS THE FACT THAT MS. SHATTO
14 WAS PROVIDED FOR A SEVERAL MONTH ASSIGNMENT TO THE
15 HOSPITAL. WITH MS. TURNER IT WAS SHIFT BY SHIFT.
16 NOT ONLY DID SHE HAVE TO ACCEPT IT, BUT IT HAD TO BE
17 APPROVED BY MEDUSTRIAL. SHE WAS NOT GUARANTEED FOR
18 ANY PERIOD OF TIME BEYOND THE SHIFT THAT SHE WAS
19 THERE, AND, FRANKLY, SHE COULD HAVE WALKED OUT
20 WITHOUT ANY KIND OF CONSEQUENCES BY THE DEPARTMENT
21 OF CORRECTIONS BECAUSE THERE WAS NO DISCIPLINARY
22 POLICY; THERE WAS NO GRIEVANCE POLICY; THERE WAS
23 REALLY NO REPERCUSSIONS OR NO CONSEQUENCES TO HER
24 DOING THAT AS FAR AS ANY KIND OF RELATIONSHIP
25 BETWEEN HER AND THE DEPARTMENT OF CORRECTIONS.

1 AGAIN, THE STAFFING AGENCY, SINCE THERE WAS NO -- IT
2 WAS NOT A PARTY TO THE APPEAL AT THAT POINT, THERE'S
3 NO INDICATION AS TO WHAT KIND OF CONTRACT WAS IN
4 PLACE BETWEEN THE HOSPITAL AND THE STAFFING AGENCY
5 IN THAT CLAIM, NO INDICATION IF IT, LIKE IN THIS
6 CLAIM, SPECIFICALLY SET FORTH THAT THESE INDIVIDUALS
7 ARE NOT THE EMPLOYEES OF THE DEPARTMENT OF
8 CORRECTIONS OR THAT WORKERS' COMP INSURANCE WOULD BE
9 PROVIDED FOR THOSE INDIVIDUALS. AND IT'S UNCLEAR IN
10 THAT CLAIM WITH WHOM MS. SHATTO BELIEVED SHE WAS
11 EMPLOYED. IN THIS CLAIM IT'S CLEAR THAT MS. TURNER
12 BELIEVED THAT SHE WAS EMPLOYED WITH MEDUSTRIAL AND
13 NEVER BELIEVED NOR WANTED TO BE EMPLOYED WITH THE
14 DEPARTMENT OF CORRECTIONS.

15 AS FAR AS ANY OF THE FACTORS SPECIFIC TO THE
16 DEPARTMENT OF CORRECTIONS WITH REGARD TO THE
17 EMPLOYEE/INDEPENDENT CONTRACTOR RELATIONSHIP, THEY
18 HAD NO CONTROL OF WHETHER SHE'D EVEN SHOW UP DAY BY
19 DAY. THEY HAD NO WAY TO CONTROL IF SHE WOULD SHOW
20 UP FOR THE SHIFT, IF SHE WANTED TO TAKE A SHIFT, IF
21 MEDUSTRIAL WOULD EVEN PERMIT HER TO TAKE THAT SHIFT.
22 THERE WAS NO PAYMENT BY DEPARTMENT OF CORRECTIONS TO
23 MS. TURNER. THEY PROVIDED NO BENEFITS, NO LEAVE, NO
24 RETIREMENT, NO INSURANCE, NOR DID SHE ANTICIPATE
25 THAT SHE WOULD HAVE ANY OF THAT FROM THE DEPARTMENT

1 OF CORRECTIONS. THEY COULD NOT FIRE HER, AS SHE WAS
2 NEVER HIRED. AGAIN, IT WAS SHIFT BY SHIFT WHETHER
3 SHE WOULD EVEN CHOOSE TO GO TO THE DEPARTMENT OF
4 CORRECTIONS OR ANY OF THE OTHER COMPANIES WITH WHICH
5 MEDUSTRIAL CONTRACTED.

6 AND AS FAR AS THE PROVISION OF EQUIPMENT,
7 THERE'S OBVIOUSLY CERTAIN SECURITY CONCERNS THAT NOT
8 ONLY ARE DEALT WITH IN THE MEDICAL FIELD AS FAR AS
9 AN INDIVIDUAL PROVIDING THEIR OWN MEDICATIONS OR
10 NEEDLES OR ANYTHING ALONG THOSE LINES, BUT THERE'S
11 ALSO SECURITY CONCERNS, GIVEN THAT THIS IS THE
12 DEPARTMENT OF CORRECTIONS. I BELIEVE THE FIRST
13 PERSON TO TESTIFY TODAY IS GOING TO BE JUSTIN
14 GUDVANGEN, WHO BASICALLY INDICATED THAT SOME OF THE
15 SUPPLIES THAT A NURSE TYPICALLY WOULD PROVIDE
16 THEMSELVES AND THE EQUIPMENT THAT THEY WOULD CARRY
17 WITH THEM ARE BANDAGE SCISSORS, FORCEPS, THINGS
18 ALONG THOSE LINES, WHICH COULD POTENTIALLY BE A
19 SECURITY THREAT, SO THOSE HAD TO BE ACTUALLY CHECKED
20 IN AND CHECKED OUT AT THE DEPARTMENT OF CORRECTIONS,
21 GIVEN THE NATURE OF THE SECURED FACILITY.

22 I THINK THAT'S -- AND, FURTHERMORE, GOING BACK
23 TO THE CONTRACT, HER ONLY BEING THERE DEPENDENT UPON
24 -- PURSUANT TO THE TERMS OF THE CONTRACT BETWEEN
25 SOUTH CAROLINA DEPARTMENT OF CORRECTIONS AND

1 MEDUSTRIAL, NONE OF THE PROVISIONS OF THAT CONTRACT
2 WERE DIRECTLY ENFORCEABLE AGAINST MS. TURNER.

3 ULTIMATELY, WE BELIEVE THAT THE EVIDENCE
4 STRONGLY INDICATES AND SUPPORTS THE FACT THAT SHE IS
5 NOT AN EMPLOYEE OF THE DEPARTMENT OF CORRECTIONS,
6 NEVER WAS AN EMPLOYEE OF THE DEPARTMENT OF
7 CORRECTIONS, AND WE CONTEND THAT WE SHOULD BE
8 RELEASED FROM THIS CLAIM PURSUANT TO 42-1-415.
9 THANK YOU.

10 **BY THE COMMISSIONER:**

11 MS. GLOVER, ON BEHALF OF THE UNINSURED FUND.

12 **BY MS. GLOVER:**

13 COMMISSIONER, IT'S THE FUND'S POSITION THAT
14 NONE OF THE PARTIES HERE ARE ABLE TO TRANSFER
15 LIABILITY TO THE FUND UNDER 42-1-415, AS THERE IS NO
16 VALID CERTIFICATE OF INSURANCE IN PLACE ON THE DATE
17 OF ACCIDENT. WE DON'T FEEL THAT ANY PARTY CAN RELY
18 ON A 2010 CERTIFICATE OF INSURANCE WHEREBY
19 CONTRACTUALLY IT WAS SUPPOSED TO BE EXTENDED. IF
20 THE ACTUAL POLICY ITSELF WAS NOT EXTENDED, THEN
21 THERE IS NO COVERAGE. IF THERE IS NO COVERAGE, THEN
22 WE CONTEND THAT IT GOES UPSTREAM, NOT TO THE FUND.

23 IN REGARDS TO IF YOU FIND THE CLAIMANT TO BE AN
24 EMPLOYEE, WE WOULD AGREE WITH THE OTHER POSITIONS OF
25 THE OTHER DEFENDANTS IN THE CLAIM, COMMISSIONER.

1 BY THE COMMISSIONER:

2 ANYTHING ELSE ON BEHALF OF THE CLAIMANT?

3 BY MR. SAMUELS:

4 IF I MAY IN REPLY, YOUR HONOR, I WOULD LIKE TO
5 ADDRESS SEVERAL POINTS THAT WERE MADE.

6 BY MS. GLOVER:

7 COMMISSIONER, BEFORE STEPHEN STARTS I NEED TO
8 STEP OUT TO MAKE A PHONE CALL. I'VE GOT A
9 POTENTIALLY SICK CHILD.

10 BY THE COMMISSIONER:

11 ALL RIGHT. WE WILL JUST TAKE A COUPLE OF
12 MINUTES.

13 (OFF THE RECORD)

14 BY THE COMMISSIONER:

15 ALL RIGHT. MR. SAMUELS.

16 BY MR. SAMUELS:

17 THANK YOU, YOUR HONOR. I WANTED TO RESPOND TO
18 THE CONTENTIONS MADE BY THE VARIOUS DEFENDANTS. I
19 BELIEVE IT WAS MR. GOODWYN WHO DISCUSSED THAT THE
20 EMPLOYER RETAINS THE RIGHT TO DIRECT THE MEDICAL
21 TREATMENT. I WOULD MAKE TWO POINTS ON THAT. ONE,
22 THAT'S NOT ACTUALLY THE LAW. THE LAW IS THAT THE
23 EMPLOYER HAS THE OBLIGATION TO PROVIDE MEDICAL
24 TREATMENT DEEMED NECESSARY BY THE ATTENDING
25 PHYSICIAN. THEY DO NORMALLY HAVE THE ABILITY TO

1 APPOINT THE ATTENDING PHYSICIAN, AND THAT WOULD BE
2 THE CASE HAD THEY ACCEPTED THIS CASE. IN THIS CASE,
3 THIS CASE IS DENIED. THEY'VE WAIVED THEIR RIGHT TO
4 SELECT THE ATTENDING PHYSICIAN, AND MS. TURNER IS
5 ENTITLED TO HAVE TREATMENT THROUGH THE PHYSICIANS OF
6 HER CHOICE.

7 I WANTED TO TALK ABOUT SOME OF THE OTHER
8 ARGUMENTS. IT WAS POINTED OUT, I BELIEVE BY MR.
9 HARBISON, THAT MS. TURNER RECEIVED A 1099 THAT
10 STATES NON-EMPLOYEE COMPENSATION. THAT'S PRECISELY
11 OUR POINT ON THE TAX RETURNS. THE EMPLOYER,
12 CONDUSTRIAL, CHOSE TO CLASSIFY HER AS A 1099
13 EMPLOYEE. THEY MADE THE UNILATERAL DECISION TO PAY
14 HER ON A 1099. SHE WAS FORCED INTO THAT
15 RELATIONSHIP. BECAUSE SHE FILLED OUT A W-4 AND
16 OTHER FORMS THAT WOULD INDICATE SHE WAS AN EMPLOYEE,
17 UNDER CHAVIS V. WATKINS SHE WAS ALLOWED -- SHOULD BE
18 ALLOWED TO HAVE THAT EMPLOYMENT RELATIONSHIP
19 CONTINUE.

20 ON THE AVERAGE WEEKLY WAGE ISSUE AND STEPHEN
21 VERSUS AVINS CASE, MR. HARBISON IS ATTEMPTING TO
22 COMPARE AN EMPLOYEE TO AN OWNER WHO ELECTS TO BE
23 UNDER THE ACT. IN THE STEPHEN CASE, THE CLAIMANT IN
24 THAT CASE WAS THE OWNER OF A BUSINESS WHO HAD
25 EMPLOYEES AND PAID THE EMPLOYEES OUT OF HIS GROSS

1 REVENUE. HE ELECTED TO BE SUBJECT TO THE ACT, WHICH
2 AN OWNER OF A SOLE PROPRIETORSHIP CAN DO. HE HAS
3 THAT OPTION. BUT IN THAT CASE HE HAD A BUSINESS.
4 HE WAS A SUBCONTRACTOR. MS. TURNER IS AN EMPLOYEE.
5 HER RATE OF PAY AND HER EARNINGS WERE DETERMINED BY
6 THE EMPLOYER. AND IF WE TAKE A LOOK AT SECTION 42-
7 1-40, IT TALKS ABOUT AVERAGE WEEKLY WAGE MEANS THE
8 EARNINGS OF THE INJURED EMPLOYEE, AND THEN THEY MAKE
9 A REFERENCE TO THAT IT SHOULD BE CALCULATED BY
10 TAKING THE TOTAL WAGES PAID FOR THE LAST FOUR
11 QUARTERS PRECEDING THE QUARTER IN WHICH THE INJURY
12 OCCURRED, AS REPORTED ON THE DEPARTMENT OF
13 EMPLOYMENT AND WORKFORCE'S EMPLOYER CONTRIBUTION
14 REPORTS, DIVIDED BY 52 OR THE ACTUAL NUMBER OF WEEKS
15 IN WHICH WAGES WERE PAID. WE ACKNOWLEDGE THAT
16 BECAUSE THEY MISCLASSIFIED HER AS AN INDEPENDENT
17 CONTRACTOR, NOT AN EMPLOYEE, THEY DIDN'T FILE
18 ANYTHING WITH THE DEPARTMENT OF EMPLOYMENT AND
19 WORKFORCE. NONETHELESS, THE REST OF IT REMAINS
20 TRUE. IF YOU LOOK AT PAGE 228 OF THE CLAIMANT'S APA
21 SUBMISSIONS, THERE IS AN EXHIBIT FROM CONDUSTRIAL
22 THAT SAYS YEAR-TO-DATE EARNINGS AND COVERS HER
23 EARNINGS DURING THE 52-WEEK PERIOD PRIOR. SO IT IS
24 THAT, YOUR HONOR, THAT WE CONTEND IS THE EVIDENCE
25 THAT WOULD DETERMINE WHAT HER WEEKLY AVERAGE WEEKLY

1 WAGE AND COMPENSATION RATE IS. AND THAT'S STILL GOT
2 TO BE THE WAY YOU HAVE TO GO. THE ONLY WAY TO GO
3 BEYOND THE ACTUAL EARNINGS PAID TO THE CLAIMANT BY
4 CONDUSTRIAL IS IF YOU FIND EXCEPTIONAL REASONS.
5 THERE ARE NO EXCEPTIONAL REASONS HERE THAT WOULD
6 JUSTIFY A DEVIATION FROM THE WAGE. THAT'S WHAT THEY
7 PAID HER, AND THAT'S THE WAY IT'S ALWAYS BEEN. WHEN
8 YOU ARE AN EMPLOYEE AND YOU ARE PAID BY THE
9 EMPLOYER, YOUR AVERAGE WEEKLY WAGE IS THE AVERAGE OF
10 YOUR WAGES. THERE ARE NO EXCEPTIONAL CIRCUMSTANCES
11 HERE THAT WOULD JUSTIFY A DEVIATION FROM THAT, IN
12 PARTICULAR ANY DEVIATIONS THAT -- OR ANY EXCEPTIONAL
13 FACTORS THAT WERE WITHIN HER CONTROL.

14 THE DEPARTMENT OF CORRECTIONS POINTED OUT THAT
15 THEY HAVE SPECIAL SECURITY CONCERNS BECAUSE THEY ARE
16 A CORRECTIONAL INSTITUTION. THAT, YOUR HONOR, IS
17 EVIDENCE OF CONTROL. OF COURSE, IN THIS CASE, WHICH
18 IS ACTUALLY ON THE JOB THAT SHE IS PUT INTO BY
19 CONDUSTRIAL, THE JOB IN THE PRISON HAD A LOT OF
20 EVIDENCE OF CONTROL AS PART OF THE SECURITY
21 CONCERNS, EVIDENCE OF CONTROL THAT MAKES HER AN
22 EMPLOYEE.

23 LASTLY, I WANTED TO TALK ABOUT COLLATERAL
24 ESTOPPEL. COUNTRYWIDE CONTENTS THAT BECAUSE THERE
25 IS AN ADMINISTRATIVE DECISION OF THE EMPLOYMENT

1 SECURITY COMMISSION HOLDING A PARTICULAR PERSON WAS
2 AN INDEPENDENT CONTRACTOR, NOT AN EMPLOYEE, THAT
3 THAT SOMEHOW SHOULD HAVE PRECLUSIVE EFFECT AS TO MS.
4 TURNER. THAT, YOU HONOR, IS MISGUIDED FOR A NUMBER
5 OF REASONS. WHAT CONDUCT IS ATTEMPTING TO DO IS
6 USE OFFENSIVE COLLATERAL ESTOPPEL, AND OFFENSIVE
7 COLLATERAL ESTOPPEL IS A SITUATION WHERE IN A
8 PREVIOUS LITIGATION NOT INVOLVING THE -- ONE OF THE
9 PARTIES A FACT IS ESTABLISHED. AND THERE ARE
10 ELEMENTS OF THAT, AND THE ELEMENTS ARE NOT MET HERE
11 BECAUSE MS. TURNER WAS NOT A PARTY TO THAT DECISION.
12 IF ANYTHING -- IF THE -- IF WHAT'S ---

13 **BY THE COMMISSIONER:**

14 AND I DON'T KNOW THAT MR. GOODWYN IS ARGUING
15 THAT IT'S ACTUALLY COLLATERAL ESTOPPEL. AND THERE'S
16 AN -- I CANNOT REMEMBER THE NAME OF IT, BUT THERE IS
17 AN OLD DECISION OUT THERE WITH THE -- NOT THE
18 DEPARTMENT OF WORKFORCE, WHATEVER THEY USED TO BE
19 CALLED, AND IT WAS ONE OF THEIR DECISIONS, AND THE
20 COURT SAID THAT THAT WASN'T -- THAT THAT DID NOT
21 OPERATE IN ANY TYPE OF ESTOPPEL MANNER. I'M NOT --
22 I'LL CERTAINLY LISTEN TO THE REST OF YOUR ARGUMENT,
23 BUT I'M NOT SURE THAT'S WHAT -- I THINK MR. GOODWYN
24 IS ARGUING THAT IT SHOULD -- AND HE CAN SPEAK TO
25 THIS, BUT I DID NOT TAKE IT AS A COLLATERAL ESTOPPEL

1 ISSUE. I TOOK IT AS MORE OF CONSISTENCY AND AN
2 ARGUMENT.

3 BY MR. SAMUELS:

4 WELL, IF I MAY, YOUR HONOR, I THINK THE CASE
5 YOU'RE REFERRING TO IS *SHELTON VERSUS OSCAR MAYER*
6 *FOODS CORPORATION*, WHICH IS AT PAGE 224 OF OUR
7 SUBMISSIONS, AND WHAT THE COURT HELD THERE -- AND,
8 IN FACT, IT'S INTERESTING ABOUT THAT CASE BECAUSE IN
9 THAT CASE, UNLIKE IN THIS CASE, IT WAS THE SAME
10 PARTIES. IT WAS THE SAME EMPLOYER AND THE SAME
11 EMPLOYEE. AND THE COURT -- WHAT HAPPENED IS THE
12 EMPLOYEE HAD PREVAILED IN HIS CLAIM FOR UNEMPLOYMENT
13 AND HE WAS SEEKING TO USE THAT ALSO AS HAVING
14 PRECLUSIVE EFFECT ON HIS LATER EMPLOYMENT-RELATED
15 LAWSUIT. AND WHAT THE SUPREME HELD IS THAT BECAUSE
16 HEARINGS BEFORE THE EMPLOYMENT SECURITY COMMISSION,
17 OR NOW THE DEPARTMENT OF EMPLOYMENT AND WORKFORCE,
18 ARE INFORMAL, THEY'RE NOT A COURT OF RECORD, THE
19 STAKES ARE RELATIVELY LOW SO THERE IS NO INCENTIVE
20 FOR THE PARTIES TO FULLY LITIGATE THE CASE, AS WE
21 ARE DOING HERE, THAT DECISIONS OF THE EMPLOYMENT
22 SECURITY COMMISSION HAVE NO PRECLUSIVE EFFECT IN
23 LATER LITIGATION. SO, IN THIS CASE WE HAVE A
24 SUPREME COURT CASE THAT SAYS YOU CANNOT GIVE THAT
25 DECISION ANY WEIGHT OR CONSIDERATION BECAUSE IT HAS

1 NO PRECLUSIVE EFFECT. AND, SECONDLY, MS. TURNER WAS
2 NOT A PARTY TO IT. SHE DID NOT HAVE THE OPPORTUNITY
3 TO LITIGATE THAT ISSUE. WE DON'T KNOW WHAT WAS
4 DONE. WE KNOW THAT CONDUSTRIAL WAS ABLE TO WIN AN
5 EMPLOYMENT SECURITY COMMISSION HEARING AGAINST A PRO
6 SE CLAIMANT. WE DON'T KNOW WHAT EVIDENCE WAS PUT
7 UP. NONE OF THE FACTORS THAT WOULD MAKE IT HAVE ANY
8 PRECLUSIVE EFFECT OR ANY IMPACT ON THIS CASE ARE
9 PRESENT. SO WE WOULD REQUEST THAT YOUR HONOR STRIKE
10 THE DEFENSE OF WHATEVER THEY WANT TO CALL IT, CLAIM
11 PRECLUSION OR COLLATERAL ESTOPPEL. IT IS CERTAINLY
12 NOT APPLICABLE IN THIS CASE. THANK YOU.

13 **BY THE COMMISSIONER:**

14 MR. GOODWYN, ON BEHALF OF
15 CONDUSTRIAL/MEDUSTRIAL, IS THERE ANYTHING FURTHER AS
16 FAR AS POSITIONS?

17 **BY MR. GOODWYN:**

18 YES, YOUR HONOR. JUST TO -- I'VE GOT A FEW
19 THINGS, BUT JUST TO ADDRESS THAT MOST RECENT POINT,
20 I THINK IT IS NOTEWORTHY THAT IF MS. TURNER HAD
21 FILED FOR UNEMPLOYMENT IN THIS CASE SHE WOULD BE
22 PRECLUDED BY THE DEPARTMENT OF EMPLOYMENT AND
23 WORKFORCE DECISION THAT WE HAVE INCLUDED. IF YOU
24 LOOK AT IT, IT WAS A CASE INVOLVING ONE PARTICULAR
25 INDIVIDUAL, AND THEY DECIDED THAT THEY WANTED TO GO

1 AHEAD AND SET A PRECEDENT BECAUSE THEY KNEW THAT
2 CONDUSTRIAL HAD MANY OTHER SIMILAR INDEPENDENT
3 CONTRACTORS. SO IT WOULD BE QUITE THE RESULT TO
4 HAVE THE DEPARTMENT OF EMPLOYMENT AND WORKFORCE NOT
5 ALLOWING HER TO GET UNEMPLOYMENT BECAUSE SHE IS AN
6 INDEPENDENT CONTRACTOR, THEN THE WORKERS'
7 COMPENSATION COMMISSION TURN AROUND AND HAVE THE
8 OPPOSITE RULING. IT WOULD BE VERY INCONSISTENT.

9 I HAVE ANOTHER ISSUE ---

10 **BY THE COMMISSIONER:**

11 LET ME MAKE SURE I UNDERSTAND YOUR POSITION,
12 THOUGH, ON THAT BECAUSE I STATED THAT I DID NOT
13 THINK -- ARE YOU ARGUING THAT SHE IS ESTOPPED
14 BECAUSE OF THAT, OR ARE YOU ARGUING IT TO SHOW THAT
15 THE VARIOUS WEIGHING AND HOW THE WEIGHING SHOULD BE
16 DONE AND THE CONSISTENCY ARGUMENT?

17 **BY MR. GOODWYN:**

18 BOTH.

19 **BY THE COMMISSIONER:**

20 SO YOU'RE ARGUING MS. TURNER IS BOUND BY THAT
21 EVEN THOUGH SHE WASN'T A PARTY?

22 **BY MR. GOODWYN:**

23 RIGHT. I THINK SHE IS BOUND BY THAT DECISION
24 BECAUSE THEY MADE IT A GENERAL DECISION. THIS
25 WASN'T A CASE-SPECIFIC, INDIVIDUAL-SPECIFIC

1 DECISION. IT WAS A DECISION THAT SAYS IN THE FUTURE
2 ANYBODY FROM CONDUSTRIAL THAT'S AN INDEPENDENT
3 CONTRACTOR UNDER THIS AGREEMENT THAT THE GUY IN THAT
4 CASE WAS, IS CONSIDERED BY THE DEPARTMENT OF
5 EMPLOYMENT AND WORKFORCE TO BE AN INDEPENDENT
6 CONTRACTOR AND IS, THEREFORE, PRECLUDED FROM GETTING
7 UNEMPLOYMENT. THAT'S WHY IT'S SO SIGNIFICANT. IT'S
8 NOT JUST ONE CASE.

9 **BY THE COMMISSIONER:**

10 AND I HAVEN'T SEEN THAT. I'LL LOOK AT IT.

11 **BY MR. GOODWYN:**

12 SURE.

13 **BY THE COMMISSIONER:**

14 DOES THAT DECISION, THOUGH, EVEN THOUGH IT
15 PRECLUDES SORT OF A FIRST-LEVEL HEARING, ARE THOSE
16 INDIVIDUALS WHO ARE NOT PARTIES TO THAT, IS THEIR
17 RIGHT OF APPEAL STILL PROTECTED? WHAT IS -- DOES IT
18 ADDRESS WHAT THOSE PEOPLE ARE SUPPOSED TO DO?

19 **BY MR. GOODWYN:**

20 I DON'T THINK IT DOES. I THINK THAT'S JUST THE
21 DEPARTMENT OF EMPLOYMENT AND WORKFORCE ISSUED THAT
22 DECISION FOR THEMSELVES FOR THE FUTURE SO THEY
23 DIDN'T HAVE, YOU KNOW, CONFLICTING RESULTS FROM
24 DIFFERENT HEARINGS. THEY DID A HIGHER LEVEL
25 INVESTIGATION INTO THEIR PRACTICES WITH THESE

1 INDEPENDENT CONTRACTORS AND FOUND, YES, IN FACT,
2 THEY ARE INDEPENDENT CONTRACTORS, SO WE DON'T HAVE
3 TO LOOK AT THIS ON ON A CASE-BY-CASE BASIS GOING
4 INTO THE FUTURE.

5 **BY THE COMMISSIONER:**

6 OKAY. AND I HAVEN'T SEEN IT, BUT IT WOULD MAKE
7 SENSE IF SOMEBODY WASN'T A PARTY THAT THEY WOULD
8 STILL HAVE A LEVEL OF BEING ABLE TO CONTEST THAT
9 SINCE THEY WEREN'T PRIVY TO THAT DECISION OR EVEN
10 SERVED WITH IT EVEN IF THEY WEREN'T A PARTY. SO --
11 BUT -- OKAY. I UNDERSTAND WHAT YOU'RE SAYING. I
12 UNDERSTAND YOUR POSITION.

13 **BY MR. GOODWYN:**

14 THAT'S WHAT THEY RULED.

15 **BY MR. HARBISON:**

16 I THINK THEY USED THE ALMOST IDENTICAL TEST
17 THAT YOU'D BE USING TODAY, ALSO.

18 **BY MR. GOODWYN:**

19 RIGHT.

20 **BY MR. SAMUELS:**

21 EXCEPT THAT THE *SHELTON* CASE, WHERE THE -- IT
22 WAS THE SAME PARTIES, SAME EMPLOYEE, SAME EMPLOYER.
23 THE SUPREME COURT SAID NO PRECLUSIVE EFFECT. SO ---

24 **BY THE COMMISSIONER:**

25 AND AS I INDICATED, I'M FAMILIAR WITH THE CASE.

1 I JUST COULDN'T NAME IT BECAUSE I HAVEN'T SEEN THE
2 CASE IN A LONG TIME. SO I WILL LOOK AT THE ISSUE,
3 BUT -- AND THAT'S ALL IN RECORD HERE, AND YOU ALL
4 HAVE PRESENTED YOUR -- AND PROTECTED YOUR RECORD
5 APPROPRIATELY. ALL RIGHT. IS THERE ANYTHING ELSE?

6 **BY MR. GOODWYN:**

7 A COUPLE OF OTHER ISSUES. IN RESPONSE TO
8 COUNTRYWIDE'S ARGUMENT THEY ARE NOT A P.E.O. OR CO-
9 EMPLOYER MODEL, THEY ARE THE EMPLOYER OF RECORD
10 MODEL, IS WHAT THEY'RE TRYING TO FIT IN UNDER. THE
11 COUNTRYWIDE SERVICE AGREEMENT CUTS DIRECTLY AGAINST
12 THAT ARGUMENT. IT SPECIFICALLY SAYS THEY ARE CO-
13 EMPLOYERS. IT'S A CO-EMPLOYER SITUATION. THAT'S
14 PARAGRAPH THREE OF THE COUNTRYWIDE SERVICE
15 AGREEMENT. SO, I CERTAINLY DIRECT THE COMMISSION'S
16 ATTENTION TO THAT, AND THAT'S CERTAINLY OUR
17 POSITION, THAT THIS IS A CO-EMPLOYER AGREEMENT, PER
18 THE AGREEMENT THAT THEY SIGNED.

19 ONE OTHER ISSUE, I DON'T KNOW IF -- I FORGOT
20 HER NAME. WHAT IS YOUR NAME AGAIN, MA'AM?

21 **BY MS. RHODES:**

22 JANET RHODES.

23 **BY MR. GOODWYN:**

24 I DON'T KNOW IF MS. RHODES IS RECORDING THE
25 HEARING, BUT I DON'T THINK ANYBODY CAN BE RECORDING

1 THE HEARING EXCEPT THE COURT REPORTER.

2 **BY MS. RHODES:**

3 I'M CERTAINLY NOT RECORDING.

4 **BY MR. GOODWYN:**

5 OKAY, JUST MAKING SURE SHE'S -- AND IN RESPONSE
6 TO MR. SAMUELS' CONTENTION THAT NOBODY IS CONTESTING
7 THE TRAUMA TO MS. TURNER, WE CERTAINLY ARE. THERE
8 WAS ANOTHER NURSE THAT WAS INVOLVED IN THIS INCIDENT
9 THAT YOU WILL HEAR TESTIMONY FROM. SHE'S BACK AT --
10 WAS BACK AT WORK, I THINK, WITHIN AT LEAST A WEEK OR
11 TWO OF THIS INCIDENT. WE THINK THERE ARE A LOT OF
12 CREDIBILITY ISSUES HERE. WE DO NOT BELIEVE THE
13 EXTENT OF THE TRAUMA THAT SHE IS GOING TO REPRESENT.
14 SO, YES, THAT IS A SIGNIFICANT FACTOR IN THE CASE.

15 AND AS FAR AS LIGHT DUTY THAT'S BEEN INDICATED
16 BY DR. WESTERKAM AND MAYBE ONE OTHER DOCTOR, I THINK
17 THE TESTIMONY IN THE CASE WAS THAT WE WERE ABLE TO
18 ACCOMMODATE THOSE LIGHT-DUTY RESTRICTIONS, PER THAT
19 LETTER BACK IN SEPTEMBER OF 2015, SHORTLY AFTER THE
20 INCIDENT. SO AS A RESULT, THERE SHOULD BE NO T.T.D.
21 SINCE SHE TURNED DOWN THE LIGHT-DUTY ASSIGNMENT. I
22 THINK THAT'S ALL.

23 **BY THE COMMISSIONER:**

24 ANYTHING FURTHER ON BEHALF OF COUNTRYWIDE AND
25 GUARANTEE?

1 BY MR. HARBISON:

2 I DON'T THINK SO RIGHT NOW, COMMISSIONER.

3 BY THE COMMISSIONER:

4 ALL RIGHT. ANYTHING ELSE ON BEHALF OF THE
5 DEPARTMENT OF CORRECTIONS AND THE STATE ACCIDENT
6 FUND?

7 BY MS. FARTHING:

8 NOT AT THIS TIME.

9 BY THE COMMISSIONER:

10 ON BEHALF OF THE UNINSURED FUND?

11 BY MS. GLOVER:

12 NOTHING FROM THE U.E.F., COMMISSIONER.

13 BY THE COMMISSIONER:

14 ALL RIGHT. WITH REGARDS TO EVIDENCE THAT HAS
15 BEEN SUBMITTED IN THIS MATTER, WE NEED TO ADDRESS
16 THE APAs, SO I WILL CALL THE NUMBERS WITH REGARDS TO
17 THE SUBMISSIONS. THE CLAIMANT HAS SUBMITTED PAGES
18 ONE THROUGH 312. THE GUARANTEE INSURANCE COMPANY
19 AND COUNTRYWIDE STAFFING GROUP HAS SUBMITTED PAGES
20 313 THROUGH 737. IN A PRETRIAL RULING 735 TO 737,
21 AS IT IS A COMPILATION TYPE OF DOCUMENT AND IS NOT
22 AN APPROPRIATE APA, HAS BEEN REMOVED TEMPORARILY.
23 THAT IS, AS I RECALL IT, MORE OF A MOTION, A MOTION
24 IN LIMINE ALMOST AT THIS POINT IN TIME. THE
25 GUARANTEE INSURANCE COMPANY AND COUNTRYWIDE IS

1 CERTAINLY FREE TO PRESENT THOSE WITH REGARDS TO
2 WITNESSES OR PRESENT THEIR POSITION AT THE CLOSE OF
3 THE ENTIRE HEARING, SHOULD THEY SUBMIT THAT THOSE
4 DOCUMENTS SHOULD BE IN EVIDENCE. THE DEPARTMENT OF
5 CORRECTIONS HAS SUBMITTED UNNUMBERED PAGES. IT'S 20
6 PAGES. THEY ARE ENTITLED EXHIBIT "B," "C," AND "D."
7 AND CONDUSTRIAL HAS SUBMITTED PAGES ONE THROUGH 169.
8 ALSO, THE PARTIES HAVE HANDED UP DEPOSITIONS. THERE
9 IS A DEPOSITION OF GEORGE KASPARS AND ALSO TWO
10 DEPOSITIONS OF MR. ZACHARY COLLIER THAT HAVE BEEN
11 TAKEN.

12 ARE THERE ANY OBJECTIONS TO THE APAs,
13 JURISDICTION, VENUE, OR ANY OTHER ITEMS OTHER THAN
14 THE ONE THAT HAS BEEN STATED ON BEHALF OF THE
15 CLAIMANT, MR. SAMUELS?

16 **BY MR. SAMUELS:**

17 YOUR HONOR, MY ONLY OBJECTION WOULD BE TO
18 INCLUDING THE JUNE 1ST, 2016, SCDEW DECISION, TAB
19 14, PAGES 36 TO 57 OF CONDUSTRIAL'S SUBMISSIONS.
20 AND THAT WOULD BE BASED ON THE PREVIOUS LEGAL
21 ARGUMENT THAT IT'S IRRELEVANT, AS IT HAS NO
22 PRECLUSIVE EFFECT IN THIS CASE.

23 **BY THE COMMISSIONER:**

24 OKAY. AND IT'S CERTAINLY -- I MEAN, IT CAN BE
25 PRESENTED. YOU ALL CAN PRESENT CASES FROM OTHER

1 JURISDICTIONS. SOMETIMES YOU ALL PRESENT OUR CASES
2 FOR PERSUASIVE VALUE. CERTAINLY IT CAN BE PRESENTED
3 IN THAT REGARD. IT MAY NOT BE APPROPRIATE AS AN
4 ACTUAL APA, BUT IT CERTAINLY CAN BE SUBMITTED TO ME
5 WITH REGARDS TO ARGUING PERSUASIVE VALUE AND MAYBE
6 NOT PRECEDENTIAL VALUE. MR. GOODWYN SAYS IT'S ALSO
7 PRECEDENTIAL, BUT IT CERTAINLY CAN BE PRESENTED AS
8 PERSUASIVE. SO EVEN IF IT GETS REMOVED, IT STILL
9 CAN BE SUBMITTED. SO, I CAN REMOVE IT FROM THE APAs
10 AND HAVE IT SUBMITTED AS PRECEDENTIAL AND PERSUASIVE
11 AUTHORITY, BUT I THINK IT COMES IN.

12 ANYTHING ELSE ON BEHALF OF THE CLAIMANT?

13 **BY MR. SAMUELS:**

14 NO, YOUR HONOR.

15 **BY THE COMMISSIONER:**

16 MR. GOODWYN?

17 **BY MR. GOODWYN:**

18 THE ONLY THING I WOULD HAVE, I THINK MR.

19 HARBISON HAS INDICATED HE WAS GOING TO CALL JESS

20 CARRILLO AS A WITNESS. IS THAT CORRECT?

21 **BY MR. HARBISON:**

22 YES.

23 **BY MR. GOODWYN:**

24 WE HAVE -- WE DID TAKE HIS DEPOSITION DE BENE

25 ESSE. TO THE EXTENT THAT HE DOES NOT END UP SHOWING

1 UP TO TESTIFY LIVE, I RESERVE THE RIGHT TO SUBMIT
2 HIS TRANSCRIPT.

3 **BY THE COMMISSIONER:**

4 ALL RIGHT.

5 **BY MR. HARBISON:**

6 NO OBJECTION.

7 **BY THE COMMISSIONER:**

8 MR. HARBISON?

9 **BY MR. HARBISON:**

10 NO OBJECTIONS, COMMISSIONER, TO WHAT YOU JUST
11 SAID.

12 **BY THE COMMISSIONER:**

13 ALL RIGHT. MS. FARTHING?

14 **BY MS. FARTHING:**

15 NO OBJECTIONS.

16 **BY THE COMMISSIONER:**

17 MS. GLOVER?

18 **BY MS. GLOVER:**

19 NO OBJECTIONS.

20 **BY THE COMMISSIONER:**

21 ALL RIGHT. WITHOUT FURTHER OBJECTION THE
22 COMMISSION FILE BECOMES PART OF THE RECORD WITH THE
23 EXCEPTION OF ANY SELF-SERVING DECLARATIONS AND
24 UNSTIPULATED MEDICAL REPORTS.

25 I BELIEVE WE'RE READY FOR THE FIRST WITNESS.