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

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

FINAL RESPONDENT'S BRIEF OF RESPONDENT-APPELLANT

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STATEMENT OF THE CASE

I. Background and Facts

This matter stems from alleged physical and mental injuries 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. R. Vol. 7, pp. 2955-59. Medustrial is a division of Condustrial, Inc. ("Condustrial"), 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 Condustrial, and agreeing to payment for professional services on an hourly basis via a Form 1099. R. Vol. 7, pp. 2955-59.

Condustrial 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 throughout South Carolina. R., Vol. 7, pp. 2971-77. Under that agreement, the nurses performed services for SCDC, at SCDC facilities, and under SCDC direction. Condustrial 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 Condustrial's responsibility. Claimant agreed to her

[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 Condustrial. Thereafter, Condustrial elected to continue operation of Medustrial's business under that moniker or trade/brand name. Medustrial is not a separate legal entity apart from Condustrial. As such, Condustrial is the relevant business entity for all purposes pertaining to this matter.

assignment as a nurse for SCDC. She was free to accept or decline any shifts for work offered by SCDC.

Condustrial 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. R., Vol. 7, pp. 2961-70. That agreement states that Countrywide is a "contract labor service (CLS) entity" that will "outsource" certain "Selected Staffing/Employees" for Condustrial's "normal business operations." R., Vol. 7, p. 2961. Further, the 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." *Id.* Selected Staffing Employees are supposed to be described under "Exhibit B" to the agreement; however, there is no Exhibit B attached. *Id.* The contract between Countrywide and Condustrial specifically 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) R. Vol. 7, p. 2962

Again, there is no Exhibit B defining "Selected/Staffing/Employees" attached to the agreement between Condustrial and Countrywide. There is, however, a list of employee classification codes for Condustrial's South Carolina operations attached to the agreement for Countrywide's pricing purposes. R., Vol. 7, pp. 2968-69. This list of class codes includes two medical/nurse staffing codes substantially similar to Claimant's job class– 8829 and 8833. R., Vol. 7, p. 2969. The contract envisions the addition of employees intended to be covered under its terms on a continuing or rolling basis. Specifically, the agreement requires Condustrial 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 Employee for each applicable payroll period.*" (emphasis added) R., Vol. 7, p. 2962.

Countrywide and Condustrial executed a separate document modifying Countrywide's standard service agreement. R. Vol. 7, pp. 3117-18. The modified agreement stated that Condustrial would process payroll under its own federal tax identification number (FEIN). R., Vol. 7, p. 3117. Under the modified terms, Condustrial would still upload new employee information and applicable class codes into Countrywide's system for employment administrative purposes. *Id.* Moreover, Condustrial would still 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 Condustrial's behalf." *Id.* Based on its belief that its contract nurses for SCDC were independent contractors not subject to the workers compensation laws, Condustrial 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." R., Vol. 7, p. 3167. 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.*" R., Vol 7, p. 3171 (emphasis added). There are no medical or nursing class codes designated in the South Carolina schedule of operations section of GIC's policy for Countrywide. R., Vol. 7, p. 3160.

II. Position of the Parties

Turner contends she is a covered employee under the South Carolina Workers Compensation Act ("Act"). She alleges Condustrial 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). R., Vol. 1, p. 425. Regarding the scope and nature of her injuries, Turner alleges compensable injuries to her spine (neck and low back), right shoulder and arm, as well as psychological injuries (PTSD) stemming from the incident itself ("mental-mental" claim) and/or as a natural consequence of pain/disability from her physical injuries ("physical-mental" claim). R., Vol. 1, p. 130. Turner seeks temporary total disability benefits (TTD) from the date of accident and continuing, as well as further medical evaluation and treatment. R., Vol. 1, pp. 431-33. She contends she has not reached MMI. Finally, Turner argues that her average weekly wage ("AWW") and applicable compensation rate should be based on gross payments from Condustrial, not her net taxable income after deduction of business expenses as reflected in her tax returns. R., Vol. 1, pp. 430-31.

All Defendants to the claim submitted as a common defense that Tuner is an independent contractor and not entitled to benefits under the Act. Likewise, all Defendants argue in the alternative that, if Turner 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). Finally, all Defendants dispute the scope and nature of Claimant's compensable injuries if the claim is awarded, as well as her entitlement to TTD. [2]

[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.

Regarding the liable party and coverage issues presented, the Defendants' respective positions diverge sharply. First, Condustrial argues that if Turner 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. 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 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 GIC under the indemnification provision of its service agreement with Condustrial. R., Vol. 7, pp. 2976-77.

Next, if Condustrial is deemed to be Turner's employer for purposes of the Act, and the service agreement with Countrywide is somehow not implicated, then Condustrial is essentially left "uninsured" relative to Claimant's employment. Under that scenario, Condustrial 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 a nutshell, these 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. In this case, if Condustrial indeed failed to secure and maintain worker's compensation coverage for Turner's employment, then liability still defaults to Countrywide and GIC.

Countrywide and GIC, by and through Guaranty as its successor in interest, jointly submit that Turner's purported employment with Condustrial does not implicate the service agreement between Condustrial and Countrywide.[3] R., Vol. 1, pp. 190-193. Specifically, Turner was not a "Selected Staffing/Employee" within the meaning of that agreement because she was never reported or otherwise submitted to Countrywide by Condustrial as such. R., Vol. 1, pp. 181-183. Further, Turner's employment was never contemplated by Countrywide in its agreement with Condustrial, much less on GIC's policy for Countrywide. R., Vol. 1, p. 184. In addition, both GIC and Countrywide aver that the d/b/a party to the service agreement with Condustrial-Countrywide Staffing Solutions Group (CSSG)- is not a licensed PEO in South Carolina. R., Vol. 1, p. 185. As such, liability cannot be imputed to Countrywide and GIC via operation of S.C. Code § 40-68-70 and/or §42-9-120. R., Vol. 1, pp. 187-190.

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 Condustrial. Specifically, GIC argues that its policy for Countrywide did not cover appropriate class codes in line with Turner's work as a nurse at a dangerous location like a high security prison infirmary where she was assaulted. GIC further submits that it never would have underwritten such a risk had it been disclosed to them. GIC does argue for cancellation or rescission of its policy for Countrywide in South Carolina 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/Condustrial agreement by operation of law.

[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.*

In addition to the common defense that Turner was an independent contractor, SCDC also submits that she was not its direct employee per the holding of Shatto *supra*. SCDC points to the terms of its contract with Condustrial, which specifically states that contract nurses are not SCDC employees. SCDC further argues it is not Claimant's "statutory employer" per S.C. Code §42-1-40 *et seq* either because SCDC never contracted with Countrywide for the performance of any work on its behalf. Specifically, the statute states, in pertinent part, "When any person .... 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 .... referred to as "subcontractor" *for the execution or performance by or under such subcontractor for the whole or any part of the work undertaken by such owner*, the owner shall be liable to pay any workmen 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." (emphasis added). A contract for the provision of staffing or labor services to a client company is entirely different than a subcontract agreement whereby the subcontractor agrees to actually perform work/services that the owner or general contractor undertakes. Here, Condustrial never contracted to perform any work on behalf of SCDC, which is the hallmark of statutory employment liability under the statutes.

In the alternative, SCDC contends any potential liability on its part as an "upstream" or "statutory" employer of Claimant is secondary to that of Condustrial as Claimant's direct employer. SCDC reserves all rights of indemnity against Condustrial via S.C. Code §42-1-440 and other applicable law. Finally, SCDC submits any liability imposed upon it 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 an employee of Condustrial, not an independent contractor, at the time of her accident; 2) Claimant is not a "Selected Staffing/Employee" within the meaning of the service agreement between Condustrial and Countrywide; 3) there is no basis for "reformation" of the contract between Condustrial and Countrywide to confer coverage for this claim under that agreement; 4) Condustrial 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 the d/b/a party to the agreement was not a licensed PEO In South Carolina; 6) GIC's policy for Countrywide would only apply to cover the claim if: a) Countrywide had reported the appropriate class codes corresponding with Tuner's employment and their locations to GIC; and b) GIC underwriting had approved insuring such risk; 7) Condustrial 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 9) there is no basis for transferring liability from SCDC and SAF to the UEF under §42-1-415. R., Vol. 1, pp. 7-78.

Regarding the claim merits, the Hearing Commissioner found the following: 1) Turner sustained compensable physical injuries to her right elbow, right shoulder, neck and back, as well as PTSD related to the incident itself and her physical injuries; 2) Claimant's AWW should be based on gross payments received - not net earnings after deduction of business expenses; 3) Turner's prayer for TTD was denied as not being supported by medical evidence; and 4) Condustrial offered Turner light duty employment consistent with her work restrictions, which Turner refused, thereby barring her entitlement to compensation benefits under S.C. Code §42-9-190. R., Vol. 1, pp. 52-59.

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 entered its own findings regarding the AWW issue but otherwise affirmed the Hearing Commissioner on the employment, coverage, liable party, and TTD issues by adopting her findings of fact and conclusions of law verbatim in their entirety. R., Vol. 1, pp. 79-126. Condustrial filed a Motion to Reconsider per WCC R. 67-215 (B). R., Vol. 1, pp. 213-217. Turner then filed a Motion to Admit Newly Discovered Evidence for the Panel's consideration regarding the TTD issue. R., Vol. 1, pp. 218-227. The Panel denied Condustrial's Motion for Reconsideration and ruled it had no jurisdiction to consider Turner's Motion to Admit Newly Discovered Evidence. After Condustrial and Turner filed cross-appeals to this Court, Turner filed a Motion for Partial Remand for the Commission to rule on the merits of her Motion per SCACR 240. The Court granted the Motion for Partial Remand. R., Vol. 1, pp. 127-128. The Commission subsequently denied Turner's Motion on the merits via Order dated September 20, 2021. R., Vol. 1, pp. 127-128.

STANDARD OF REVIEW

Judicial review of a Commission decision is governed by the S.C. Administrative Procedures Act (APA)- S.C. Code §1-23-380. The APA "mandates that the Commission take the evidence, judge the credibility and weight of that evidence, and from that judgement determine the facts of the case. Rogers v. Kunja Knitting Mills, Inc., 312 S.C. 377, 381, 440 S.E.2d 401, 403 (Ct. App. 1994). A reviewing court should affirm the Commission's decision unless it is clearly erroneous in view of the substantial evidence in the whole record. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). Under the "substantial evidence rule" the Court may not substitute its judgement for that of the Commission as to the weight of the evidence. *id.* Substantial evidence is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case; rather, it is evidence, when considering the record as whole, allows reasonable minds to reach the same conclusion as the Commission. Gattis v. Murrells Inlet VFW No. 10420, 353 S.C. 100, 576 S.E.2d 191 (Ct. App. 2002). The possibility of drawing two inconsistent conclusions from the same evidence does not preclude the Commission's findings from being supported by substantial evidence. Houston v. Deloach & Deloach, 378 S.C. 543, 663 S.E.2d 85 (Ct. App. 2008).

The Commission is the ultimate fact finder in workers compensation cases. Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000). The final determination of witness credibility and the weight to be accorded evidence is reserved to the Commission. Brunson v. American Koyo Bearings, 395 S.C. 450, 718 S.E.2d 755 (Ct. App. 2011). In the case of expert evidence, "[e]xpert medical testimony is designed to aid the Commission in coming to the correct conclusion; therefore, the Commission determines the weight and credit to be given to the expert testimony. Tiller v. National Healthcare Center, 334 S.C. 333, 340, 513 S.E.2d 843, 846 (1999).

ARGUMENTS

I. The Panel properly denied TTD beyond September 30, 2015 because there was insufficient "medical evidence" of "disability" due to "injury" after such date.

Since Claimant's alleged disability resulting from her psychological and physical injuries is not self-evident, the Commission's deferral to medical evidence on the issue of temporary total disability was proper. First, "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 (G). 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) [emphasis added]. The burden for proving entitlement to compensation benefits for total disability 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).

Further, North Carolina law governing the role of medical evidence in disability determinations is particularly 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 with South Carolina courts [internal citations omitted]). The North Carolina Act's definition of "disability" is identical to the South Carolina Act. *See* N.C. Gen. Stat. §97-2(9). The North Carolina Court of Appeals has held that a claimant can show total disability or "incapacity" due to injury within the meaning of the statue 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). [4] In Knight v. Walmart, 149 N.C. App. 1, 562 S.E.2d 434 (2002) the Court suggested that a claimant's mere self-serving 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.").

This Court's holding in Burnette v. City of Greenville, 401 S.C. 417, 737 S.E.2d 200 (Ct. App. 2012) endorses the principle that medical evidence must support the Commission's disability award. In that case the Commission issued a finding regarding the significance of an MRI report that was not corroborated by a medical expert. The Court reversed the Commission's denial of a claim that was based, at least in part, on the Commission's unqualified medical opinion. The Court reiterated the well-established maxim of South Carolina law that an award may not rest upon surmise, conjecture, or speculation. *See also* Hutson v. S.C. Ports Authority, 399 S.C. 381, 387, 732 S.E.2d 500, 503 (2012). Indeed, the Panel correctly recognized Burnette's application to this case by citing it as grounds for its denial of Turner's claim for TTD beyond September 30, 2015. R., Vol. 1, p. 108.

Here, the only medical evidence supporting any period of total disability within the meaning of the Act is the out of work note from a counselor at the State Office of Victim's Assistance ("SOVA") indicating she was psychologically disabled from working during the finite period between September 6, 2015 and September 30, 2015. R., Vol. 7, p. 3027. This record was ostensibly the basis for the Commission's TTD award for that period. Turner cites numerous

[4] The Court goes on to identify 3 other ways the claimant can prove disability and entitlement to benefits when the incapacity to work is partial or due to other causes that the instant case does not implicate.

medical records outlining her subjective complaints of mental incapacity in support of her arguments for TTD beyond September 30, 2015. However, these references are merely recitations of her post-accident history and self-serving complaints of her diminished mental capacity. They do not constitute medical opinions that Turner is incapacitated from performing gainful work due to a mental injury. As such, they are insufficient proof of Turner's ongoing disability due to psychological injury beyond September 30, 2015.

Further, Turner asks the Panel to infer disability based on her purportedly low psychological "Global Assessment of Functioning" ("GAF) noted in the records.[5] However, without testimony from a medical or psychological expert opining on the significance of Turner's GAF as it relates to her alleged disability, she is asking the Panel to engage in the same unqualified guessing game this Court specially admonished the Commission for in Burnette *supra.* The Panel properly rejected Turner's similar pleas in this case.

Next, Turner argues that once she initially established that she was disabled due to her psychological condition as of September 6, 2015 there is a "statutory presumption" that such disability continues until the defense proves otherwise, even beyond the end date of the provider's medical note. [Appellant Brief p. 15]. Turner's argument is erroneous for several reasons. First, it is based on erroneous an interpretation WCC Regulation 67-502 (B). Specially, Turner conveniently omits the remainder of the regulation's language, the context of which makes clear any "presumption" of ongoing disability only applies when compensation benefits have already commenced such as in an admittedly covered and compensable claim. Contrarily, Turner's coverage and entitlement to benefits under the Act is disputed and no compensation benefits have been initiated.

[5] GAF is a psychological assessment tool referenced in the Diagnostic and Statistical Manual of Mental Disorders *4th Edition.* ("DSM IV").

The regulation also specifically references its enabling statute- S.C. Code §42-9-260 entitled "Notice to commission **when payments have begun**; suspension or termination of payments." [emphasis added]. S.C. Code §42-9-260 itself contains no presumption of ongoing disability. It is finally worth noting that all the ensuing Article 5 regulations address termination and suspension of temporary disability benefits that have already commenced. Read in this context, any regulatory presumption of ongoing disability is simply not applicable here.

Second, Turner's burden shifting argument flouts well-established South Carolina law. She seeks retroactive TTD compensation denied by the defendants via quasi-judicial remedies provided under the Act. As such, she alone bears the burned of proving her entitlement to same just like any other litigant bringing an action. Coleman v. Quality Concrete Products *supra* (the burden for proving entitlement to compensation benefits for total disability under S.C. Code §42-9-10 rests squarely on the claimant). Finally, WCC R. 67-502's definition of "disability" and its purported presumption of disability is contrary to the definition of "disability" codified by S.C. Code §42-1-120. A regulation, although having the force of law, cannot be applied in a manner that thwarts a statutory right or purpose. To the extent WCC R. 67-502 (B) creates a more onerous definition of "disability" it is invalid. *See* Goodman v. City of Columbia, 318 S.C. 488 458 S.E.2d 531 (SC 1995) (holding that a regulation may not alter or add to a statute requirements).

Regarding her physical injuries, Turner contends orthopedic surgeon, Dr. Hess "gave her restrictions which precluded her form working as a nurse due to her physical injuries." [Appellant's Brief p. 13]. However, she does not cite any support in the Record for this wholly self-serving proclamation. In fact, a review of Dr. Hess's record from October 15, 2015 actually reveals the contrary. There are no references to specific work restrictions or inability to work. R., Vol. 6, pp. 2723-32. Dr. Hess's physical examination of Claimant's elbow and shoulder is also fairly benign.

He notes that Turner's physical injuries are "improving" and merely prescribes physical therapy for shoulder and elbow range of motion and strengthening. R., Vol. 6, p. 2729. Her physical inability to work secondary to a fairly innocuous elbow and/or shoulder injury is simply not self-evident from the face of these records. The mere fact that Turner allegedly experiences physical pain or discomfort due to injury is not determinative of her entitlement to disability when there is no evidence of diminution of earning capacity. Keeter v. Clifton Mfg. Co., 225 S.C. 389,392, 82 S.E.2d 520, 522 (1967) (compensation is not awarded for physical injury as such but for "disability" produced by such injury which is measured by the employee's capacity/incapacity to earn wages). Again, there is no medical evidence in the Record supporting the notion she is unable to earn wages due to injury after September 30, 2015.

For these reasons, the Panel employed the correct legal standard for assessing temporary disability by deferring to medial evidence and substantial evidence in the Record otherwise supports its decision. The Court must affirm the finite TTD award.

II. Turner refused Condustrial's offer of suitable employment; therefore, she is affirmatively barred from receipt of compensation benefits pursuant to S.C. Code § 42-9-190.

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." *See* Martin v. Rapid Plumbing, 369 S.C. 278, 631 S.E.2d 547 (Ct. App. 2006) (holding that claimant's refusal to return to work wen suitable employment was offered provided employer with legal justification to terminate his temporary compensation). The operative statutory 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. In other words, the statute does not require that the employment being offered come from or even be with the "employer." Rather, the statute literally permits a purported employer to "procure"

suitable employment within an injured worker's capacity and cause that employment to be offered. This furthers the manifest purpose of the statute to mitigate an injured worker's disability regardless of the posture or circumstances of the underling claim.

As such, Turner's argument that Condustrial's offer of employment was invalid as a matter of law because it is inconsistent with its position that she is an independent contractor is without merit. Turner would have merely become Condustrial's employee upon the acceptance of its offer and going forward despite the underlying litigation over her employment vs. independent contractor status. Any diminished earnings between the clerical job and her LPN position could be recouped pursuant to S.C. Code §42-9-20. There is no authority for the proposition that a claimant is justified in refusing suitable employment simply because it pays less when the Act provides a remedy for that scenario.

Otherwise, substantial evidence in the Record supports the Panel's determination that Turner refused Condustrial's offer of employment. R., Vol. 1, p. 108. Tony Durham, the Owner/President of Condustrial, testified that he personally called Turner and offered her a full-time employee position on his office once she felt better. R., Vol. 5, pp. 2077-79. Claimant unequivocally refused this offer, stating, "I don't want that. I just want comp." R., Vol. 5, p. 2078. Thereafter, Condustrial's general counsel, Tom Sears, delivered a letter to Turner at her home outlining the specifics of the light duty job offer, including a $15.00 hourly wage and ability to her to set her own hours. R., Vol. 7, p. 3063. Mr. Sears also testified regarding the sincerity of Condustrial's efforts to assist Turner despite the denial of her coverage under the Act. R., Vol. 3, pp. 958-961.

Again, Claimant never accepted the employment offer. It is clear from the Record that Turner simply had no desire to return to work in any capacity under any circumstances; she simply "wanted comp," which is anathema to South Carolina's public policy of encouraging injured

workers to return to work suitable to their capacity. Lee v. Bondex, Inc., 406 S.C. 97, 749 S.E.2d 155 (Ct. App. 2013) ("for sound policy reasons the worker's compensation system encourages an injured employee, who is still able to perform light duty work to continue working for his employer until he reached maximum medical improvement and then, if possible, return to his previous position.").

Next, substantial evidence in the Record establishes that Condustrial's employment offer was made in good faith and suitable to Claimant's physical and mental capacity. Light duty clerical work in Condustrial's office far removed from SCDC was a perfectly reasonable response to Claimant's subjective complaints of fear and anxiety over working in a prison setting. Moreover, there is no evidence that Claimant was physically unable to perform the light duty office work, including filing, computer work, and answering phones.

Contrary to Claimant's bloviations of mistreatment and abandonment by Condustrial, Condustrial maintained a daily log of its conversations and interactions with Turner following the accident that documents Condustrial's multiple efforts to assist Turner notwithstanding their denial of her coverage under the Act. R., Vol. 7, pp. 3060-3062. These logs confirm Claimant was extended every courtesy and accommodation, including personal attention from Condustrial's owner and general counsel. Notwithstanding Turner's cynical and baseless characterization of these efforts as a mere pretext to deny her compensation, there is nothing nefarious about an employer seeking to accommodate an injured worker's disability even when it may incidentally mitigate its own potential claim exposure.

Further, Turner's unfounded accusations of odious motives behind Condustrial's light duty employment offer are simply evidentiary issues that the Panel clearly rejected. Turner is now essentially asking this Court to substitute its judgment for that of the Commission as to the weight

of conflicting evidence, which is against the applicable standard of review on appeal. *See* Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981) (under the "substantial evidence rule" the Court may not substitute its judgement for that of the Commission as to the weight of the evidence); *See also* Houston v. Deloach & Deloach, 378 S.C. 543, 663 S.E.2d 85 (Ct. App. 2008) (the possibility of drawing two inconsistent conclusions from the same evidence does not preclude the Commission's findings from being supported by substantial evidence).

Turner's reliance on Johnson v. Rent-A-Center, Inc., 398 S.C. 595, 730 S.E.2d 857 (2012) is misplaced. It should first be noted that Johnson is a "substantial evidence" case to the extent the Supreme Court merely affirmed the Commission's decision by declining to substitute its judgement for that of the Commission regarding application of the underlying facts to the S.C. Code §42-9-190 issues. Nevertheless, that case is still factually distinguishable from the instant case on several fronts. First, the issue in Johnson involved "constructive refusal" of employment when claimant resigned her employment before the employer could even offer her light duty work. Here, Condustrial actually made an offer of light duty employment which Turner patently, not just "constructively," refused. In addition, the claimant in Johnson resigned her employment because she was being asked to resume working with a co-employee whom she blamed for the occurrence of her accident, which the Commission found justifiable, and the Court held was supported by substantial evidence. Here, Condustrial's offer of light duty employment in their office was far removed from persons and locations Turner could have blamed or even associated with her accident in the prison infirmary. Bottom line, Johnson has no relevance or application to the instant case.

Turner also cites the Virginia case of Food Lion, Inc. v. Lee, 431 S.E.2d 342 (Va. App. 2013) as persuasive authority for a two-prong analytical framework for assessing suitability of a light

duty employment offer. The first prong annunciated in Lee is whether the employment being offered is suitable to the claimant's capacity, which in the instant case has already been established *supra.* The other prong generally addresses whether refusal of the offer is otherwise justified for reasons other than suitability to the worker's capacity. That test is whether a "reasonable person desirous of employment" would have refused the offered work. Lee, 431 S.E.2d at 344. Again, Turner cites tension between Condustrial and herself as the basis of her refusal. However, this is an entirely subjective and unilateral sentiment. Turner may resent Condustrial for denying her claim, but that denial has been made in good faith and the evidence in the Record does not support her contention that Condustrial harbored the same animosity toward her at the time of the light duty employment offer. As discussed previously, the evidence establishes that Condustrial went above and beyond to accommodate/assist Turner. Turner caustically snubbed those efforts by stating "I don't want that. I just want comp." Her contemptible actions do not reasonably reflect the attitude of a person "desirous of employment" under the standard annunciated in Lee.

By definition any "reasonableness" test is an objective measure deduced by weighing conflicting and competing evidentiary factors. For reasons also stated previously, the Court cannot reweigh evidence to resolve the issue of the reasonableness of Turner's refusal; that is exclusively the Commission's province under the applicable standard of review. The Court did not observe Turner's hostile demeanor and palpable contempt during her testimony, which goes to the weight of the objective reasonableness of her refusal. At most, the Court can only clarify the legal standard and remand the issue for further evidence and consideration by the Panel.

Finally, there is no South Carolina authority holding that the validity of suitable employment offer is dependent on it being renewed periodically even after it is initially refused. The absurdity of this proposition is self-evident- an incessant cycle of futile offers and refusals

over the life of the claim. This argument may be more palatable if Claimant contends she would have accepted such offer if it had in fact been extended again. However, there is no such testimony from Claimant in the Record.

For these reasons, the Panels' finding that Turner refused Condustrial's suitable light duty employment offer without justification is supported by substantial evidence in the Record and must be affirmed.

III. The Panel did not err as a matter of law in finding that Claimant's AWW should be based on Turner's gross revenue, less deduction for business related expenses clearly necessary to generate her income, as reflected on her federal income tax returns.

The Hearing Commissioner found that Turner's AWW and compensation are $1130.86 and $753.94, respectively. This calculation is based on Turner's gross payments received in the four quarters prior to the quarter in which she was injured, specifically, the third and fourth quarters of 2014 and the first and second quarters of 2015. R. Vol. 7, pp. 3079-99; Second Amended Supplemental Record on Appeal, pp. 3539-47. Despite the undisputed fact that Turner deducted numerous business expenses on her tax returns necessary to generate her income, the Commissioner rejected the defendants' arguments to strictly apply the case of Stephen v. Avins Construction Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996), which holds, *inter alia,* that a contractor's compensation rate should be determined based on net taxable income because "earnings" of the injured employee within the meaning of the Act denotes the actual sum paid to the employee as his wages, not the totality of payments received, including reimbursements and deduction of expenses.

The Panel, as the ultimate fact finder in worker's compensation matters, reversed and found that Turner's Claimant's AWW and applicable compensation rate are $762.21 and $508.17, respectively. The Panel rejected the parties' zero sum game arguments. Instead, the Panel took a

middle ground approach to wage calculation by ruling that some, but not all, deductions claimed by Turner on her 2014 Form 1099 Schedule C tax return (2014 was the last full year of earnings prior to the accident) should be subtracted from gross earnings to most closely approximate the actual earnings lost due to injury. *See* Sellers v. Pinedale Residential Center, 350 S.C. 183, 564 S.E.694 (Ct. App. 2002) (the worker's compensation statute which sets forth several different methods for calculating the average weekly wage provides an elasticity or flexibility with a view toward achieving the ultimate objective of fairly reflecting probable future earning loss). Bottom line, the statute affords the Commission tremendous discretion to fashion a fair and equitable wage calculation for compensation purposes. The Panel here exercised that discretion by reasoning that South Carolina law unequivocally holds that mileage deductions should not be included in wage calculations. Stephen *supra;* Wright v. Wright, 306 S.C. 331, 411 S.E.2d 829 (Ct. App. 1991) (mileage deductions taken on federal income tax returns are includable as income for calculation of benefits). Moreover, the Panel relied on the Stephen court's favorable citation to 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 properly extrapolated Turner's "earnings" from her 2014 Schedule C by excluding mileage deductions and expenses unequivocally incurred to generate her gross income. Specifically, the 2014 Schedule C reflects gross revenue of $56,180.00. Turner 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. Turner'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, the

Panel recognized that some deductions, including $2840.00 for professional liability insurance, $900.00 for contract labor, $2,200.00 for continuing education requirements, and $1,565.00 for nursing uniforms [see R., Vol. 7, pp. 3065-99], were clearly incurred solely as a result of her occupation as an LPN and necessary to generate her gross income. Subtraction of these unequivocal business deductions yields net earnings of $39,635.00, which divided by 52 weeks equals an AWW of $762.21 and a compensation rate of $508.17. Condustrial submits the Panel's methodology produces a fair and reasonable approximation of Turner's earnings for compensation purposes under the Act.

Turner's attempts to distinguish Stephen from the instant case by noting that claimant in that case was a business owner, whereas she has been found to be an employee. However, this is a distinction without a difference for purposes of determining earnings for a fair and equitable wage calculation. The claimant in Stephen was a self-employed subcontractor, who was the *statutory employee* of the contractor that hired him, which is the exact same scenario presented here where Turner has been deemed SCDC's statutory employee. Turner fails to explain why an alleged direct employee should be treated differently for wage calculation purposes than a subcontractor or statutory employee covered under an upstream contractor's policy. As noted previously, the ultimate goal of wage calculation under S.C. Code §42-1-40 is to fairly approximate a claimant's probable lost earnings. This goal would be the same for any claimant regardless of their pre-accident status and how they came to be covered under the Act.

In sum, Claimant essentially wants to have her proverbial cake and eat it too by claiming entitlement to an AWW based on her gross revenue as an independent contractor for federal income tax purposes, while at the same time eschewing that designation for coverage under the Act as an employee. In making her case for entitlement to benefits as an employee, Claimant

stresses that she is essentially no different than SCDC's employee nurses. This argument is incongruent with her claims for entitlement to a premium AWW and compensation rate substantially greater than her nursing peers. The Panel properly rejected her ploy and the Court should as well.

IV. The Full Commission properly denied Turner's Motion to Admit Newly Discovered evidence because it fails to satisfy the requirements of the Regulation governing same.

WCC Regulation 67-707 governs the admission of newly discovered evidence on appeal to the Commission's Appellate Panel and only contemplates cases *where review of a Single Commissioner's ruling is still pending*. Regulation 67-707 (C)(2)(d) states, in pertinent part, "[i]f the Commission grants the motion, then the review hearing is stayed." (emphasis added). In this case, the Review Hearing was held on November 10, 2020 and the Commission entered its Order on April 6, 2021. Both dates are obviously before the Motion to Admit Newly Discovered Evidence was filed on May 4, 2021. Simply put, there is no relief available to an aggrieved party *after* the Panel has already issued its final ruling other than a Motion to Reconsider pursuant to WCC Regulation 67-215 (B). Condustrial filed such a Motion on April 12, 2021 and the Commission issued its Order denying same on May 17, 2021. For these reasons, the Commission properly denied Turner's Motion to Admit Newly Discovered Evidence.

Regardless of whether the Commission maintained jurisdiction to entertain the Motion, Turner's purported newly discovered evidence patently fails to meet the Commission regulation's requirements for admission on the merits anyway. Admission of newly discovered evidence under WCC Regulation 67-707 requires the following: a) the evidence not be of a cumulative or impeaching nature; b) likely would have produced a different result had the evidence been procurable at the first hearing; c) the evidence was not known to the moving party at the time of

the first hearing; d) by reasonable diligence the new evidence could not have been secured; and e) the new evidence is being brought to the Commission's attention immediately upon its discovery. The purported evidence here fails to satisfy elements (b), (c), and (d).

First, the purported newly discovered evidence would not have likely produced a different result on the issue of Turner's entitlement to TTD beyond the finite period awarded because the Commission did not base its denial of additional periods of TTD solely on the absence of supporting disability notes from medical providers as she contends. The Appellate Panel also found that Claimant refused a suitable employment offer which affirmatively bars her entitlement to TTD pursuant to S.C. Code §42-9-190 and other applicable law. R., Vol. 1, p. 108. Therefore, because additional grounds support the denial of TTD, the admission of new alleged disability notes would not have changed the final decision on this issue.

Next, the evidence in question was known to Turner at the time of the Hearing before the Single Commissioner. Turner herself acknowledges her belief that other disability notes existed at that time. R., Vol. 1, p. 219. Based on that knowledge, Turner could have exercised a number of potential remedies to discover the actual disability notes at that stage of the proceeding, including, but not limited to, a Motion to Adjourn the Hearing to investigate further, but she failed to do so. For these reasons, element (c) for the admission of newly discovered evidence per the regulation is not satisfied.

Moreover, because reasonable diligence could have secured the additional evidence at any point before the Single Commissioner issued her initial ruling in 2018, before she issued her formal Decision and Order in July of 2020, and/or at any point prior to the Review Hearing before the Full Commission Appellate in November 2020, the evidence is not admissible under WCC R. 67-

707 (C)(2). **Yet, Turner took no action to follow up on her testimony regarding the existence of additional disability notes during that nearly three year interim**.

Further, Turner admits in her Motion that the evidence was specifically sought to counter the Single Commissioner's initial ruling denying TTD beyond September 30, 2015. R., Vol. 1, p. 220. Although her counsel purportedly sought all evidence of ongoing disability from the State Office of Victim's Assistance ("SOVA") through normal discovery processes before the Hearing before the Single Commissioner, Turner acknowledges the actual impetus for her follow-up efforts to secure the evidence was in response to the Commissioner's adverse ruling. This curious timing does not constitute the exercise of reasonable diligence to expedite legitimate outstanding discovery requests; rather, it is clearly an attempt to get a second bite of the apple following an unfavorable ruling.

Finally, the purported evidence does not even support the relief Turner requests. Her Motion to Admit Newly Discovered evidence requests a running award of TTD from the date of the accident; yet, even if admissible, this specific evidence would only support an additional finite period of TTD and certainly not a running award. As such, the Commission's denial of the Motion was not error.

CONCLUSION

For all the aforementioned reasons, the Court should AFFIRM the Panel's decisions regarding Turner's AWW, the award of TTD for a finite period of disability per the medical evidence, the finding that Turner refused Condustrial's offer of suitable light duty employment, and the denial of her Motion to Admit Newly Discovered Evidence.

Respectfully submitted,

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September 1, 2022

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STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2021-000633

Rachel J. Turner, Employee, Appellant-Respondent,

v.

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

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

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Respondent's Brief of Respondent-Appellant complies with SCACR 211(b).

September 7, 2022

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PROOF OF SERVICE

I certify that I have served the Final Respondent's Brief of Respondent-Appellant to all parties by electronic mail and/or by depositing a copy of it in the United States Mail, postage prepaid, on September 8, 2022, addressed to all attorneys of record at the addresses below:

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