RECEIVED
Sep 09 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1514359

Court of Appeals 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.

FINAL JOINT BRIEF OF RESPONDENTS SOUTH CAROLINA PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION ON BEHALF OF GUARANTEE INSURANCE COMPANY AND COUNTRYWIDE STAFFING SOLUTIONS GROUP, INC. TO RESPONDENT-APPELLANT CONDUSTRIAL, INC. F/K/A MEDUSTRIAL HEALTHCARE STAFFING SERVICE FINAL BRIEF OF APPELLANT

Grady L. Beard, Esquire
Beth B. Richardson, Esquire
Jasmine D. Smith, Esquire
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400

Attorneys for Respondent South Carolina Property and Casualty Insurance Guaranty Association on behalf of Guarantee Insurance Company

Gregory M. Alford
Alford Law Firm, LLC
18 Executive Park Road, Building 1 (29928)
Post Office Box 8008
Hilton Head Island, SC 29938
Phone: (843) 842-5500
Attorney for Respondent Countrywide Staffing Solutions Group, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF ISSUES

1. Whether substantial evidence supports the Full Commission's Ruling that under the Selected Staffing Agreement, Countrywide nor Guarantee owe any obligations to the claimant, Rachel Turner, or Condustrial because:

   (a) Condustrial never intended nor attempted to submit Turner, a prison worker, to their Selected Staffing Agreement with Countrywide because Condustrial classified and had an independent contractor agreement with Turner;

   (b) Condustrial is solely liable for its own strategic business decisions and related outcomes under the Selected Staffing Agreement, including its decision to disregard providing workers compensation coverage for its independent contractors like Turner under the Selected Staffing Agreement or in an alternative market, or to ensure that these workers had their own workers compensation coverage, before sending them off to work in a maximum security prison facility; and

   (c) Under the Selected Staffing Agreement, Countrywide had the unilateral right to decline to accept any employee into the Selected Staffing pool, and due to Guarantee's underwriting requirements Countrywide would have had to reject Turner, due to the high-risk nature of her working in a maximum security prison.

2. Whether substantial evidence supports the Full Commission's decision to reject Condustrial's attempt to fabricate insurance coverage for Turner through reformation of the Selected Staffing Agreement, where no facts, law or equity supports such position.

3. Whether substantial evidence supports the Full Commission's decision that Guarantee is not liable for any losses suffered by Turner because Condustrial was not an insured, directly or indirectly, under the Policy where Turner was never an employee of record of Countrywide, and even if Turner had been, Turner was not among the workers in class codes and locations approved by Countrywide under the Selected Staffing Agreement or Guarantee under the Policy.

4. Whether the great weight of the evidence supports a finding that Turner, in fact, was an independent contractor and not an employee where the direct evidence of right or exercise of control factor favors finding Turner to be an independent contractor because Condustrial's brokerage model is inapposite to a finding of control, Turner had a duty to read the controlling documents, the evidence of furnishing equipment factor favors finding Turner to be an independent contractor, the evidence of method of payment favors finding Turner to be an independent contractor, and the evidence of right to fire factors in favor of finding Turner to be an independent contractor.

STATEMENT OF THE CASE

This is a workers' compensation appeal by Rachel J. Turner (Turner) from the Decision and Order of the South Carolina Workers' Compensation Commission Appellate Panel (the Full Commission), filed on April 6, 2021. **(R. pp. 79-126).**

Turner filed a claim against Respondents South Carolina Department of Corrections (SCDC), Condustrial, Inc. f/k/a Medustrial Healthcare Staffing Service (Condustrial), Countrywide Staffing Solutions Group, Inc. (Countrywide), State Accident Fund, South Carolina Uninsured Employer's Fund, and Guarantee Insurance Company (Guarantee), alleging she suffered physical injuries to her right shoulder, right arm, back, and psychological injuries caused by an incident at SCDC on September 5, 2015. **(R. pp. 17, 130, 3054).** Condustrial denied the claim, arguing Turner was an independent contractor and not an employee eligible for workers compensation benefits as defined in the Workers Compensation Act. The Single Commissioner held a hearing over multiple days beginning on July 24, 2017, and concluding on November 6, 2017.

The Single Commissioner issued a Decision and Order on July 21, 2020, from which all parties appealed the Single Commissioner's Decision and Order to the Full Commission in one way or another. As the Order states in the Stipulations section, on November 27, 2017, after the hearing in this matter concluded, Guarantee 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 (the Guaranty Association) has appeared on behalf of Guarantee in this matter.

The Guaranty Association requested 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 Turner having the status of employee and concluding Turner 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) Turner developed PTSD as a direct result of the assault and surrounding injuries; and (4) Turner was disabled within the meaning of the Act from September 6, 2015, until September 30, 2016. **(R. pp. 134-68).**

To the extent the Full Commission concluded Turner was an employee eligible for workers compensation benefits, the Guaranty Association asked the Full Commission to affirm the Single Commissioner's conclusions that (1) the record does not include evidence to support finding Turner was unable to work in any capacity after September 30, 2015, (2) Turner refused suitable employment and therefore is not entitled to temporary total disability benefits (TTD), and (3) *Burnette v. City of Greenville*, 401 S.C. 417, 737 S.E.2d 200 (Ct. App. 2012) barred an award of TTD. **(R. pp. 198-212).** Additionally, the Guaranty Association and Respondent Countrywide Staffing Solutions Group, Inc. (Countrywide) jointly asked the Full Commission 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 Turner under the Condustrial/Countrywide Selected Staffing Agreement, and reformation of contract is not warranted under any common or statutory law or in equity; and (2) the Guaranty Association is not liable for any losses suffered by Turner because (a) Condustrial was not an insured under the Policy; and (b) Turner was never an employee of record of Countrywide, and even if Turner had been an employee of record of Countrywide, she was a prison worker, not among the workers in class codes and locations approved by Guarantee under the Policy. **(R. pp. 169-94).**

The Full Commission affirmed the Decision and Order of the Single Commissioner except for the calculation of Turner's AWW and compensation rate. **(R. pp. 124-26).** Turner and Condustrial appealed various issues from this Order, to which the Guaranty Association, jointly with Respondent Countrywide, now files their Initial Brief responding to Condustrial's appeal.[1]

STANDARD

The Administrative Procedures Act ("APA") governs this Court's review of the Full Commission's decisions. *See Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981). "The claimant has the burden of proving facts that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture or speculation." *Nicholson v. S.C. Dep't of Soc. Servs.*, 411 S.C. 381, 384, 769 S.E.2d 1, 2-3 (2015) (quoting *Crisp v. South Co.*, 401 S.C. 627, 641, 738 S.E.2d 835, 842 (2013)). "A decision of the Worker's Compensation Commission will not be overturned by a reviewing court unless it is clearly unsupported by substantial evidence in the record." *Howell v. Pac. Columbia Mills*, 291 S.C. 469, 471, 354 S.E.2d 384, 385 (1987). Substantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the Full Commission reached. *Waters v. S.C. Land Resources Conservation Comm'n*, 321 S.C. 219, 467 S.E.2d 913 (1996).

Appellant Condustrial erroneously conflates different standards of review in its brief to this Court.[2] In an appeal from the Full Commission, this Court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but it may reverse when

[1] In a separate Brief filed concurrently with the instant brief, the Guaranty Association and Countrywide jointly responded to Turner's Initial Brief of Appellant.

[2] Specifically, Condustrial erroneously states "this Court owes no deference to the Commission regarding the employment relationship, insurance coverage, and equitable issues presented."

the decision is affected by an error of law. *Hopper v. Terry Hunt Const.*, 373 S.C. 475, 479, 646 S.E.2d 162, 164 (Ct. App. 2007), *aff'd*, 383 S.C. 310, 680 S.E.2d 1 (2009). "Certain situations involve a mixed question of law and fact." *Id.* When mixed questions of law and fact are presented, the question of "whether the facts of a case were correctly applied to [the law] is a question of fact, subject to the substantial evidence standard." *Id.* (holding the determination of the requirements to transfer liability to the State Accident Fund under section 42-1-415 was a question of law, but whether the statutory employer and its carrier met those requirements was a question of fact subject to the substantial evidence standard).

The substantial evidence standard of review discussed above applies to all questions of coverage in this matter. However, whether Turner is an independent contractor or employee is a jurisdictional question. The existence or absence of an employment relationship is jurisdictional; therefore, "this Court has the power and duty to review the entire record and decide the jurisdictional facts in accordance with the preponderance of the evidence." *Glass v. Dow Chem. Co.*, 325 S.C. 198, 482 S.E.2d 49 (1997); *Vines v. Champion Blg. Prods.*, 315 S.C. 13, 431 S.E.2d 585 (1993).

ARGUMENT

The Guaranty Association and Countrywide jointly respond to Condustrial's Initial Brief. *See* Rule 208(b)(6), SCACR (providing that in cases involving more than one appellant or respondent, any number of parties may join in a single brief and any party may adopt by reference all or any part of the brief of another).

Condustrial's initial brief raises four issues. Three issues raised in Condustrial's Initial Brief relate to coverage. This Court should affirm the Full Commission's Decision and Order as to all issues related to coverage. Substantial evidence supports the Full Commission's decision

that Condustrial failed to procure workers compensation insurance for Turner, a nurse working in a maximum security, prison facility, under its Selected Staffing Agreement with Countrywide. Therefore, neither Countrywide nor its carrier, Guarantee, have any liability to Turner or Condustrial.

Substantial evidence further supports the Full Commission's decision that reformation of contract was not appropriate where there was neither mutual mistake of fact in formation of the Selected Staffing Agreement, an agency relationship, or statutory law or equity which would support Condustrial's position for reformation. In fact, substantial evidence shows Condustrial comes to the Court with unclean hands.

Finally, the Full Commission correctly determined that neither Guarantee and Countrywide's Worker's Compensation Insurance Policy nor any statute related thereto provided a direct or indirect means by which Guarantee could be held responsible for covering Turner.

The Guaranty Association and Countrywide join in Condustrial's argument that the substantial evidence in the record confirms Turner was an independent contractor, and therefore the Court should reverse the Decision of the Full Commission on this ground. To this end, the Guaranty Association and Countrywide add below the following case law and additional evidence in the record for the Court's consideration.

I. The Full Commission correctly concluded that under the Select Staffing Agreement, neither Countrywide nor Guarantee owe any obligation to Turner or Condustrial.

Condustrial is a staffing company in operation since 2002. In the beginning, Condustrial specialized in staffing workers for construction projects. Then, in 2006, Condustrial bought "Medustrial" a brokerage model that staffed approximately 130 nurses in South Carolina with a payroll of about 1.4 million dollars. Condustrial classified and had a written independent contractor agreement with about 120 of these workers.

At the time of the Turner's injury, Tony Durham, President of Condustrial, and Tom Sears, General Counsel for Condustrial, had served in their roles for the company for over fifteen and nine years respectively. They were both involved in the negotiation of the "Contract Labor Services Agreement" and "Procedural Amendment" (collectively, "Selected Staffing Agreement") with Countrywide,[3] as well as intimately familiar with Condustrial's arrangements for workers compensation in the past.[4]

There is no dispute that Condustrial did not submit Turner for coverage under the Selected Staffing Agreement, nor did Condustrial ensure that Turner carried her own workers compensation insurance before sending her off to work at the Kirkland Correctional Institution, a Level Three Maximum security facility. Under the Selected Staffing Agreement, moreover, "all strategic, operational and other business-related decisions regarding [Condustrial's] business . . . and related outcomes shall exclusively be the responsibility of [Condustrial] and [Countrywide] shall bear no responsibility or liability for any actions or inactions by [Condustrial]."[5] For these reasons and others discussed below, Condustrial's gap in workforce coverage is not only its own doing but its own problem. The Selected Staffing Agreement squarely places the gap in coverage on Condustrial's shoulders. Further, substantial evidence demonstrates that Condustrial comes to the Court with unclean hands and without any facts or law which would support its position on reformation of contract. Thus, this Court should affirm the Full Commission's Decision on all grounds related to coverage in this matter.

---

[3] **(R. pp. 2961-70, 3119-21).**
[4] **(R. pp. 931-32, 1946, 1951, 2066).**
[5] **(R. pp. 2961-62 ¶ 2.a).**

A. The Selected Staffing Agreement required Condustrial to submit timely, complete, and accurate information, including NCCI class codes and locations, for workers with whom it wanted to procure workers compensation coverage. This submission was required to be at least three business days prior to the date on which payroll is to be issued.

The Selected Staffing Agreement is governed by the common law of contracts and, accordingly, the parties' obligations thereunder are subject to its plain language. *See Silver v. Aabstract 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." (quoting *McPherson v. J.E. Sirrine & Co.*, 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945)).

The plain language states that Countrywide would provide various services, including workers compensation benefits, for "Selected Staffing/Employees performing services for [Condustrial] based on timely, complete and accurate information and payment provided by [Condustrial]."[6] The Selected Staffing Agreement required Condustrial to:

> Submit 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 [Countrywide].*** All information provided by [Condustrial] to [Countrywide] will be complete, accurate, and not misleading."[7]

Thus, if Condustrial did not submit timely, complete, and accurate payroll information including worker class codes regarding any worker at least three days prior to the date on which payroll was

[6] *Id.* at ¶ 1.
[7] *Id.* at ¶ 2.c.

to be issued by Countrywide, then the worker was not covered by the Selected Staffing Agreement. At the hearing, Condustrial plainly understood these terms. As Tony Durham admitted, "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."[8]

Moreover, there is nothing vague or ambiguous about the term, "Selected Staffing/Employees," under the Selected Staffing Agreement. Section 2.c defines Selected 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 [Countrywide].*" Condustrial's President Tony Durham and General Counsel Tom Sears both testified they understood who was and who was not a Selected Staffing/Employee. Tom Sears admittedly negotiated the Selected Staffing Agreement whereby Condustrial would provide compensation codes and locations where employees worked and put that data into Countrywide's system.[9] When asked "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?," Sears responded, "I think in the normal course of business, yes."[10] Similarly, Tony Durham agreed that Condustrial had to submit the class code and location to Countrywide for Selected Staffing/Employees to be approved and honored under the Selected Staffing Agreement.[11]

---

[8] **(R. p. 2195).**
[9] **(R. pp. 1310-11).**
[10] **(R. pp. 1419-20).**
[11] **(R. pp. 2282-83).**

Condustrial's argument that the plain language of section 2.c allows it to submit workers for workers compensation coverage at any time under the Selected Staffing Agreement is disingenuous. With respect to Condustrial's quotation of section 2.c, Condustrial indicates the end of a sentence prematurely. Section 2.c does not simply require Condustrial to provide "timely, complete and accurate payroll information . . . for each applicable payroll period."[12] Rather, section 2.c requires Condustrial to provide "timely, complete and accurate payroll information . . . for each applicable payroll period *at least three banking days prior to the date on which payroll is to be issued by [Countrywide].*"

Finally, Condustrial makes much ado about nothing with reference to "Exhibit B". The alleged failure of the parties to attach Exhibit B to the Selected Staffing Agreement does not give Condustrial the ability to add workers at any time. As described in section 1.a, 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 "[f]urnish 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."[13] Exhibit B says nothing about the process by which a "Selected Staffing/Employees" would be covered for workers compensation purposes. As discussed above, and admitted by Condustrial many times, section 2.a dictated who was covered. Section 2.a 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." Exhibit B,

---

[12] **(R. p. 272).** Notably, the undersigned also pointed out this misquotation to Condustrial when it presented the same argument to the Full Commission.
[13] **(R. p. 2961 ¶ 1.a).**

according to paragraph 1.a, merely describes the type of work "Selected Staffing/Employees" were going to perform and at what locations.[14]

In the end, there are simply no facts to suggest that Condustrial was ever confused about what was a "Selected Staffing/Employee" or how to submit workers for coverage. The undisputed evidence shows that Condustrial followed the procedures for submitting workers for coverage under the Selected Staffing Agreement including timely providing Countrywide the class codes and the locations of the workers for which it wanted coverage at least three banking days before each payroll period.[15]

B. Condustrial chose not to submit Turner, a nurse working in a prison facility, for workers compensation coverage under the Selected Staffing Agreement, or ensure that she went to work with her own workers compensation insurance.

Condustrial admitted that it failed to include Turner in its payroll under the Selected Staffing Agreement. Tom Sears stated: "I would agree that independent contractors under Medustrial were not covered by the Agreement."[16] Again, Sears reiterated at the hearing: "I agree that when we made this contract with Countrywide, we did not intend to include independent contractors."[17]

---

[14] The reference to Exhibit B is the only reference in the Agreement, moreover, and notably, in contrast, Exhibit A, which was attached to the Agreement, was not referenced anywhere in the Agreement. The oddity suggests that the reference to Exhibit B may have been a typo and should have been instead a reference to Exhibit A. To this end, 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 would have been the list that Condustrial would have expected to be covered by the Contract in its inception. **(R. p. 1412)**; *see also* **(Amended Supp. R. pp. 3420-538)** (Condustrial Payroll for August and September 2015); **(R. pp. 3349-51)** (List of locations provided by Condustrial to Countrywide excluding reference to any prison facility).

[15] **(Amended Supp. R. pp. 3420-538)** (Condustrial Payroll for August and September 2015); **(R. pp. 3349-51)** (List of locations provided by Condustrial to Countrywide excluding reference to any prison facility).

[16] **(R. p. 1307).**

[17] **(R. pp. 1307, 1353).**

Turner, particularly, was staffed at the Kirkland Correctional Institution, a Level Three Maximum security facility, housing some of the most dangerous inmates in South Carolina.[18] Condustrial never submitted any worker with class code 7720, which applies to workers in prison, under the Selected Staffing Agreement, or for that matter told Countrywide about any worker classified under class code 7720 staffed at the Kirkland Correctional Institution.[19] As the Full Commission concluded, "the credible and reliable evidence in the record demonstrates that [Turner]'s class code and location were never submitted to [Countrywide] for coverage."[20]

Moreover, Condustrial's emphasis that Countrywide was aware of its Medustrial brokerage line of business, including approximately 180 nurses, or submission of a few nurses working in hospitals and nursing homes under class codes 8829 and 8833, fails to affect the outcome for Turner under the Selected Staffing Agreement. There is no relationship between providing coverage for workers in prison facilities such as Turner and providing coverage for workers in public and private hospitals and nursing homes in South Carolina.[21] What is more, alleged conversations had before formation of the Selected Staffing Agreement cannot modify or reform the plain language now. The Selected Staffing 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."[22] "[T]his Agreement supersedes all

---

[18] **(Amended Supp. R. pp. 3400-19).**

[19] **(R. pp. 2462-74)** (Becky Barnette, Guarantee's Vice-President for Underwriting and Manager of the PEO Unit, testified in detail how the proper NCCI classification code for Turner was 7720, for workers in prisons, not the 8829 or 8833, for workers in nursing homes and hospitals respectively); *see also* **(R. p. 117 n.6)** (explaining how Barnette's "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, [Agreement], or [Countrywide/Guarantee] Policy . . . ").

[20] **(R. p. 112).**

[21] **(R. pp. 2462-75, 2522-27; Amended Supp. R. pp. 3408-19).**

[22] **(R. p. 2966 ¶ 20)** ("Entire Agreement, Amendment").

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."[23]

C. Under the Selected Staffing Agreement, Condustrial's business "decisions and related outcomes shall exclusively be the responsibility of [Condustrial] and [Countrywide] shall bear no responsibility or liability for any actions or inactions by [Condustrial]."

Under the Selected Staffing Agreement, Condustrial agreed to bear alone both the responsibility to submit Selected Staffing/Employees for workers compensation purposes thereunder, as well as the consequences of failing to do so. Section 2.a states:

> [Condustrial] 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 [Condustrial] and [Countrywide] shall bear no responsibility or liability for any actions or inactions by [Condustrial].[24]

Moreover, Sears admitted repeatedly that Condustrial made a "business decision to maintain this [1099] brokerage model."[25] When asked, "It was your business – your company's business decision to have these 1099 employees out there without workers' compensation insurance," Sears responded, "Yes."[26] Knowing that it chose not to submit Turner for workers compensation coverage under the Selected Staffing Agreement too, Condustrial failed to ensure Turner procured her own coverage before staffing her as a nurse in a Level III maximum security facility. Any gap in coverage is not only Condustrial's own doing, but its own problem to bear.

---

[23] *Id.* ¶ 20 ("Supremacy of the Agreement").
[24] **(R. p. 2961 ¶ 2.a.).**
[25] **(R. p. 1314).**
[26] *Id.*

D. Under the Selected Staffing Agreement, Countrywide had the unilateral right to decline to accept any employee into the Selected Staffing pool, and due to Guarantee's underwriting requirements Countrywide would have had to reject Turner, due to the high-risk nature of her working in a maximum security prison.

For argument purposes only, even if there was a provision in the Selected Staffing Agreement whereby Condustrial could submit employees for coverage after-the-fact (which there is not),[27] Condustrial admitted that Paragraph 6 permitted Countrywide to reject an exposure presenting undue risk of injury or death. Paragraph 6 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."[28]

Tony Durham further confirmed that "if [Condustrial] sent [Countrywide] something that was not covered within a code that [Condustrial] had on our [Selected Staffing Agreement], that they would certainly have the reasonable expectation to say, 'hey, that's not cool. Don't do that.'"[29] Likewise, Tom Sears admitted too that Paragraph 6 required Condustrial to provide the locations of its workers and that Countrywide had the ability to reject specific exposures.[30] When asked "But

---

[27] Tony Durham admitted that the Agreement fails to provide for an audit and retroactive coverage. **(R. p. 2244).**

[28] **(R. p. 2202).**

[29] **(R. p. 2202)**; *see also* **(R. 2203)** ("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.").

[30] **(R. 1335-37, Amended Supp. R. 3383).**

[Countrywide has] a right of prior approval. You can't just give us anybody," Sears responded "The contract does say that, yes."[31] In fact, Countrywide had rejected Condustrial's United States Longshore and Harbor (U.S.L.&H) workers exposure and Condustrial found coverage for these workers elsewhere.[32]

Finally, ample evidence presented at the hearing demonstrated that Countrywide would have rejected any submission of Turner, a prison worker, under the Selected Staffing Agreement. Such exposure was deemed by its insurer Guarantee as presenting an unreasonable risk of injury or death.[33] Therefore, even if there was a process by which Turner could be submitted for coverage after-the-fact (which there is not), it would make no difference to the outcome of this matter, as Turner, a prison worker, would have been rejected by Countrywide and its insurer, Guarantee, as presenting an unreasonable risk of injury or death.

II. Substantial evidence supports the Full Commission's decision to reject Condustrial's attempt to fabricate insurance coverage for Turner through reformation of the Selected Staffing Agreement, where no facts, law or equity supports such position. In fact, Condustrial comes to the Court with unclean hands.

At the outset, this Court should dismiss summarily Condustrial's argument requesting that this Court declare Countrywide a "de facto" Professional Employer Organization (PEO). Condustrial also then asks this Court to reform, by application of the statutory obligations of PEOs, an agreement which two sophisticated business entities negotiated at arms-length that provides for an inapposite result, primarily because Condustrial did not want a PEO.

---

[31] **(R. p. 1354).**

[32] **(R. pp. 181, 2203-04)** (regarding U.S.L. & H coverage).

[33] **(R. pp. 2475-76)** (Becky Barnette stating that Guarantee Insurance Company has never insured workers staffed at any prison facility, Maximum Security Level Three or not); **(R. pp. 2497, 2505-06)** (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").

There is no authority, common law or statutory, to support this legal fantasy. Condustrial cites none. *See Transp. In. Co. & Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 699 S.E.2d 687 (2010) (providing an appellant court will decline to consider conclusory arguments where there is no citation to legal authority); *R G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000). The Guaranty Association and Countrywide 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, much less, then took the additional step, to bootstrap the requirements applicable to PEO by statute to reform a contract between two sophisticated business entities expressly providing for a different result.

As the Full Commission determined, the South Carolina's PEO statute, S.C. Code Ann. §§ 40-68-10 *et seq.*, does not apply to the Selected Staffing Agreement between Condustrial and Countrywide, who is not a licensed PEO. Condustrial's relationship with Countrywide is governed by the law of contracts, and the common law cannot support reformation of contract where there was no mutual mistake of fact at the time of formation or any agency relationship outside the contract. Simply put, in this case, two sophisticated business entities negotiated the Selected Staffing Agreement substantially contradicting Condustrial's position on appeal that it reasonably believed Countrywide was a PEO at the time of contracting, or that the PEO statutes would ever step in and upend the Selected Staffing Agreement in a manner that contradicts its express terms. Finally, this Court cannot ignore that Condustrial comes to it for relief with unclean hands.

A. The statutory scheme governing contracts with PEOs applies to licensees and their clients, and Countrywide was neither a licensed PEO nor entered into an agreement with Condustrial reflective of that relationship as required by statute.

Even if the Court were to consider Condustrial's novel "de facto" PEO argument on appeal, statutes must be strictly construed and narrowly applied under South Carolina law. This court

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 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).

As the Full Commission concluded, the South Carolina PEO statute governs contracts between licensees and client companies. 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 through 40-68-55 address the requirements for licensees. Section 40-68-70 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." Countrywide was not a licensed PEO, now or at the time of contracting, and therefore the South Carolina PEO statute governing contracts between licensees and client companies does not apply in this matter.

Condustrial's argument that the PEO statute envisions that PEOs will exist outside a licensing status misses the mark. Just because the legislature provided a mechanism to regulate entities operating as PEOs without a license,[34] that regulation does not provide the authority for a

[34] S.C. Code Ann. §§ 40-68-150 (providing for criminal penalties).

court to declare an entity a "de facto" PEO to which the court then sets aside agreements made by two sophisticated business entities providing for a different result.

B. There was no mutual mistake of fact or agency relationship that would impose liability upon Countrywide under the Selected Staffing Agreement where: (a) Condustrial expressly negotiated and entered into an agreement providing for something less than a relationship with a Professional Employer Organization, and one more like an Administrative Services Organization; and (b) Condustrial agreed to take full responsibility for its decisions and related outcomes under the Selected Staffing Agreement.

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 in fact negotiated and entered into an agreement with Countrywide for something different from and less expensive than a contract with a Professional Employer Organization, and instead more like an agreement with an Administrative Services Organization (ASO).[35] The Agreement provides that it is a "Contract Labor Service Agreement" between Condustrial and Countrywide Payroll and HR Solutions, Inc., also defined as "a contract labor service (CLS) entity." The Selected Staffing Agreement "fails to contain any provision referencing a professional employer organization or warranting in any way that [Countrywide] is a PEO."[36] As the Full Commission concluded, moreover, though Countrywide may have initiated a conversation with Condustrial regarding back room services pointing out that one of its companies, Countrywide HR, was now a licensed PEO, as the discussions between the parties ensued, Condustrial admitted that it did not want a full PEO arrangement, but something different from a PEO, less expensive than a PEO, and something more like an ASO.[37]

The Amendment to the Selected Staffing Agreement dated two days before the Selected Staffing Agreement's execution, furthermore, removes Countrywide's ability to provide services required of a PEO under South Carolina law.[38] For example, Condustrial refused to allow Countrywide to have control over its employees, to be the employer of record, or to take over payroll functions.[39] As the Commission aptly noted, to be a PEO, section 40-68-70(A)(2) states that a contract between a licensee and a client company "must provide that the

---

[35] **(R. pp. 113-15).**
[36] **(R. p. 115).**
[37] **(R. p. 113)** (providing abundant citations to testimony from Tony Durham and Tom Sears at trial that Condustrial did not want a PEO arrangement).
[38] **(R. pp. 3119-121).**
[39] *Id.*

licensee . . . assume[] responsibility for the payment of wages to the assigned employees without regard to payments by the client to the licensee."[40]

Condustrial and Countrywide left out other terms otherwise required in a contract between a PEO and client company under section 40-68-70(A) under the Selected Staffing Agreement too. Section 40-68-70(A)(6) requires a licensee to agree by contract among other items that:

> (a) notice to or acknowledgment of the occurrence of an injury on the part of the client company is notice to or knowledge on the part of the licensee and its workers' compensation insurer;
>
> (b) for the purposes of Title 42 [relating to the Laws of Workers Compensation], the jurisdiction of the client company is the jurisdiction of the licensee and its workers' compensation insurer;
>
> (c) the licensee and its workers' compensation insurer is bound by and subject to the awards, judgments, or decrees rendered against them under the provisions of Title 42 [relating to the Laws of Workers Compensation];

The Selected Staffing Agreement does not include these provisions or suggest by reference that Countrywide agreed to be subject to workers compensation laws, and for good reason too. The Selected Staffing Agreement instead specifically places full responsibility on Condustrial for its decision to submit (or not) a worker thereunder, and specifically absolves Countrywide for any liability associated therewith.

Condustrial's liberal references to the testimony of Tony Durham, who allegedly believed that despite the Selected Staffing Agreement's terms, Countrywide was a PEO and that the PEO statutes would somehow apply to Turner if injured and force Countrywide to provide coverage is without merit. First, this Court cannot ignore that the Full Commission expressly found the testimony of Condustrial on this issue, including Durham, to be "contradicted by the testimony of

[40] S.C. Code Ann. § 40-68-70(A)(2).

the parties, the [Selected Staffing Agreement], and applicable law."[41] To accept Durham's position, this Court would have to set aside Condustrial's express acceptance of full responsibility for its business decision to submit (or not) workers for coverage under the Selected Staffing Agreement and any related outcome associated therewith, as well as its agreement that Countrywide would not be liable for the same.

Furthermore, Tony Durham is the President of Condustrial, a staffing company, not an insurance agent or underwriter of workers compensation coverage with any "industry knowledge" of PEOs. Condustrial's attempt to elevate his testimony about what is a PEO and when the PEO statutes apply is without foundation. He may have over his years as President of Condustrial entered into different types of workers compensation arrangements, but there was no evidence presented at the hearing that he had any workers compensation insurance industry expertise in understanding what was a PEO or when the PEO statutes would apply. He was neither an agent brokering such relationships, for example, nor an underwriter for such policies. In fact, before entering into this Selected Staffing Agreement, Condustrial employed an insurance agent named Alfred Hyndshaw to assist it in procuring workers compensation insurance and did not rely on Tony Durham for the same.[42]

Finally, as to witnesses testifying about workers compensation insurance and underwriting more generally, and then more specifically about worker classification codes and PEO arrangements too, the Full Commission found that the testimony of Becky Barnette, Guarantee's Vice-President for Underwriting and Manager of the PEO Unit, must receive the greatest weight.

---

[41] **(R. pp. 112-15).**
[42] **(R. p. 1673).**

As discussed in more detail below, Barnette explained that Guarantee did not have a PEO policy with Countrywide. Countrywide was not a PEO.[43]

The common law agency cases referenced on page 40 of Condustrial's Initial Brief, finally, are 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. Condustrial and Countrywide are sophisticated, arms-length business entities, not in any agency relationship with one another outside the four corners of the contract.

C. Condustrial comes to the Court with unclean hands and should be estopped from setting forth any argument outside the four corners of the Selected Staffing Agreement.

As discussed above, substantial evidence supports the Full Commission's decision that the equities are not on Condustrial's side. Condustrial intentionally bargained for something less expensive than a relationship with a PEO, and a relationship more like and ASO. The Selected Staffing Agreement, therefore, lacks several essential terms required of any client relationship with a PEO. Furthermore, Condustrial neither submitted Turner for coverage under the Selected Staffing Agreement nor ensured that Turner procured her own workers compensation insurance before staffing her at a Level Three, maximum security, prison facility, and despite having signed a contract with the South Carolina Department of Corrections representing that Turner would have workers compensation coverage. Under the Selected Staffing Agreement, vis a vis' Countrywide, this decision must be borne by Condustrial alone, and Condustrial expressly agreed that Countrywide would have no liability for the same.

---

[43] **(R. pp. 117 n.6, 2508).**

Boldly, however, Condustrial asks the Court to disregard the four corners of the agreement because Countrywide allegedly represented it was a PEO before entering into the same. The Selected Staffing Agreement, however, "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."[44] "[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."[45]

Further, substantial evidence shows that Condustrial is a bad actor, acting with reckless disregard for Turner's workplace safety and security for economic gain.[46] Before entering into the Selected Staffing Agreement with Countrywide, Condustrial rejected the renewal rates quoted by its direct insurer as being too expensive.[47] It negotiated the Selected Staffing Agreement with Countrywide because it wanted something other than and less expensive than a contract with a PEO, and something more like a relationship with an ASO.[48]

The 1099 nurse brokerage had a payroll of approximating $800,000.00 dollars.[49] By classifying these nurses as 1099s, instead of employees, Condustrial avoided being their employer of record, providing for workers compensation insurance in the assigned risk pool, as well as various employment taxes. Tom Sears and Tony Durham both knew that Condustrial could not

---

[44] **(R. pp. 2961-70 ¶ 20, 3119-121)** ("Entire Agreement, Amendment").
[45] **(R. p. 2966 ¶ 20)** ("Supremacy of the Agreement").
[46] **(R. p. 2264).**
[47] **(R. p. 2067).**
[48] **(R. p. 2166)**; *see also* **(R. p. 113).**
[49] **(R. p. 2067).**

insure nurses working in prison facilities anywhere but in the assigned risk pool too.[50] By charging the South Carolina Department of Corrections for fully insured staff,[51] Condustrial even pocketed the profit of not covering its staff with workers compensation insurance or ensuring that its staff procured the same for themselves.[52]

In 2014, Condustrial also 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 nurses working in prison facilities, Condustrial's General Counsel Tom Sears falsely informed Guarantee that the nurses were insured instead by the State of South Carolina, thus keeping these nurses off the Policy, or, perhaps to avoid any effort by Guarantee to void the coverage for material misrepresentation.[53]

---

[50] **(R. p. 2247)** (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 admitting that Condustrial ended up after this litigation ensued insuring the 1099 nurses in the assigned risk market); **(R. p. 2258)** ("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."); **(R. pp. 1400-01)** (Tom Sears admitting after this litigation ensued that Condustrial engaged brokers to find workers compensation insurance for its nurses staffed in prison facilities and ended up with an assigned risk policy); **(R. pp. 1364)** (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* **(R. p. 3122)**.

[51] **(R. pp. 2972-78 ¶ 6).**

[52] **(R. pp. 1323-26)**; *see also* **(R. pp. 2233-34)** (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.").

[53] **(R. pp. 2430-31)** (Becky Barnette, Vice-President for Underwriting and Manager of the PEO Unit for The Guarantee Insurance Company 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); **(R. pp. 2445-52, 2474-75)** (Barnette giving examples where Guarantee rejected Countrywide clients with class codes and locations carrying unacceptable risk); **(R. 2475-76)** (Barnette testifying that it would not write a policy to cover workers in prison under any circumstances, and the company had never done so); **(R. p. 2543)** ("If there is a material misrepresentation made to the underwriting and the insurance company upon soliciting coverages,

When taking the record as a whole and the substantial evidence discussed above, reasonable minds would reach the same conclusion as the Full Commission that there was no mutual mistake of fact at the time of forming the Selected Staffing Agreement, no agency relationship outside the contract, no statutory law related to PEOs, nor other equitable considerations supporting Condustrial's request for relief in the form of reformation. Should Turner be deemed an employee under South Carolina law, Condustrial is rightfully caught with having to account for this gap in coverage. This result is expressly what it bargained for under the Selected Staffing Agreement and by the exercise of reckless business judgment. Buyer's Remorse is no excuse.

III. **Substantial evidence supports the Full Commission's decision that Guarantee is not liable for any losses suffered by Turner because Condustrial was not an insured, directly or indirectly, under the Policy where Turner was never an employee of record of Countrywide, and even if Turner had been, Turner was not among the workers in class codes and locations approved by Countrywide under the Selected Staffing Agreement or Guarantee under the Policy.**

The Full Commission ruled that Guarantee is not liable for any losses suffered by Turner because (1) Condustrial was not an insured under the Policy; (2) Turner was never an employee of record of Countrywide; and (3) even if Turner had been an employee of record of Countrywide, Turner was not among the workers in class codes and locations approved by Guarantee under the Policy.

Condustrial does not dispute the Commissioner's first two findings. Condustrial was not an insured under the Policy and Turner was never an employee of record of Countrywide. Condustrial argues instead that "[Guarantee] argues that [it] is only required to cover risks it agrees

---

then the insurance company has the right to seek the ability to void the coverage because it was obtained through misrepresentation.").

to cover at the inception of its policy with its insured, Countrywide." Condustrial misstates Guarantee's testimony.

Guarantee provided workers compensation insurance for Countrywide's properly reported employees of record in states and at locations approved by Guarantee. To this end, Becky Barnette,[54] Guarantee's Vice-President for Underwriting and Manager of the PEO Unit, explained in detail that Guarantee provided workers' compensation insurance to Countrywide from June 30, 2015, through June 30, 2016, under Workers Compensation Insurance Policy Number WCP500069701GIC,[55] with Endorsements dated July 20, 2015,[56] and July 30, 2015[57] (collectively, "Guarantee/Countrywide Policy"). Under the Guarantee/Countrywide Policy, Guarantee only insured properly reported Countrywide employees.[58] And Guarantee only insured properly reported Countrywide employees in states and locations approved by Guarantee.[59] "This Policy includes at its effective date the Information Page and all endorsements and schedules listed

---

[54] As to witnesses testifying to worker classification codes, and PEO arrangement, the Full Commission adopted the Single Commissioner's findings that Becky Barnette, Guarantee's Vice-President for Underwriting and Manager of the PEO Unit, must receive the greatest weight. Her experience and expertise in underwriting workers compensation coverage and understanding of PEO arrangements far outweighs that of any other witness have various roles in the insurance process who testified during trial and attempted to interpret the facts, Agreement, or Guarantee/Countrywide Policy. **(R. p. 117).**

[55] **(R. pp. 3133-291).**

[56] **(R. pp. 3352-81).**

[57] **(R. pp. 3292-324).**

[58] **(R. p. 3135 ¶¶ 1, 3.d,** and **4)** (naming Countrywide 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).

[59] *Id.* Information Page ¶ 1 (naming Countrywide as the Insured); ¶ 3.d (including those Countrywide workers listed in any endorsement); ¶ 4 (including those Countrywide 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).

there."[60] "You are Insured if you are an employer named in Item 1 of the Information Page."[61] "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 . . . ."[62]

Barnette testified repeatedly that 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 entirety and also approved of the class code but rejected the location.[63] 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.[64]

In this case, Barnette testified definitively that NCCI class code 7720 was the proper classification for a worker like Turner who was staffed at a correctional institution. Neither 7720 nor the Kirkland Correctional Institution was ever a class code or location submitted to

---

[60] *Id.* Workers Compensation and Employers Liability Insurance Policy General Section ¶ A (The Policy).

[61] *Id.* Workers Compensation and Employers Liability Insurance Policy General Section ¶ A (Who is Insured and naming Countrywide).

[62] *Id.* Workers Compensation and Employers Liability Insurance Policy General Section ¶ E (Locations).

[63] **(R. pp. 2445-46; 3352-81)** (rejecting a particular manufacturing code under the Policy); **(R. pp. 2449-52); (Amended Supp. R. 3384-98)** (rejecting submission for coverage based on the location, not the class code).

[64] **(R. p. 2278)** (emphasis added). 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 establish himself as an expert in underwriting or workers compensation insurance coverage issues, including PEO arrangements, at the hearing. As discussed in more detail elsewhere in this Initial Brief, the Guaranty Association would dispute giving any weight to Durham's testimony regarding underwriting or workers compensation insurance coverage issues, including PEO arrangements.

Countrywide or Guarantee for coverage.[65] 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.**[66]

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.[67]

Condustrial does not appear to dispute these facts. Condustrial's argument apparently hangs on application of the PEO statute in this instance. Substantial evidence, however, supports the Full Commission's rejection of the application of the PEO statute in this matter on all grounds raised by Condustrial for all the reasons discussed in the Full Commission's Decision and Order and above. Condustrial just conveniently forgets that it chose not to renew its direct policy of insurance or enter into a Selected Staffing Agreement with a PEO. It wanted something other than and less expensive than a direct insured or PEO relationship, something more like an ASO relationship, so it negotiated and entered into an agreement with Countywide, wherein the terms expressly rejected any provision that the parties would be subject to the statutory laws related to

---

[65] **(R. pp. 2454-55, 3349-51; Amended Supp. R. p. 3399)** (no prison location or Kirkland Correctional Facility listed); **(R. pp. 2461-73, 3324, 3349-51; Amended Supp. R. p. 3399); (Amended Supp. R. pp. 3400-19)** (NCCI Scopes Manual Codes 8829, 8833, 7720, and 9410 explaining that 7720 is proper classification for workers in prisons); **(R. pp. 2476-77)** (stating 7720 was not submitted for coverage).

[66] **(R. pp. 2475-76).**

[67] *See supra* note 54.

workers compensation. Condustrial also expressly agreed to be solely responsible for its business decision and related outcomes to submit (or not) any worker for coverage under the Selected Staffing Agreement and hold Countrywide harmless. And where the Selected Staffing Agreement allowed Countrywide, and the Policy allowed Guarantee, to reject certain class codes or locations. Ample evidence was presented that Countrywide and Guarantee would have rejected Turner, a prison worker. In fact, Guarantee had rejected certain exposures presented by Countrywide under the Policy, and Countrywide had rejected Condustrial's U.S.L.&H. exposure under the Selected Staffing Agreement.

IV. **The great weight of the evidence supports a finding that Turner was an independent contractor and not an employee where the direct evidence of right or exercise of control factor favors finding Turner to be an independent contractor because Condustrial's brokerage model is inapposite to a finding of control, Turner had a duty to read the controlling documents, the evidence of furnishing equipment factor favors finding Turner to be an independent contractor, the evidence of method of payment favors finding Turner to be an independent contractor, and the evidence of right to fire factors in favor of finding Turner to be an independent contractor.**

The Guaranty Association and Countrywide adopt and incorporate the applicable common law arguments asserted on pages 9-30 of Condustrial's Initial Brief, adding consideration of the following:

The existence or absence of and employment relationship is jurisdictional; therefore, "this Court has the power and duty to review the entire record and decide the jurisdictional facts in accordance with the preponderance of the evidence." *Glass v. Dow Chem. Co.*, 325 S.C. 198, 482 S.E.2d 49 (1997); *Vines v. Champion Blg. Prods.*, 315 S.C. 13, 431 S.E.2d 585 (1993).

This case is distinguishable from *Shatto v. McLeod Reg'l Med. Ctr.*, 406 S.C. 470, 753 S.E.2d 416 (2013). 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, Turner admitted that she never sought to be an employee of SCDC. Yet, the Commission erroneously used

requirements of SCDC as justification to find that Condustrial exercised control over Turner's work, which is simply contrary to the documents and testimony in the record. Moreover, the requirements of SCDC, even if somehow imputed to Condustrial, do not rise to the level of control required under South Carolina law.

Courts across the country, including North Carolina in *Rhoney v. Fele*, 134 N.C. App. 614, 618-19, 518 S.E.2d 536, 540 (1999)[68] as cited in Condustrial's Initial Brief, 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. 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

[68] *See Stephen v. Avins Const. Co.*, 324 S.C. 334, 340, 478 S.E.2d 74, 77 (Ct. App. 1996) ("Because South Carolina adopted large portions of the North Carolina Workers' Compensation legislation, we rely on North Carolina precedent in Workers' Compensation cases.").

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, in addition to the facts noted by Condustrial on pages 9-30 of its brief, the record also demonstrates Condustrial did not allow Turner any type of drawing account or advances against pay. **(R. pp. 972-74).** She was not eligible for any pensions, bonuses, paid vacations or sick leave through Condustrial. **(R. pp. 974-975, 1240-41).** The company did not carry any workers' compensation insurance for Turner and did not deduct any social security or federal taxes from her pay. **(R. pp. 974-75, 1238-41).**

When Tony Durham, the Owner/President of Condustrial, first took over the company, he inherited the independent contractor nurse model and during the erratic purchase process, inherited the forms from the prior business owner. **(R. pp. 1951-54, 1987).** The company operated under the agreements the prior owners had in place. He explained the "Personnel Services Agreement" the company had with SCDC. **(R. 1988).** The Commission erroneously concluded that this agreement between SCDC and Condustrial is evidence that Turner is an employee of Condustrial. Durham testified that he was personally involved in the negotiations of the contract. **(R. 1989).** 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." **(R. p. 1990, 2972).**

Durham believed the Personnel Services Agreement showed Condustrial 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." **(R. p. 2973).** 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." **(R. pp. 1990-91, 2010-11, 2013, 2089).** He testified that he confirmed with SCDC that they knew the nurses were independent contractors. **(R. pp. 1990-91, 2010-11, 2013, 2089, 2119).** Furthermore, despite the language in the contract between SCDC and Condustrial, Tommy Burgess, with Admin Support Services for Health Services at SCDC, explained that Turner would not have known the contents of that contract. **(R. p. 837).** Other management level SCDC employees testified that they knew Turner was a contract nurse with SCDC.

Like Sears, Durham explained that Condustrial did not have the right to control how Turner did her work. **(R. p. 2068).** The company did not provide any supplies or materials to help the nurses do their work. **(R. p. 2069).** It did not have the right to fire the nurses. **(R. p. 2069).** It did not provide training to the nurses. **(R. p. 2104).** He testified that no person from Condustrial ever visited SCDC to see what the contract nurses did or how they performed their work. **(R. pp. 2068-69, 2111).** 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. **(R. p. 2106).**

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 Turner, which was common in general nursing practice and not specific to SCDC. **(R. p. 486).** Gudvangen explained that Turner had autonomy to perform the job as she wished, and it was a "very light supervision" type of job. **(R. p. 504-05).** 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. **(R. pp. 527-28).** 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. **(R. pp. 514-15).**

Like Nurse Gudvangen, Russell Rush, Director for Occupational Safety and Workers' Compensation at SCDC, testified that Turner was a contract nurse with SCDC. **(R. p. 2674).** He also explained that SCDC had full-time medical staff employed by SCDC, and they supplemented the staff with contract nurses, like Turner, who were not employed by SCDC. **(R. p. 2674).**

Nurse Sidney, another LPN who worked as an independent contractor through Condustrial, 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 Condustrial. **(R. pp. 2649-50).** Contrary to the Commission'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. **(R. p. 2651).** 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 Condustrial, testified regarding Turner's independent contractor status. **(R. p. 2656).** He testified that the majority of the nurses for Condustrial such as Turner were independent contractors. **(R. pp. 2656-2657).** He stated that there was no doubt in his mind that those nurses were contractors because they worked for the nurse registry through Condustrial and concurrently for other companies. **(R. pp. 2656-58, 2661).** Accordingly, under the brokerage model, the overwhelming evidence in the record demonstrates Condustrial did not exercise control over Turner.

Furthermore, along with the duty to read a document before signing, 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, Turner 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. **(R. pp. 608).** Turner agreed that no person prevented her from reading the Independent Contractor Agreement and she did not ask any person at Condustrial to explain the agreement or any other document before she voluntarily signed them. **(R. p. 604).** She also claimed she did not read her tax returns—which lists her profession as LPN Nursing Contractor—before she signed them. **(R. pp. 702-703).**

As explained by Sears, and Turner's own testimony, Turner is a licensed practical nurse, which required specialized training and education to obtain that degree and licensure. **(R. p. 1148);** *see also* **(R. p. 545).** Because Turner 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. Turner cannot now avoid the agreements or claim misrepresentations as to the independent contractor relationship.

Turner cannot avoid her duty to read and instead deny knowledge of the arrangement under a specious ignorance claim. If Turner simply read the contract and associated documents, any alleged misunderstanding or misrepresentations would have been identified and addressed. Moreover, Turner testified that had she read the documents, she would have asked questions regarding her status as an independent contractor. **(R. p. 727).** These were arm's-length transactions involving a written contract, which Turner had every opportunity to review before, during, and after she executed the contract on two separate occasions.

Moreover, Turner's testimony regarding failing to read any of the documents lacks credibility. Turner alleged an employment application was misrepresented to her, but she signed a document that stated, "Independent Contractor Application." **(R. pp. 618, 620-21, 3132).** She claimed she remembered completing an employment application but alleged she did not recall completing the Licensed Professional Independent Contractor Agreement. **(R. p. 553).** 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. **(R. p. 623).** She claimed she did not even read a one-sentence document for the SLED report, which is simply not believable. **(R. p. 613-14).** Remarkably, she claimed she did not read the *weekly* timesheets she signed that stated "Contractor, Rachel Turner." **(R. p. 648).** She acknowledged she read other lengthy contractual documents in her lifetime, for example, student loan documents, leasing agreements, car loan documents. Yet, she expects this Court to believe she did not read a single document that explains she was an independent contractor. **(R. p. 612-13).**

Although a few of the general documents used the term "employee," 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, Turner admitted that she would have asked questions had she read the documents. If there was any confusion on Turner's part, it was her duty to seek clarification. Accordingly, the Commission erroneously dismissed the above-mentioned documents by citing to testimony by Turner 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.

CONCLUSION

Initially, the Guaranty Association and Countrywide submit that substantial evidence demonstrates Turner was an independent contractor not an employee. To the extent this Court finds Turner was an employee, however, the Guaranty Association and Countrywide submit that substantial evidence, including the Full Commission's adoption of the credibility of the witnesses, as applied to the controlling law in this case leaves only one conclusion: Condustrial did not provide for workers compensation insurance for Turner under these specific circumstances. That is, Condustrial knowingly staffed Turner at a prison facility without providing her worker's compensation insurance or ensuring that she had obtained it for herself. Further, as addressed in the Guaranty Association's and Countrywide's Initial Brief responding to Turner's Initial Brief, substantial evidence in the record supports the decision of the Full Commission regarding Turner's average weekly wage, duration of benefits, and her refusal of the offer of suitable employment, and the Full Commission properly denied Turner's Motion to Submit Additional and After Discovered Evidence. For these reasons, the Guaranty Association and Countrywide respectively submit that the decision of the Full Commission on this issue of whether Turner is an employee should be REVERSED, but in the event the Court of Appeals affirms the Full Commission's

decision in this regard, then the decision of the Full Commission should be AFFIRMED in all other respects.

Respectfully,

s/Beth B. Richardson
Grady L. Beard, Esquire
Beth B. Richardson, Esquire
Jasmine D. Smith, Esquire
1310 Gadsden Street (29201)
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400

Attorneys for Respondent South Carolina Property and Casualty Insurance Guaranty Association on behalf of Guarantee Insurance Company

Gregory M. Alford
Alford Law Firm, LLC
18 Executive Park Road, Building 1 (29928)
Post Office Box 8008
Hilton Head Island, SC 29938
Phone: (843) 842-5500
Attorney for Respondent Countrywide Staffing Solutions Group, Inc.

September 9, 2022

RECEIVED
Sep 09 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1514359

Court of Appeals Case No. 2021-000633

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

v.

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

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

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Joint Brief of Respondents South Carolina Property and Casualty Insurance Guaranty Association on Behalf of Guarantee Insurance Company and Countrywide Staffing Solutions Group, Inc. to Respondent-Appellant Condustrial, Inc., f/k/a Medustrial HealthCare Staffing Service Final Brief of Appellant complies with Rule 211(b) of the South Carolina Appellate Court Rules.

s/Beth B. Richardson
Grady L. Beard, Esquire
Beth B. Richardson, Esquire
Jasmine D. Smith, Esquire
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400

September 9, 2022