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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No: 2021-633

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 BRIEF OF RESPONDENTS SOUTH CAROLINA DEPARTMENT OF CORRECTIONS AND STATE ACCIDENT FUND

Erin F. Farthing
S.C. Bar No. 76151
South Carolina State Accident Fund
PO Box 102100
Columbia, SC 29221
(803) 896-5892
efarthing@saf.sc.gov

Attorney for Respondents South Carolina Department of Corrections and State Accident Fund

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

ISSUES ON APPEAL

1. Whether substantial evidence supports the finding of the Full Commission that Appellant Turner was not entitled to temporary total benefits from September 30, 2015 to the date of the hearing before the Single Commissioner.

2. Whether substantial evidence supports the finding of the Full Commission regarding Appellant Turner's Average Weekly Wage and Compensation Rate.

3. Whether the Full Commission properly denied Appellant Turner's Motion to Admit Newly Discovered Evidence as Appellant failed to satisfy the elements of Regulation 67-707.

STATEMENT OF THE CASE

This matter arises out of an incident that took place at the Kirkland Correctional Institution of the South Carolina Department of Corrections ("SCDC") on or around September 5, 2015 during which Appellant Rachel Turner and another nurse, who was a direct employee of the SCDC, were held hostage by two inmates. Appellant was working on that date at the SCDC pursuant to a Personnel Service Agreement between Medustrial Healthcare and SCDC. During this incident, Appellant alleged that she was physically assaulted, and, as a result, sustained physical injuries as well as psychological overlay.

This matter came before the Commission pursuant to a Form 50 filed by Appellant on or around May 31, 2016[1], in which Appellant named SCDC/Medustrial/Condustrial/Countrywide as Appellant's employer, and State Accident Fund/Uninsured Employers Fund/American Zurich Ins. Co./National Union Fire Ins. Co./Guarantee Insurance Co. as the employer's insurance carrier. Respondents SCDC and State Accident Fund ("SAF) filed a Form 51 denying responsibility for this claim as Appellant was not an employee of SCDC on the date of injury.

After a number of status conferences, numerous requests and motions by all parties, and protracted discovery, this claim was set to be tried on July 24, 2017 and July 31, 2017.[2] The hearing on the merits of this claim commenced on July 24, 2017, at which time the parties put their positions on the record, and witness Justin Gudvangen and the Appellant testified. Prior to reconvening the second day of the hearing on July 31, 2017, counsel for Countrywide Staffing Solutions Group and Guarantee Insurance Company advised the Commission of a potential

[1] A number of Forms 50 and Forms 51 were filed prior to the May 31, 2016 Form 50. However, as they are not relevant to the arguments raised in the present appeal, Respondents are not including these filings in their brief or designation of matter.

[2] Prior to the hearing, with the consent of all parties, American Zurich Insurance Company and National Union Fire Insurance Company were dismissed from this claim.

conflict between his two clients, and requested to be relieved as counsel for these parties. On July 31, 2017, this request was considered by the Hearing Commissioner and granted, and the continuation of the hearing was postponed to permit these parties to obtain new counsel. Following a number of additional status conferences and telephone conferences, the hearing reconvened on October 12 and 13, 2017. After the matter did not conclude following two additional full days of hearing, the matter was scheduled to reconvene on November 2, 2017, to continue through the weekend if needed to conclude the hearing. In all, the hearing took seven days of testimony and presentation of evidence: July 24, October 12, October 13, November 2, November 3, November 4, and November 6, 2017.[3] In addition, there were numerous status conferences and conference calls involving the Hearing Commissioner and parties between those dates.[4]

The Hearing Commissioner issued her Order and Decision on July 31, 2020. The Hearing Commissioner's Order held that, on the date of her injury, Appellant was a direct employee of Condustrial and a statutory employee of SCDC; that she sustained an injury by accident arising out of and in the course and scope of that employment on September 5, 2015; that Condustrial failed to maintain workers' compensation insurance covering Appellant at the time of her work accident; and that liability for the injuries sustained by Appellant as a result of her September 5, 2015 work accident transferred to SCDC, as the statutory employer, and SAF, as SCDC's carrier, under S.C. Code Ann. §§42-1-400 through 42-1-450. The Hearing Commissioner further held that

[3] On all but two of those hearing dates, the parties were on the record well past 5:00 p.m., and November 4, 2017 was a Saturday.

[4] Shortly after the final day of hearing, insurer Guarantee Insurance Company filed for bankruptcy, and an automatic temporary stay was issued pending resolution of issues related to that filing. The SC Property & Casualty Insurance Guaranty Association was substituted as a party for Guarantee Insurance Company.

Appellant's average weekly wage was $1,130.86, with a corresponding compensation rate of $753.94.

Following the issuance of the Order, SCDC and SAF filed a timely Form 30 appealing portions of the Hearing Commissioner's Order, as did Appellant, Condustrial, and Guarantee Insurance Company/SC Property & Casualty Insurance Guaranty Association.

Following argument on November 10, 2020, the Full Commission issued an Order dated April 6, 2021, in which it affirmed in part and reversed in part the decision of the Single Commissioner. Specifically, the Full Commission reversed the Single Commissioner's Findings of Fact and Conclusion of Law regarding the average weekly wage/compensation rate. The Full Commission instead held that the correct average weekly wage was $762.21 and the compensation rate was $508.17.

Following the decision of the Full Commission, Respondent-Appellant Condustrial filed a Motion to Reconsider on April 12, 2021. On May 4, Appellant filed a Motion to Submit Additional and Newly Discovered Evidence. On May 17, 2021, the Full Commission denied Condustrial's Motion to Reconsider. On June 15, 2021, Appellant filed a Notice of Appeal from the April 6, 2021 and May 17, 2021 Orders of the Full Commission, and Condustrial filed its own Notice of Appeal from those same Orders on June 16, 2021.

With regard to Appellant's Motion to Submit Additional and Newly Discovered Evidence, the Full Commission issued an Order on June 21, 2021 denying the Motion as it lacked jurisdiction. Appellant requested, and was granted, a partial remand for the Full Commission to consider the merits of the Motion. On September 20, 2021, the Full Commission issued an Order denying the Motion. This appeal now follows.

STATEMENT OF THE FACTS

Appellant Rachel Turner is a licensed practical nurse ("LPN") who, in February 7, 2013, entered into a relationship with Medustrial Healthcare, Inc., a division or service of Condustrial, Inc., under which Medustrial/Condustrial placed Appellant as a nurse with various companies with which Medustrial/Condustrial contracted. (R. p. 2980) Appellant chose which assignments and shifts she would accept, and where. (R. pp. 632-633, 734-736) The wages Appellant earned through Condustrial were reported on a 1099 rather than a W-2. (R. pp. 3079-3099; 3539-3547) When Appellant filed her 2014 and 2015 tax returns, she filed a Schedule C in which she claimed a number of business-related deductions, including vehicle expenses, insurance, office expenses, utilities, internet/cable, laptop computer, office supplies, and other claimed business related expenses. (R. pp. 3079-3099; 3539-3547) Appellant's alleged business expenses for 2014 totaled $39,577.00 and as a result her total business "profit" for that year was $16,603.00. (R. pp. 3082) For 2015, Appellant's alleged business expenses totaled $30,296.00, and her total business "profit" for that year was $12,706.00. (R. p. 3541) As a result of Appellant's claimed business expenses, along with other deductions, Appellant did not pay any income taxes in 2014 or 2015. [5] (R. pp. 3079-3099; 3539-3547)

On or around September 5, 2015, Appellant was working at Kirkland Correctional Institution ("Kirkland") of the South Carolina Department of Corrections ("SCDC") pursuant to a contract between Medustrial Healthcare and SCDC. (R. pp. 2972-2978). Pursuant to the terms of that contract, Medustrial, acting as an independent contractor of SCDC, supplied nursing professionals to provide services to the inmates within the custody and control of the SCDC. (R. pp. 2972-2978) Appellant was one of the nursing professionals sent by Condustrial to SCDC

[5] It does appear that Appellant paid self-employment taxes in 2014 and 2015.

pursuant to that contract. While she was approached about working directly for SCDC, she declined due to the low pay and lack of flexibility. (R. pp. 531, 637, 639) Appellant testified that she never worked directly for SCDC. (R. pp. 733-734)

On or around September 5, 2015, two inmates held Appellant and another nurse, who was an employee of SCDC, hostage for a number of hours. (R. pp. 593-599) Following her release by the inmates, Appellant's brother took her to the hospital, where she received treatment. (R. pp. 599-600, 2702-2714) She was diagnosed with facial pain, bruising, and anxiety post assault, and was discharged home in stable condition. (R. pp. 2702-2714) The records from the hospital visit do not include any mention of Appellant's ability to return to work. (R. pp. 2702-2714)

On September 16, 2015, Appellant was seen by Dr. Robert Dunn, III, with Springdale Family Practice, who diagnosed Appellant with difficulty sleeping and anxiety. (R. pp. 2716-2717) The record from this visit does not include any mention of Appellant's ability to return to work. (R. pp. 2716-2717) That same day, a Mary Ward, AGNP-BC[6], completed a SOVA Physician's Disability Report for Lost Wages. (R. p. 3027) In that form, Ms. Ward notes that Appellant did not sustain any disability as a result of the September 5, 2015 incident, but that she appears anxious and fearful. (R. p. 3027) Ms. Ward opines that Appellant "will be totally unable to work from 9/16/2015 through 9/30/2015." (R. p. 3027) That document directed her to follow up with her PCP and a "MHC" [7] after that time. (R. p. 3027) The next medical note that addresses Appellant's ability to work is an October 20, 2015 record from Dr. Ryan Hess, in which he noted that Appellant was set to begin psychological therapy, but that she could return to work with a

[6] Ms. Ward appears to work at Springdale Family Practice as the address provided on the SOVA form matches the address for Springdale Family Practice. The medical record from Appellant's September 16, 2015 visit does not reference any medical treatment provided to Appellant by Ms. Ward. (R. pp. 2716-2717)

[7] Based on context, it appears this refers to a mental health provider.

lifting restriction of no greater than ten to twenty pounds that was to last for six weeks. (R. pp. 2727-2732) The only other record properly submitted by Appellant to the Commission to address restrictions is the report from an independent medical examination with Dr. Westerkam on September 5, 2017. (R. pp. 2924-2926) In his report, Dr. Westerkam "recommend[ed] that she not lift any more than 10 pounds with the right arm and that she avoid all overhead work with the right arm." (R. p. 2925) He also recommended against "bending, stooping, or crawling." (R. p. 2926)

At the hearing before the Single Commissioner, Tony Durham, the Owner/President of Respondent-Appellant Condustrial, testified that he called Appellant around ten days after the hostage situation to ask her to return to her position with Condustrial when she felt better. (R. pp. 2076-2078) He further testified that he informed her of an available position they had in his office, and asked if she would fill that position when she felt better. (R. pp. 2077-2078) He testified that he informed Appellant that she would be a full time employee of his. (R. p. 2078) Mr. Durham testified that Appellant responded that she did not want the job, and instead wanted "comp." (R. p. 2078) Mr. Durham testified that he attempted to contact Appellant after that initial call, but she would not take his calls. (R. p. 2080)

Tom Sears, Condustrial's general counsel also described a similar phone call with Appellant during which she requested workers' compensation. (R. pp. 956-957) He also described Appellant hanging up on him, and refusing to talk to him when he tried to reach out to her again. (R. pp. 957-958) In response, Lissette Colachi, an employee with Condustrial/Medustrial, drafted and hand delivered a letter to Appellant dated September 24, 2015. (R. pp. 660-662, 960) In the letter, Colachi expressed the company's concern for Appellant, and extended two separate job offers to her: to place her in a low-key nursing home or a special needs facility, or to come work

in the office and assist with minor filing and paperwork. (R. pp. 3063, 660-662, 960-961) Ms. Colachi also communicated this offer to Appellant verbally. (R. pp. 662, 960-961) Appellant testified that she declined the offer. (R. p. 662)

STANDARD OF REVIEW

"In workers' compensation cases, the Full Commission is the ultimate fact finder." DeBruhl v. Kershaw County Sheriff's Dep't, 303 S.C. 20, 24, 397 S.E.2d 782, 785 (Ct. App.1990). "While a finding of fact of the commission will normally be upheld, such a finding may not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it." Edwards v. Pettit Constr. Co., 273 S.C. 576, 579, 257 S.E.2d 754, 755 (1979). The final decision regarding witness credibility and the weight to be afforded evidence resides with the Full Commission. Ford v. Allied Chem. Co., 252 S.C. 561, 167 S.E.2d 564 (1969). It is not the job of the appellate courts to weigh the evidence as determined by the Full Commission. Ellis v. Spartan Mills, 276 S.C. 216, 277 S.E.2d 590 (1981). "Under the scope of review established in the APA, this Court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law." Bass v. Isochem, 365 S.C. 454, 467, 617 S.E.2d 369, 376 (Ct. App. 2005).

The South Carolina Administrative Procedures Act establishes the "substantial evidence" standard of review for decisions by the South Carolina Workers' Compensation Commission and other state agencies. Lark v. Bi-Lo, Inc., 276 S.C. 130, 133-134, 276 S.E. 2d 304, 307 (1981). Under this standard, the Court of Appeals' review "is limited to deciding whether the appellate panel's decision is unsupported by substantial evidence or is controlled by some error of law." Gadson v. Mikasa Corp., 368 S.C. 214, 221, 628 S.E. 2d 262, 266 (Ct. App. 2006) (citing S.C. Code Ann. §1-23-380). "The commission's decision **must** be affirmed if the factual findings are supported by substantial evidence in the record." Jennings v. Chambers Dev. Co., 335 S.C. 249, 259, 516 S.E.2d 453, 458 (Ct. App. 1999) (quoting Minor v. Philips Prods., 329 S.C. 321, 493 S.E.2d 819 (1997))(emphasis added).

ARGUMENT

1. **The Full Commission properly denied temporary total disability ("TTD") benefits from September 30, 2015 through the date of the hearing before the Single Commissioner because Appellant failed to meet her burden through sufficient evidence that she was entitled to such benefits. Further, Appellant refused an offer of suitable employment, which bars her from receipt of TTD benefits pursuant to S.C. Code Ann. §42-9-190**

Appellant contends that the Commission erred in ruling that she was only entitled to temporary total disability ("TTD") benefits from September 6, 2015 through September 30, 2015. Rather, Appellant contends she is entitled to TTD benefits from the date of her work injury and continuing to this date on a running award. However, such claim is entirely unsupported by the law and the evidence in the record, and would be based entirely on speculation. Substantial evidence in the record supports the Commission's ruling that Appellant is not entitled to TTD benefits after September 30, 2015 through to the date of the hearing before the Single Commissioner, and such holding should be upheld.

In her brief, Appellant contends that she is entitled to TTD benefits from the date of her work injury to present. The basis for this argument is Appellant's claim that she has "never recovered sufficiently from her PTSD to the point where she could return to work." However, Appellant's argument is not based on any properly submitted medical evidence. Appellant further argues that she is not barred from receipt of TTD benefits for refusing suitable employment since she claims the offer was not genuine and made in good faith, and was made at a time Appellant was written out of work. Again, the evidence in the record does not support these contentions.

Appellant had the burden of proving through competent evidence that she was entitled to TTD benefits, and for what time period. Lee v. Bondex, Inc., 406 S.C. 97, 749 S.E.2d 155 (Ct. App. 2013 (noting that "[t]he claimant bears the burden of proving entitlement to temporary disability compensation."). Further, the Courts have held that an award in favor of a claimant

"may not rest on surmise, conjecture or speculation and must be founded on evidence of sufficient substance to afford a reasonable basis for it." Coleman v. Quality Concrete Products, Inc., 245 S.C 625, 142 S.E.2d 43 (1965). In order to establish entitlement to TTD benefits, a claimant must establish "that work restrictions prevent him from performing the job he had before the injury, and that his current employer has not offered him light-duty employment." Lee v. Bondex, Inc., 406 S.C. at 102, 749 S.E.2d at 157 (Ct. App. 2013). Additionally, S.C. Code Ann. §42-9-190 provides that where "an injured employee refuses employment procured for him suitable to his capacity and approved by the commission he shall not be entitled to any compensation at any time during the continuance of such refusal." In the present matter, Appellant failed to prove that she had work restrictions preventing her from working after September 30, 2015. Furthermore, the record shows that there was a clear offer of light-duty employment.

In support of her argument that she has not been able to return to work in any capacity since her assault, Appellant refers to her testimony before the Hearing Commissioner[8] as well as references in the medical records to her complaints and condition. Critically, Appellant fails to point to any actual opinion from a medical provider or from a vocational expert that Appellant has been and remains unable to return to work in any capacity outside of a single document writing

[8] Appellant also references certain behaviors during her testimony during the hearing and her alleged inability to attend the full hearing in person. While Appellant certainly did exhibit some of the behaviors referenced in her brief (snapping a rubber band, requesting that the male defense attorneys not approach, etc.), she was inconsistent with some of these behaviors throughout her testimony. At one point it was noted that she had stopped shaking her hand, and she seemed surprised by that fact. (R. pp. 695, lines 19-21) Further, while Appellant references her alleged panic when the lights went out around 7:00 p.m., there were other noises and occurrences during her testimony that did not elicit any response from Appellant. All of these behaviors were observed by the Hearing Commissioner, who still found that Appellant failed to establish that she was totally disabled and entitled to TTD from the date of injury.

her out of work from September 16, 2015 until September 30, 2015.[9] (R. p. 3027) While Appellant's medical records reflect requests for out-of-work statements following September 30, 2015, Appellant failed to produce any such statements. [10] Also, while Appellant testified that she previously received out-of-work statements but they were lost during her eviction from a prior residence, she presented no evidence that she attempted to obtain replacement copies of these statements from her providers prior to the Hearing Commissioner's decision that she was not entitled to TTD benefits after September 30, 2015.

Ultimately, the "evidence" that the Appellant is urging this Court to consider outside of actual medical opinions is her own self-serving statements, both in her testimony and to her providers. Appellant is also requesting that this Court interpret Appellant's medical records to read into them some sort of implied statement that Appellant is totally disabled. However, to do so would be ask the Court to do exactly what the Commission held it cannot do under Burnette v. City of Greenville, 401 S.C. 417, 737 S.E.2d 200 (Ct. App. 2013): issue an opinion that would be the equivalent of a medical opinion.

With regard to the offer of employment made to Appellant by Condustrial in September 2015, Appellant contends that it was made one time, and that she could not have accepted the offer since she was written entirely out of work at the time it was made. She further claims that since the offer was made and rejected, the offer was "null and void unless renewed or a counteroffer [was] made." However, there is no evidence that she advised Condustrial that, at the time they extended the offer of employment, she remained written out of work for another six days, to put

[9]The fact that the nurse practitioner completing the document limited the time period during which Appellant was unable to work to a two week period rather than leaving it open ended indicates that she thought this disability was for a finite period of time.

[10] All providers Appellant has seen since the date of her injury have either been providers she has chosen or that she has been sent to by her attorney.

Condustrial on notice that it needed to extend or renew its offer. Additionally, while she faults Condustrial for not renewing its offer after September 30, 2015, there is no evidence that Appellant ever contacted Condustrial after that date to see if the offer was still available to her. In fact, the evidence in the record is that she refused to take calls from Tony Durham and Tom Sears, cutting off communication with those who could make or confirm such an offer.

In addition to Appellant's rejection of the job offer by Condustrial, there is also no evidence in the record that Appellant ever attempted to search for or secure any type of employment outside of Condustrial after September 30, 2015. See Coleman v. Quality Concrete Products, Inc., 245 S.C 625, 142 S.E.2d 43 (1965) (*quoting* Larson's Workmen's Compensation Law, Vol. II, Section 57-66 that "Whenever claimant depends in part on a showing that he has been unable to get work because of his physical condition it naturally follows that claimant must prove that he has made reasonable efforts to secure employment.") Instead, Appellant is asking this Court to award her six and a half years of compensation, and continuing, based on a single record placing her out of work for two weeks in 2015 and her own claims that she is unable to return to work in any capacity.

In addition to arguing that she could not have accepted Condustrial's offer of employment, Appellant also asks this Court to find that the offer of employment from Condustrial was not made in good faith and was not genuine. This request is based entirely on speculation regarding the alleged motives behind the drafting of the letter, and conduct and behavior over the past five years that has significantly soured the relationship between Appellant and Condustrial. She has not presented any actual evidence that the offer was not genuine and would not have been honored by Condustrial. In fact, the only evidence in the record is the testimony from the Owner/President of Condustrial and its general counsel that such offer was genuine and made in a genuine effort to assist Appellant. Appellant acknowledges that she declined the offer, and that all contacts between

Appellant and Condustrial after the offer were hostile, contributing to the further disintegration of their relationship.

Finally, Appellant contends that the Commission erred in declining to award TTD back to the date of injury because Appellant is not at MMI, so the liable party would not have been able to stop TTD under the Act once it was started back in September 2015. However, TTD has never been started, and this matter is not before the Commission on Respondents' Form 21. Rather, the matter was before the Commission on the Appellant's Form 50 to determine whether Appellant was an employee and therefore covered by the Act, whether she sustained a compensable injury, and whether she was owed TTD and for what time period. As this was on Appellant's Form 50, it was her burden to prove all of the above. The Act is clear that a covered injured worker is entitled to TTD only for the time period "[w]hen the incapacity for work resulting from an injury is total." S.C. Code Ann. §42-9-10(A) The Hearing Commissioner reviewed the evidence for the time prior to the hearing before her and found that it supports a finding that Appellant was disabled for a definite period of time, and she awarded back TTD for that period of time.

What the Appellant is asking the Court to do instead is to award her more than six and a half years of back TTD based on a single document, completed by someone other than the doctor who actually evaluated her, that placed her out of work for two weeks. Of note, the Commission did not address entitlement to benefits beyond the date of the hearing since "the Commission would not have knowledge of whether the Claimant has or has not been issued work restrictions applicable to periods after the date of the hearing." The Commission, and this Court, do not have any records from Appellant's present treatment, and the opinions of her present doctors regarding her work restrictions, if any. Further, Appellant is asking the Court to award such benefits despite a clear offer of employment within the record. Such a finding would be entirely inconsistent with

the intent of the Workers' Compensation Act, and would necessarily be entirely founded on conjecture and speculation.

The Commission's finding that Appellant is not owed TTD past September 30, 2015 is supported by sufficient evidence in the record, and should be affirmed by this Court.

2. <u>The Full Commission properly calculated Appellant's Average Weekly Wage and Compensation Rate based on her gross wages less business related expenses necessary to generate her income.</u>

Appellant contends that the Full Commission's finding that Appellant's average weekly wage is $762.21 and her compensation rate is $508.47 is unsupported by the law. However, the Full Commission's calculation of Appellant's average weekly wage and compensation rated is both supported by law and is fair to the parties in keeping with the intent of S.C. Code Ann. §42-1-40.

S.C. Code Ann. §42-1-40 sets forth the manner by which an injured worker's average weekly wage and compensation rate is calculated. "Average weekly wages" is defined as "the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of fifty-two weeks immediately preceding the date of the injury." Section 42-1-40 provides that it is to be "calculated by taking the total wages paid for the last four quarters immediately preceding the quarter in which the injury occurred as reported on the Department of Employment and Workforce's Employer Contribution Reports divided by fifty-two or by the actual number of weeks for which wages were paid, whichever is less." However, §42-1-40 specifically provides that, in situations where a traditional calculation "would be unfair, *either to the employer or employee*, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury." (Emphasis added).

In the present matter, Appellant requested that the Hearing Commissioner find that she was an employee of Medustrial and/or Condustrial on the date of injury. While Appellant contended that it was always her belief and understanding that she was an employee of Condustrial, her wages earned through Condustrial were reported on a 1099 rather than a W-2. As a result, when Appellant filed her 2014 and 2015 tax returns, she filed a Schedule C in which she claimed a number of business-related deductions, including vehicle expenses, insurance, office expenses, utilities, internet/cable, laptop computer, office supplies, and other business related expenses. Appellant's claimed business expenses for 2014 totaled $39,577.00 and as a result her total business "profit" for that year was $16,603.00. For 2015, Appellant's claimed business expenses totaled $30,296.00, and her total business "profit" for that year was $12,706.00. As a result of Appellant's claimed business expenses, along with other deductions, Appellant did not pay any income taxes in 2014 or 2015.

While Appellant asked the Commission to find her to be an employee of Condustrial, she clearly was paid as an independent contractor, and took advantage of the tax deductions available to her because she was paid as such. Appellant claimed that more than two-thirds of her earnings in 2014 and 2015 went to pay tax-deductible business expenses, but has now asked the Commission to find that these expenses are income for purposes of calculating her average weekly wage and compensation rate. Such finding is inconsistent with the holding of this Court in Stephen v. Avins Constr. Co., 324 S.C. 334, 478 S.E. 2d 74 (Ct. App. 1997), and is wholly unfair to Appellant's employer.

Appellant appears to contend that there is only one way that her average weekly wage and compensation rate could possibly be calculated. However, the Hearing Commissioner indicated in her order that she was presented with, and considered, various other options in calculating

Appellant's average weekly wage to be fair to both parties. This included using Appellant's net wages, which would have resulted in an average weekly wage of $333.29 per week and a compensation rate of $222.20. Another method involved using the wages of the SCDC employee nurse who was also involved in the hostage situation on September 5, 2015, as a like employee. A third method considered by the Hearing Commissioner included using the testimony of Tony Durham that the hourly rate charged to a business by Condustrial for an employee nurse versus an independent contractor nurse would be 60-65% above the pay rate for that nurse. Therefore, an employee nurse would be paid 35-40% of the rate charged to a business.

In holding that Appellant was an employee rather than an independent contractor on the date of injury, it was incumbent upon the Commission to properly determine Appellant's average weekly wage had she been paid as an employee. As such, the Commission properly considered the deductions listed by Appellant in her tax returns and determined, consistent with prior precedent, those expenses incurred to generate her gross income. The Commission did not reduce Appellant's net earnings by those expenses incurred as a result of her occupation to produce her income/revenue. In so doing, the Commission properly calculated an average weekly wage and compensation rate that is fair to both Appellant and her employer.

The Commission in this matter correctly rejected those calculations of Appellant's average weekly wage and compensation rate that would be fair to only one party. Instead, the Commission used a method to compute Appellant's average weekly wage and compensation rate that would most nearly approximate Appellant's probable lost earnings. The Full Commission's calculation of Appellant's average weekly wage and compensation rate is supported by the law and substantial evidence within the record, and should be affirmed.

3. <u>The Full Commission properly denied Appellant's Motion to Admit Newly Discovered Evidence as Appellant failed to satisfy the elements of Regulation 67-707.</u>

Appellant alleges that the Full Commission erred in denying her petition for partial remand as she alleges her Motion satisfied all the elements of Regulation 67-707. Appellant asks this Court to consider the new evidence, and order that Appellant is entitled to back and ongoing TTD benefits. However, Appellant's Motion does not satisfy the requirements of Regulation 67-707, the Full Commission properly denied Appellant's Motion, and this Court should affirm that decision and not admit the evidence requested by Appellant as it was not properly and timely submitted to the Commission.

Regulation 67-707 provides that "[w]hen additional evidence is necessary for the completion of the record in a case on review the Commission *may, in its discretion*, order such evidence taken before a Commissioner." (emphasis added). Where a party makes such a request, they must establish that "[t]he evidence sought to be introduced is not evidence of a cumulative or impeaching character but would likely have produced a different result had the evidence been procurable at the first hearing." The party must further show that"[t]he evidence was not known to the moving party at the time of the first hearing, by reasonable diligence the new evidence could not have been secured, and the discovery of the new evidence is being brought to the attention of the Commission immediately upon its discovery." Regulation 67-707(C)(2). If the Commission grants the motion to introduce new evidence, "the review hearing is stayed. The case will be remanded to the original Hearing Commissioner who may, unless otherwise provided, reconvene the hearing or admit the deposition of a witness into the record." The original Hearing Commissioner would then "issue his or her findings and recommendations in the form of an order to the Commission and the parties."

In the present claim, Appellant filed a Motion requesting to add a record that Appellant claims reflects a physician's opinion that she was unable to work from October 21, 2015 through

November 20, 2015. Appellant is arguing that this record alone establishes that she is entitled to back TTD, and to remain on a running TTD award. Appellant's counsel contends he did not have this record until April 19, 2021. However, it is clear that Appellant was aware of this record at the time of the hearing, and even testified to its existence during the first day of the hearing, more than three months before the hearing concluded. There is no indication Appellant or her counsel attempted to secure this record until it became evident she would get an adversary ruling from the Hearing Commissioner due to the absence of sufficient evidence to support her claim for TTD benefits. Further, there was no attempt to introduce this document until after the Full Commission issued its ruling affirming that adverse ruling.

Furthermore, it is clear that this record could have been secured through reasonable diligence prior to the hearing before the Hearing Commissioner, or certainly before she issued her ruling. This claim involved protracted discovery, and it was abundantly clear to Appellant that she was not in possession of her complete records well prior to the hearing. She testified that a number of her records were lost when she was evicted from a prior residence. Specifically, it became evident that specific documents were missing when Appellant was questioned about the only document in the record writing her entirely out of work, and testified that there were other such records. Despite this knowledge, there does not appear to be any indication that there was any effort on her part to ensure she secured all the necessary records from her providers and from SOVA prior to a ruling by the Single Commissioner, or by the review by or ruling from the Full Commission.

Even assuming *arguendo* that the record sought to be introduced by Appellant had been admitted, the record below would continue to fail completely to show entitlement to the relief Appellant seeks from this Court: six and a half years of back TTD, and to remain on a running

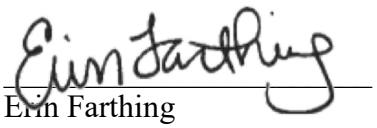
award. At best, Appellant purports that this document establishes that she was written out of work by a physician from October 21, 2015 through November 20, 2015. It does not establish that she was disabled and unable to return to work in any capacity from her date of injury to present. Further, in only supplying this record after the decision of not only the Single Commissioner, but the Full Commission, Appellant has entirely deprived any of the other parties from conducting further discovery into this document or the alleged opinions expressed therein.

For the reasons set forth above, the Full Commission properly denied Appellant's Motion to Admit Newly Discovered Evidence, and such ruling should be affirmed.

CONCLUSION

For the reasons set forth above, the Workers' Compensation Commission's finding that Appellant was not entitled to temporary total benefits from September 30, 2015 to the date of the hearing before the Single Commissioner, calculation of Appellant's average weekly wage and compensation rate, and denial of Appellant's Motion to Admit Newly Discovered Evidence were all proper and supported by the law and substantial evidence. As such, these decisions should be affirmed.

Respectfully Submitted,



Erin Farthing
S.C. Bar No. 76151
State Accident Fund
P.O. Box 102100
Columbia, SC 29221-5000
(803) 896-5892

Counsel for Respondents South Carolina Department of Corrections and State Accident Fund

Lexington, South Carolina
September 9, 2022

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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No: 2021-633

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

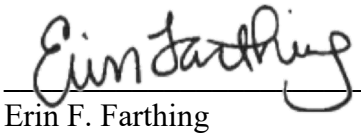
v.

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 Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



Erin F. Farthing
S.C. Bar No. 76151
South Carolina State Accident Fund
P.O. Box 1166
Lexington, SC 29071
(803) 896-5892
efarthing@saf.sc.gov

Attorney for Respondents South Carolina Department of Corrections and State Accident Fund

Lexington, South Carolina
September 9, 2022