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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2024-001255

Rachel J. Turner, Employee, Petitioner,

v.

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

of which Condustrial, Inc. f/k/a Medustrial Healthcare Staffing Service, Employer, is the Cross Petitioner..

CROSS PETITION FOR WRIT OF *CERTIORARI*

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CERTIFICATE OF COUNSEL

Counsel for Petitioner Condustrial ("Condustrial") hereby certifies that the parties' Petitions for Rehearing to the Court of Appeals' Opinion was finally ruled upon by the Court on July 3, 2024.

QUESTIONS PRESENTED

I. Did the Court of Appeals err in finding that Rachel Turner ("Turner") was an "employee" covered under the South Carolina Worker's Act ("Act") instead of an independent contractor nurse when:

   A. She was operating under a valid Independent Contractor agreement at the time of her accident;

   B. The preponderance of the evidence of in the Record otherwise establishes that she was not an "employee" under the Act in accordance with South Carolina's well-established four prong employment relationship test; AND

   C. The Court's decision is an outlier contrary to other states' decisions finding similarly situated contract nurses to be independent contractors?

II. If Turner is an "employee," then is she subject to Condustrial's employee leasing agreement with Countrywide Staffing Solutions Group ("Countrywide") for coverage under the Act?

III. Must Countrywide's workers' compensation Carrier cover this claim under the agreement between Condustrial and Countrywide?

IV. Did the Court of Appeals err as a matter of law in substituting its judgement for that of the S.C. Workers' Compensation Commission ("Commission") by finding that Turner's average weekly wage for compensation purposes should be based on her gross income despite the undisputed fact that she incurred numerous business expenses to generate her income?

STATEMENT OF THE CASE

I. Background and Facts

This matter stems from alleged physical and mental injuries sustained by Rachel Turner ("Turner") on September 5, 2015 while working as a licensed professional nurse (LPN) at the Kirkland Correctional Institution in Columbia, South Carolina. ("Kirkland"). Specifically, Turner was taken hostage and assaulted by inmates in the infirmary. At the time in question, Turner was operating under an independent contractor agreement with Medustrial dated October 9, 2014. R. Vol. 7, pp. 2955-59. Medustrial is a division of

Condustrial, Inc. ("Condustrial"), an industrial staffing company.[1] Turner specifically acknowledges that she is an "independent contractor" in the 2014 agreement, including a stipulation that she will perform her duties in reliance upon her professional training, experience, and judgment, will not be under the direction or control of Condustrial, and agreeing to payment for professional services on an hourly basis via a Form 1099. R. Vol. 7, pp. 2955- 2959. Turner filed her federal income tax returns as a contract nurse via a Form 1040 Schedule C "Profit or Loss from Business," including a myriad of purported business deductions from her gross income to arrive at her net taxable income.

Condustrial in turn had an agreement with the South Carolina Department of Corrections ("SCDC") for the provision of medical staffing personnel, including LPNs like Turner, to staff SCDC medical facilities throughout South Carolina. R.Vol. 7, pp. 2971-2977. Under that agreement, the nurses performed medical services for SCDC's inmates, at SCDC facilities, and under SCDC direction. Condustrial itself never agreed to undertake any nursing work on behalf of SCDC; it merely acted as a broker for provision of nurses to SCDC. All other administrative functions related to payments for professional nursing services were Condustrial's responsibility. Turner agreed to her assignment as a nurse for SCDC. She was free to accept or decline any shifts for work offered by SCDC.

Condustrial entered into a service agreement with Countrywide Payroll & HR Solutions, Inc. d/b/a Countrywide Staffing Solutions Group (collectively referred to herein as "Countrywide") to address worker's compensation coverage and other employment related matters for its employees on March 26, 2015 R., Vol. 7 pp. 2961-70. That agreement states that Countrywide is a "contract labor service (CLS) entity" that will "outsource" certain "Selected Staffing/Employees" for Condustrial's "normal business operations." Further, the service agreement provides that Countrywide shall "provide unemployment

[1] Medustrial previously operated as a separate legal entity, including at the inception of Claimant's agreement with them in 2013. Medustrial's book of business was subsequently acquired by Condustrial. Thereafter, Condustrial elected to continue operation of Medustrial's business under that moniker or trade/brand name. Medustrial is not a separate legal entity apart from Condustrial. As such, Condustrial is the relevant business entity for all purposes pertaining to this matter.

insurance and worker's compensation benefits; and handle unemployment and worker's compensation claims involving Selected Staffing/Employees." Selected Staffing Employees are supposed to be described under "Exhibit B" to the agreement; however, there is no Exhibit B attached. The contract between Countrywide and Condustrial specifically states that "all labor and/or employment performed by the Selected/Staffing Employees under this agreement *shall be performed under the mutual direction and control of both parties as co-employers, as recited throughout the agreement…*"(emphasis added). " R. Vol. 7 p. 2962 (emphasis added).

Again, there is no Exhibit B defining "Selected/Staffing/Employees" attached to the agreement between Condustrial and Countrywide. There is, however, a list of employee classification codes for Condustrial's South Carolina operations attached to the agreement for Countrywide's pricing purposes. This list of class codes includes two medical/nurse staffing codes substantially similar to Turner's LPN job class– 8829 and 8833. The contract envisions the addition of employees intended to be covered under its terms on a continuing or rolling basis. Specifically, the agreement requires Condustrial to "submit timely, complete, and accurate payroll information (including gross wages earned , any deductions, time worked, leave time/off status, workers' classification code, and overtime exempt status) *for each Assigned Employee for each applicable payroll period*." (emphasis added).

Countrywide and Condustrial executed a separate document modifying Countrywide's standard service agreement. R., Vol. 7, pp. 3117-18. The modified agreement stated that Condustrial would process payroll under its own federal tax identification number (FEIN). R., Vol. 7, p. 3117. Under the modified terms, Condustrial would still upload new employee information and applicable class codes into Countrywide's system for employment administrative purposes. Moreover, Condustrial would also report all payroll tax and other payroll deductions, including workers compensation premiums, to Countrywide. Countrywide would then "report all required payroll tax reports and remit those monies on Condustrial's behalf." Based on its belief that its contract nurses for SCDC were independent contractors not subject to

the workers compensation laws, Condustrial never submitted any assigned employee information regarding Turner and other contract nurses to Countrywide.

Countrywide's workers compensation carrier on the date of Turner's accident was Guarantee Insurance Company ("GIC"). GIC's policy for Countrywide (policy period 6/30/2015-6/30/2016) specifically states that it "will pay promptly when due the benefits required of you by the workers' compensation law." R., Vol. 7, p. 3167. The policy also provides that the premium on the Information Page of the policy is just an "estimate," and that final premium due shall be determined at the end of the term by using "actual premium basis" and the "proper classifications and rates *that lawfully apply to the business and work covered by this policy*." (emphasis added). R. Vol. 7 p. 3171. Admittedly, there are no medical or nursing class codes designated in the South Carolina schedule of operations section of GIC's policy for Countrywide.

II. Positions of the Parties

Turner contends she is a covered employee under the South Carolina Workers Compensation Act ("Act"). She alleges Condustrial is her "employer" for purposes of the Act, although she also acknowledges in the alternative that SCDC could also be deemed her employer pursuant to Shatto v. McCleod Regional Medical Center, 406 S.C. 470, 753 S.E.2d 416 (SC 2013). R. Vol. 1 p. 425. Further, Turner contends that her average weekly wage ("AWW") should be based on her gross earnings, not her net taxable income following business deductions.

All Defendants to the claim submitted as a common defense that Tuner is an independent contractor and not entitled to benefits under the Act.[2] All Defendants also contend that Turner's AWW for compensation purposes should be based on her net earnings after deduction of business expenses. Regarding the liable party and coverage issues presented, Defendants' respective positions diverge sharply. First,

[2] After the evidentiary Hearing was convened, GIC was declared insolvent and responsibility for the claim was assumed by the South Carolina Property and Casualty Guaranty Association ("Guaranty") per S.C. Code § 38-31-10 *et seq.* Guaranty essentially "stepped into the shoes" of GIC to defend the claim.

Condustrial argues that if Turner is adjudicated to be its employee, then she would be covered *ab initio* by operation of law as an "assigned employee," "Selected Staffing/Employee," and/or "co-employee" via the plain language and effect of its service agreement with Countrywide. GIC as the carrier for Countrywide would then be responsible for providing coverage for the claim. GIC's remedy for having to cover a previously unclassified employee under its policy would then be to audit its coverage of Countrywide and assess additional premium to cover the risk assumed by their insured via the Commission's determination. In turn, Countrywide's recourse against Condustrial would be an action to recover the additional premium assessed against it by GIC under the indemnification provision of its service agreement with Condustrial. R. Vol. 7 pp. 2976-77.

Countrywide and GIC jointly submit that Turner's purported employment with Condustrial does not implicate the service agreement between Condustrial and Countrywide.[3] Specifically, Turner was not a "Selected Staffing/Employee" within the meaning of that agreement because she was never submitted to by Condustrial as such. Further, Countrywide contends that Turner's employment was never otherwise contemplated by Countrywide in its agreement with Condustrial.

GIC and Countrywide part ways regarding the issue of coverage for the claim if Countrywide is deemed Turner's employer under the agreement with Condustrial. Specifically, GIC argues that its policy for Countrywide did not cover the appropriate workers' compensation class codes in line with Turner's work at a dangerous high security prison infirmary. GIC further submits that it never would have underwritten such a risk had it been disclosed to them. GIC does not argue for cancellation or rescission of its policy for Countrywide based on misrepresentation or fraud. Rather, GIC contends it can simply carve out coverage of Turner's purported employment after the fact even if she is otherwise subject to the Countrywide/Condustrial agreement.

[3] Countrywide and GIC also argued in the alternative at the 7/24/17 Hearing that Claimant is an employee of SCDC per Shatto *supra*.

SCDC submits Turner was not its direct employee per the holding of Shatto *supra*, in addition to the common defense that Turner was an independent contractor not subject to the Act at all. SCDC points to the terms of its contract with Condustrial, which specifically states that contract nurses are not SCDC employees. In the alternative, SCDC contends any potential liability on its part as an "upstream" or "statutory" employer of Claimant is secondary to that of Condustrial as Claimant's direct employer. SCDC reserves all rights of indemnity against Condustrial via S.C. Code §42-1-440 and other applicable law.

III. The Commission's Orders and Court of Appeals' Opinion

By Order dated July 31, 2020, the Single Commissioner found, *inter alia*, the following regarding the employment, coverage and liable party issues: 1) Applying the four prong test for determination of an employment relationship, Turner was an employee of Condustrial, not an independent contractor; 2) Turner was not a "Selected Staffing/Employee" within the meaning of the service agreement between Condustrial and Countrywide; 3) there is no basis for "reformation" of the contract between Condustrial and Countrywide to confer coverage under that agreement; 4) Condustrial failed to acquire workers compensation insurance coverage for Turner via its contract with Countrywide; 5) GIC's policy for Countrywide would only apply to cover the claim if: a) Countrywide had reported the appropriate class codes corresponding with Tuner's employment and their locations to GIC; and b) GIC underwriting had approved insuring such risk; 7) Condustrial was essentially "uninsured" as to Turner's employment at the time of her accident; 8) SCDC is Turner's upstream "statutory employer" liable for benefits under the Act per S.C. Code §42-1-400 *et seq* because the nursing work performed by Turner was of the same type performed by SCDC's direct employee nurses; and 9) found Turner's AWW based on Turner's gross income for purposes for the award of temporary total disability benefits ("TTD").

Thereafter, all parties appealed the Hearing Commissioner's adverse rulings on their respective positions to the Full Commission Appellate Panel ("Panel"). By Order dated April 6, 2021, the Panel affirmed the Single Commissioner on the employment, coverage, and liable party issues by adopting her findings of fact and conclusions of law verbatim. However, the Panel agreed with the Defendants' by

finding that Turner's AWW should be based on her net taxable income after allowing some, but not all, of Turner's deductions.

The Court of Appeals affirmed the Panel's decision in part and reversed in part. The Court found, *inter alia,* that Turner was Condustrial's employee, that Turner was not subject to the service agreement between Condustrial and Countrywide, and that GIC's policy would not cover Turner's employment even if she was subject to the agreement. The Court also reinstated the Single Commissioner's finding that Turner's AWWs should be based on her gross earnings.

ARGUMENTS

Condustrial respectfully submits that this Court should grant its Petition to determine once and for all whether "independent contractors" still exist in South Carolina. To put a fine point on it- if Turner is not an independent contractor under the facts of this case then there truly is no such thing anymore and South Carolina has joined the ranks of California in virtually abolishing the concept to the detriment of sophisticated parties who specifically bargain for the myriad of benefits such an arrangement provides them.

Next, if the Court finds that Turner is an employee, then this case raises additional important questions regarding potential gaps in insurance coverage for persons initially treated as independent contractors who are subsequently adjudicated to be employees. Condustrial submits that the Court should employ South Carolina's strong public policy of liberally construing coverage under the Act should cover Turner's claims.

Finally, if Turner is an employee, then she should not be able to have her proverbial cake and eat it too by claiming entitlement to an average weekly wage ("AWW") for compensation purposes under the Act based on her gross earnings as an independent contractor for federal income tax purposes, while at the same time eschewing that designation for coverage under the Act as an employee. In making her case to be an employee Turner stresses that she is essentially no different than an employee nurses. This argument is incongruent with her claims for entitlement to a premium AWW and compensation rate substantially greater than her nursing peers. The Court of Appeals' decision enabling this is especially troubling when Turner purportedly incurred numerous out of pocket business expenses to generate her income.

I. The Record confirms that Turner was an independent contractor and not Condustrial's employee.

An "independent contractor" is one who, exercising an independent employment, contracts to do work according to his own methods, skill, and expertise, without being subject to the control of an employer except to the results of his work. *See* Chavis v. Watkins, 256 S.C. 30, 180 S.E.2d 648 (SC 1970). It is elementary that in the absence a statutory provision to the contrary, an injured person who is not an employee, but an independent contractor, is not within the scope of the Act. Tillotson v. Keith Smith Builders. 357 S.C. 554, 593 S.E.2d 621 (Ct. App. 2004). The determination of whether a claimant is an employee or an independent contractor focuses on the issue of control, specifically, whether the purported employer had the right to control the method or manner of the work. Wilkinson v. Palmetto State Transport Co.. 382 S.C. 295,676 S.E.2d 700 (SC 2009). The existence of an employment relationship is jurisdictional; therefore, the Court's standard of review of whether Claimant is an employee or independent contractor is *de novo*. *See* Fortner v. Thomas M. Evans Constr. And Development LLC. 402 S.C. 421, 741 S.E.2d 538 (Ct. App. 2013) (determination of whether a worker is a statutory employee under the Act is jurisdictional; therefore, the question on appeal is a matter of law and the Court has the power to review the entire record to decide the jurisdictional facts in accordance with its own view of the preponderance of the evidence).

A. The Court of Appeals erred by dismissing the significance of the independent contractor agreement between Turner and Condustrial.

This Court in Wilkinson *supra* specifically acknowledged the significance of an independent contractor agreement when analyzing employment relationship issues for coverage under the Act. Wilkinson 382 S.C. 295 at p. 300. The Court stated, "[i]n evaluating the four factors we are guided initially by the parties' independent contractor agreement. But more importantly, *we are guided by the parties' conduct,* which mirrored the terms of the contract." *Id.* (emphasis added).

Here, Turner executed several documents representing that she agreed to be an independent

contractor. The "Licensed Professional Independent Contract Agreement" that Turner signed in 2013 and again in 2014 stated "No other document, including any agreement between the broker and the client, shall be deemed to modify any terms of this agreement unless expressly stated in writing to do so and signed by both the broker and the independent contractor." R., Vol. 7, p. 2953. The contract further stated, "The independent contractor represents that the independent contractor has read and understands the terms of this agreement." R., Vol. 7, p. 2953. The Licensed Professional Independent Contractor Agreement mentioned the term "independent contractor" *seventy-eight times in the four-page document.*

In addition to the independent contractor agreement itself, Turner also signed numerous other documents memorializing herself out as an independent contractor. The "Facilities Expectations" required signature of the "contractor." R., Vol. 7, p. 3130. Turner signed as a "contractor" to permit the company to obtain her SLED report. R., Vol. 7, p. 3131. In February 2013 and October 2014, she signed the "Substance Abuse Policy Consent Form" on the line for "contractor name." R., Vol. 2, pp. 623-24. The body of that document referenced "contractor" on several occasions. Turner signed her own 2013 and 2014 federal income tax returns which named her as an "LPN Nursing Contractor." R., Vol. 2, p. 702; R., Vol. 7, pp. 3067, 3082. Sears also explained that Claimant consented as a "contractor" on several forms and the New Hire/Rehire Checklist classified her as an independent contractor. R., Vol. 3, pp. 950-51, 953-54.

Turner's own testimony supports finding she was not a direct employee of Condustrial. She admitted she never asked to be an employee of SCDC because the schedule would not be "flexible", and she preferred a flexible schedule. R., Vol. 2, pp. 637, 639-41, 721. She agreed she could decline shifts if the supervisor at SCDC asked her to work a certain shift. R., Vol. 2, p. 569. She admitted she had the flexibility to choose the shifts she wanted to work and decline any shifts she did not want to work. R., Vol. 2, pp. 632-34. Turner admitted Condustrial did not supervise her work at SCDC or

control how she did her work as an LPN. R., Vol. 2, pp. 719-20. She was not required to report to Condustrial before, during, or after any shift on how the shift went that day. R., Vol. 2, pp. 647, 654. She did not have to ask Condustrial for permission to take vacation, and they never forbade her from taking days off or from working concurrently at a different agency. R., Vol. 2, pp. 635-36. She agreed she could work for more than one agency at any given time period. R., Vol. 2, p. 569. She understood that Condustrial was not taking out taxes and did not provide benefits such as overtime pay. R., Vol. 2, p. 570. She testified that she supplied her own healthcare insurance. R,, Vol. 2, pp. 588, 645. Extensive testimony in the Record from other non-party witnesses corroborates Turner's independent contractor status, but for the sake of brevity to comply with SCACR 242 limitations on page length Condustrial cannot recount it all in their Petition.

In sum, Turner and Condustrial specifically and knowingly disavowed an employment relationship via the execution of the independent contractor agreement and other documents. Moreover, the practical real world relationship between Turner and Condustrial, evidenced by Turner's own testimony, closely mirrors the terms of the independent contractor agreement in every meaningful sense, which is the hallmark of a valid independent contractor relationship per Wilkinson. The contract between Turner and Condustrial was not some fiction concocted by Condustrial to avoid its responsibilities under the Act. Without citing any precedent or other legal authority, the Court of Appeals essentially voids the effect of entire independent contractor agreement merely because Condustrial paid for Turner's professional malpractice insurance contrary to a single provision in the document providing otherwise. This was clear error and must be reversed in accordance with the spirit this Court established in Wilkinson.

B. **The evidence in the Record otherwise establishes that Turner is an independent contractor under the traditional common law employment test.**

Under its *de novo* standard of review *(See* Fortner *supra),* the Court must examine four factors to analyze the parties' working relationship: 1) direct evidence of the right or actual exercise of control; 2) the furnishing of supplies and/or equipment; 3) the method of payment; and 4) the right to fire. Shatto v. McLeod Regional Med. Ctr., 406 S.C. 470, 753 S.E.2d 416 (2013)[4]. Evidence of a purported employer's actual exercise of, or right to exercise, control mitigates in favor of an employment relationship. *Id.* All four factors must be analyzed even handedly in both directions to determine whether the totality of the circumstances favor an employment or independent contractor relationship. Wilkinson *supra.* No one factor alone is outcome determinative of the issue. *Id.*

First, the direct evidence of the actual exercise or right to exercise control factor favors a finding that Turner was an independent contractor. As this Court made abundantly clear in Shatto, ***who*** allegedly exercises control over the claimant is the critical inquiry. In this case, the Court of Appeals equates Turner's compliance with SCDC's requirements as evidence of the right to control by Condustrial. Even if SCDS's requirements for its contract nurses vicariously implicate Condustrial, they do not rise to the level of control required for an employment relationship for worker's compensation purposes. Any employment endeavor is inherently framed by certain general parameters necessary to achieve the desired outcome sought by the parties. One party defining its expectations framing such parameters is not necessarily an exercise of control for purposes of the employment test. Again, the exercise of control refers to the details and/or method or manner of the work to be done. *See* Chavis v. Watkins, 256 S.C. 30, 180 S.E.2d 648 (SC 1970). The purported exercise of control factors noted by the Court of Appeals only define the sphere of Turner's duties and do not constitute direction of the details, method, or manner within that sphere. *See* Johnson v. Merchant's Fertilizer Co., 198 S.C. 373, 378-379,

[4] Ironically, this case presents a scenario converse to the one presented in Shatto. The nurse in that case alleged a direct employment relationship with the hospital where she was assigned and not the agency that placed her, whereas here Turner avers that Condustrial was her direct employer. Although Turner primarily alleges Condustrial is her "employer" for purposes of the Act, she also acknowledges in the alternative that SCDC may be deemed her employer R., Vol. I, p. 425.

17 S.E.2d 695, 697-698 (1941)(not every violation of an order given to a workman will necessarily remove him from the protection of the Workmen's Compensation Act.... Certain rules concern the conduct of the workman within the *sphere of his employment,* while others *limit the sphere itself).*

The totality of the circumstances confirm that no one controls the method or manner of Turner's work at SCDC, including, but limited to, the following undisputed factors: 1) Turner is a licensed professional nurse (LPN) who relies on her education, training, and skill to accomplish her nursing duties; 2) She does not require constant supervision and direction of the method or manner in which he performs her job duties and tasks; 3)She is subject to state law setting forth the applicable standards for patient care and is bound by her professional and personal ethics in doing so; 5) Turner is free to accept or decline any shifts for work offered to her by SCDC, even though once accepted and scheduled she was required to provide four (4) hours-notice if she wished to rescind the acceptance of the assignment; and 6) She can work as much or as little for SCDC as she wants, assuming assignments and shifts are available.

Second, the furnishing equipment factor favors an independent contractor relationship. Claimant's own testimony demonstrates that Condustrial did not provide any equipment to Claimant to perform her nursing duties at SCDC. Turner explained that SCDC provided medical equipment and she provided her own uniform and shoes. She stated she had her own stethoscope, but she did not take it into the facility because they were "limited on supplies [they] could bring in." R., Vol. 2, p. 581. The Court of Appeals erroneously equates Condustrial's payment for Turner's professional malpractice insurance as provision of "equipment" for purposes of this prong. The fallacy of this finding is self-evident as insurance coverage cannot seriously be considered "equipment." 2d 328, 335 (2000)).

The Court in Shatto rejected mere regulatory compliance as a basis to support a finding of an independent contractor under the provision of equipment prong. However, unlike the hospital in Shatto SCDC did not literally provide "everything" Turner needed to perform her work. Shatto 406 S.C. at p. 480. In this case, Turner provided her own uniforms, nursing shoes and other miscellaneous nursing tools like a stethoscope. Furthermore, the furnishing of equipment in this case goes beyond simply having equipment available for mere regulatory compliance. Nurses, visitors, and other persons

in an SCDC facility are not allowed to bring any non-approved items due safety concerns. In this respect, a prison infirmary is a fundamentally different setting than the hospital in Shatto. The health and safety for everyone, not just its nurses, is SCDC's paramount concern; thus, its requirements to that end are clearly not just an exercise of control for employment purposes. This Court should therefore employ the same analysis of the furnishment of equipment factor as the Supreme Court previously endorsed in Wilkinson to find an independent contractor relationship.

Third, the method of payment factor favors finding that Turner is an independent contractor. In a vacuum, payment by the hour, as opposed to payment by the job for completion of an end, may typically mitigate in favor of an employment relationship. However, this prong must be analyzed in context. As expressed in Wilkinson, "[t]he method of payment bears no indicia of an employment relationship" where the company provided the claimant with 1099 tax forms and the claimant filed tax returns as a sole proprietor, including deductions for his business expenses and self-employment taxes. In this case, Turner was not eligible for any pensions, bonuses, paid vacations, sick leave, overtime pay, or any other ERISA benefit through Condustrial. Moreover, the company did not deduct any social security or federal taxes from her pay. R., Vol. 3, pp. 974-75, 1238-41; R., Vol. 5, 1979-82, 2097, 2121. Turner further testified that she understood the difference between a 1099 for self-employed earnings and a W-2 employee reflecting the withholding of taxes. R., Vol. 5, p. 2083. She understood that under a 1099, no additional taxes were taken out of her paycheck. R., Vol. 5, p. 2230.. At the same time, she enjoyed the benefits of an earned income credit and numerous business deductions via her classification as a 1099 self-employed person. R., Vol. 5, pp. 2232-38.. Condustrial furnished 1099 forms to Claimant, who in turn routinely filed tax returns as a sole proprietor, specifically an "LPN Nursing Contractor." R., Vol. 7, pp. 3067, 3082. Claimant's tax returns reflect deductions for her business expenses and self-employment taxes.

Finally, the evidence of the right to fire factor establishes that Turner is an independent contractor. The Court in Wilkinson explained that this factor is the most difficult to evaluate for the following two reasons: (I) unlike the other three factors the parties may never need to confront this

issue; and (2) a right of termination, in some form, exists in an independent contractor arrangement. 382 S.C. 295, 676 S.E.2d 700 (2009). "The critical inquiry is the term "fire," for it embraces the employment relationship." *Id.* In Wilkinson, the Court determined that the termination of the parties' relationship was controlled by their agreement. Viewing the agreement here in conjunction with Turner's and Condustrial's practical relationship confirms an independent contractor relationship. As noted previously, Turner was completely free to decline any shifts offered by SCDC and/or bargain for additional shifts. Moreover, Condustrial could choose to send another nurse for any assignments. *See* Ferguson v. New Hampshire Ins. Co., 412 S.C. 203,213, 771 S.E.2d 851,857 (Ct. App. 2015) (holding a company did not have the right to fire where the company could choose to use someone other than the claimant for a job, the claimant could also decline or refuse to perform a job, and there was no set schedule).

For all the aforementioned reasons, Turner's arrangement with Condustrial is that of an independent contractor under the common law employment test.

C. The Court of Appeals' opinion is an outlier contrary to other states' decisions finding similarly situated contract nurses to be independent contractors.

Courts across the country have had the opportunity to determine whether nursing agencies with business models similar to Condustrial's contract nursing brokerage are "employers" of the nurses they placed at various facilities. Those courts generally agree that the nursing brokerage in those arrangements were not employers. This finding is not a legal anomaly, as other states' courts have likewise held nurses to be independent contractors under similar facts and circumstances as presented in the instant case. *See* Health Care Assocs., Inc. v. Oklahoma Employment Sec. Comm'n, 2001 OK 50,2-3, 26 P.3d 112, 113 (2001) Trauma Nurses, Inc. v. Bd. of Review New Jersey Dep't of Labor, 242 N.J. Super. 135, 144-45, 576 A.2d 285,290 (App. Div. 1990), Contract Mgmt. Servs., Inc. of Texas v. State ex rel. Dep't of Labor, Office of Employment Sec. CMSI-TX. 745 So. 2d 194, 199 (La. Ct. App. 1999); HRP of Tennessee. Inc. v. State. Dep't of Employment Sec., No. E2005-0I I 76-COA-R3CV, 2006 WL I763673, at * I (Tenn. Ct. App. June 28, 2006).

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

> These factors demonstrate that while Nursefinders exercised control over extraneous aspects of [the nurse]'s work, such as the dates and times when work was offered and collection of his salary, Nursefinders exercised no control over [the nurse]'s nursing, the function for which hospitals sought him. To the contrary, [the nurse] was a free agent who could and did maintain similar arrangements with other suppliers of medical personnel, and who could and did accept or reject work offered to him through Nursefinders, as suited him. Conversely, Nursefinders could not compel [the nurse] to take any particular assignment. Once [the nurse] accepted work proposed by Nursefinders, [the nurse] was not under any control by Nursefinders while working. Apparently, the relationship could be terminated at will by either party at any time. Thus, Nursefinders' role was similar to that of a broker or other middleman. We therefore agree with the trial court that, as a matter of law, Nursefinders exercised insufficient control to create an employee-employer relationship between the nurse and Nursefinders. *Id.* at 619, 518 S.E.2d at 540-41.

II. If Turner is an employee under the Act, then she is subject to Condustrial's leased employee service agreement with Countrywide, which includes workers compensation coverage.

If the Court determines that Condustrial was indeed Turner's employer, then Condustrial's service agreement with Countrywide ("Contract") secures its liability for Turner's claim under the Act via Countrywide's policy with GIC as a matter of law. R., Vol. 7, p. 2961. The Contract states that Countrywide is a "contract labor service (CLS) entity" that will "outsource" certain "Selected Staffing/Employees"[1] for Condustrial's "normal business operations." Further, the Contract provides

that Countrywide *shall* "provide unemployment insurance and worker's compensation benefits; and handle unemployment and worker's compensation claims involving Selected Staffing/Employees." Selected Staffing Employees are supposed to be described and designated under "Exhibit B" to the agreement; however, there is no "Exhibit B" attached. The Contract also states that "all labor and/or employment performed by the Selected/Staffing Employees under this agreement *shall be performed under the mutual direction and control of both parties as co-employers."* (emphasis added). The Contract clearly envisions the addition of employees intended to be covered under its terms on a continuing or rolling basis. Specifically, Section 2 c. of the Contract requires Condustrial to "submit timely, complete, and accurate payroll information (including gross wages earned, any deductions, time worked, leave time/off status, workers' classification code, and overtime exempt status) for each Assigned Employee for each applicable payroll period." Finally, there is a list of employee classification codes for Condustrial's South Carolina nursing operations attached to the agreement for Countrywide's pricing purposes. This list of class codes includes two medical/nurse staffing codes substantially similar to Turner's LPN job class- 8829 and 8833.

The crux becomes how does the agreement between Countrywide and Condustrial apply to Turner, who was previously considered to be an independent contractor but then is subsequently adjudicated to be Condustrial's employee? Countrywide and GIC contend there is no basis under the Contract to account for this scenario. This interpretation, of course, leaves a huge potential gap in Condustrial's coverage. By holding that Condustrial was "uninsured" Turner's employment, the Commission found this gap is precisely what Condustrial bargained for in its agreement with Countrywide . However, the intent of the Contract, the law, and usual and customary insurance/business practices refute this outcome.

Turner became a "Selected Staffing/Employee" *ab initio* (from the outset) within the meaning of the Contract via operation of law pursuant to the Panel's Order finding that she was an employee of Condustrial on her date of accident. This finding should apply retroactively because Condustrial would

have submitted Turner to Countrywide for coverage per the Contract but for its belief that Turner was an independent contractor. Condustrial intended for all of its employees to fall under its Contract with Countrywide, including Countrywide's provision of comprehensive worker's compensation coverage. The Commission's finding that Tuner was Condustrial's employee as of September 5, 2015 is a remedial measure. Its retroactivity must include interpretation and application of the law liberally to find coverage under the Act to further its beneficent purposes to protect injured employees. *See* James v. Anne's Inc., 390 S.C. 188, 701 S.E.2d 730 (2010); *See also* Cash v. Califano, 621 F.2d 626, 628 (4th Cir. 1980) (the concept that judicial decisions are to be applied retroactively "stems from the Blackstonian view, that judges do not make law; they find law. Judicial declaration of law is merely a statement of what the law has always been.").

Further, the Contract, specifically the definition of "Selected Staffing/Employee" to be covered under it, is vague and ambiguous on its face. Condustrial points to the following ambiguities: a) referring interchangeably to employees subject to the Contract as "Selected Staffing Employee," "Assigned Employee," "recruited employee," and "leased employee;" b) specifically stating that "Selected Staffing/Employees" will be described on "Exhibit B" to the agreement when no such exhibit is attached; and c) stating in section I. a. that the "Selected Staffing/Employee" will work under the "Client's supervision" (Condustrial is designated as "Client" in the agreement). However, the Contract states in a separate section specifically governing "Selected Staffing/Employees" that duties of the employee "shall be performed under the *mutual direction and control of both parties as co-employers."* (emphasis added). Because the contractual term "Selected Staffing/Employee" is vague and ambiguous, extrinsic evidence of the intentions of the parties is admissible.[5] Condustrial

[5] The general rule is that parol evidence is admissible to show the true meaning of an ambiguous written contract. An ambiguous contract is one capable of being understood in more ways than just one, or an agreement unclear in meaning because it expresses its purpose in an indefinite manner. The purpose of all rules of contract construction is to determine the parties' intention. The courts, in attempting to ascertain this intention, will endeavor to determine the situation of the parties, as well as their purposes, at the time the contract was entered into. Bruce *v.* Blalock. 241

representatives testified their intention was for the service agreement with Countrywide to provide comprehensive workers compensation coverage, which would obviously include previously unclassified, misclassified, and/or subsequently adjudicated employees in its definition. R., Vol. 3, pp. 1074, 1124; R., Vol. 5, p. 2150.

Moreover, the owner and president of Countrywide, Zach Collier, testified that it is primarily the carrier's decision how to cover previously unreported and/or misclassified employees, but also added "I **would think that they would have to cover the business of ours if it was an employee, whether approved or unapproved."** R., Vol. I, p. 319. Collier, therefore, specifically acknowledges that the Contract accounts for possible coverage of a previously unreported and subsequently adjudicated employee. Countrywide's contention that it had no knowledge of the risks of Turner's potential employment is not supported by the evidentiary record. In fact, unrefuted testimony from Condustrial and other documentary evidence proves Condustrial expected and bargained for full coverage of its potential liability under the Act. Specifically, Tony Durham, Condustrial's owner and president who negotiated and executed the agreement with Countrywide, testified that nursing class codes 8829 and 8833 corresponding with approximately $1.4 million dollars in payroll for its SCDC contract nurses, including Turner, was presented to Countrywide during the contract negotiations. R., Vol. 5, p. 2066. Again, Mr. Durham clarified that those payroll figures and class codes included both Condustrial's employee nurses AND their independent contractor payments. When questioned why independent contractor payments were presented to Countrywide even though they were not initially considered to be part of the agreement, Mr. Durham explained, "I wanted to show him the exposure of all of our people that worked there." For these reasons, the Court of Appeals erred by failing

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S.C. 155. 127 S.E. (2d) 439 (1962). The court should put itself, as best it can, in the same position occupied by the parties when they made the contract. In doing so, the court is able to avail itself of the same light which the parties possessed when the agreement was entered into so that it may judge the meaning of the words and the correct application of the language. 17 Am. Jur. (2d), Contracts§ 272 (1964).

to construe the Contract to cover Turner after she was adjudicated to be an employee, thus leaving Condustrial uninsured under the Act for her accident. This flies in the face of South Carolina policy to construe coverage under the Act liberally to further its beneficent purpose to protect injured workers.

III. GIC IS ULTIMATELY LIABLE FOR THIS CLAIM AS COUNTRYWIDE'S WORKERS COMPENSATION CARRIER BECAUSE ITS COVERAGE MUST FOLLOW THE LAW.

If Turner is subject to the Contract between Condustrial and Countrywide by operation of law, then it necessarily follows that Countrywide's carrier, GIC, is liable for the claim. The Court of Appeals As an initial matter, workers compensation coverage in South Carolina is largely dictated statute. A carrier has very little, if any, discretion to modify or limit coverage required by the Act via the policy itself. S.C. Code §42-5-70 states, in pertinent part, that" [a]ll policies insuring the payment of compensation under this title must contain a clause to the effect that,... *the insurer shall be in all things shall be bound by and subject to the awards, judgements, or decrees rendered against insured employer ...."* (emphasis added). In addition, S.C. Code §42-5-80 (A) also provides, in pertinent part, that "[n]o policy of insurance against liability arising under this title may be issued unless it contains the agreement of the insurer that it will promptly pay to the person entitled thereto all benefits conferred by this title...." Subsection B of that statute states "[s]uch agreement must be construed to be a direct promise by the insurer to the person entitled to compensation enforceable in his name." The worker's compensation law expressly incorporates its terms into all employment agreements and insurance contracts entered into thereunder. *See* Tedars v. Savannah River Veneer Co., 202 S.C. 363, 25 S.E.2d 235 (1943). Collectively, these authorities confirm that an insurance carrier is bound by statute to cover whatever the Commission lawfully deems its insured is liable for under the Act.

In this case, GIC argues, and the Court of Appeals agreed, that it is only required to cover risks it agreed to cover at the inception of its policy with its insured. GIC contends Countrywide did not report nursing services for a prison on its policy application to GIC; therefore, GIC is not liable for claims involving employees falling within that class code. In contrast, Condustrial did in fact disclose the

exposure for the SCDC contract nurses to Countrywide. In addition to flouting the aforementioned statutory principles binding a carrier to assume all risks lawfully deemed to be part of their insured's business, GIC cannot point to any provision in its Countrywide policy to support its position. Part One B of the policy states that GIC will "pay promptly when due the benefits required of you by the workers compensation law." R., Vol. 7, p. 3167. The term "workers compensation law" is defined under the policy as "the workers compensation and occupational disease law of each state" endorsed by the policy. Contrary to GIC's arguments, its own policy language clearly defers the scope of its coverage to the "workers compensation law."

Regarding GIC's argument that it cannot be compelled to cover risks for which it is not aware, the policy specifically provides a mechanism to remedy that quandary. Part Five C of the policy states the following:

> Premium for each work classification is determined by multiplying a rate times a premium basis. Remuneration is the most common premium basis. This premium basis includes payroll and all other remuneration paid or payable during the policy period for the services of: l) all your officers and employees engaged in work covered by this policy; and 2) all other persons engaged in work that ***COULD*** **MAKE US LIABLE** under Part One (Workers Compensation Insurance) of this policy. (EMPHASIS added). [GIC policy].

This policy language expressly contradicts GIC's position that it is only required to cover risks it agrees to take on at the inception of the policy. The policy clearly recognizes that its insured's circumstances may change, which is the basis for the "could make us liable" policy language" and reference back to the workers compensation law in Part One of the policy. The policy, therefore, contemplates the risk posed by workers who *could be* held to be employees under the Act. In this case, Turner clearly falls under the "all other persons engaged in work" policy language that "could make us [GIC] liable" under the workers compensation law.

Moreover, Part Five E of the policy provides GIC with the right to conduct a premium audit of Countrywide's policy and assess additional premium for risks it is required to assume under the workers compensation law that were unknown or not in existence at the inception of the policy. The policy

states, " [t]the final premium will be determined after this policy ends by using the actual, not the estimated, premium basis and the proper classifications and rates that lawfully apply to the business and work covered by this policy." (emphasis added). Again, the provision for the premium audit and reassessment defers to the workers compensation law as to what proper class codes "lawfully apply." This includes unclassified employees at the time of the policy inception that have been subsequently adjudicated to be covered under the workers compensation law like Turner. The testimony of Albert Hyndshaw, Condustrial's former agent with decades of experience in the insurance industry, confirms that a premium audit and reassessment of premium against the insured is the usual and customary method for an insurer to cover risks after the fact. R., Vol. 4, pp. 1671-92, 1717, 1761-72.

In sum, GIC cannot pick and choose which risks implicated by its policy with Countrywide that it will cover after the fact. As a corollary, an employer's liability under the Act is entirely insured or it is totally uninsured. An employer cannot purchase a single policy that insures some of its employees but not others. Simply put, GIC is the carrier for Countrywide and is bound to cover all risks incurred by Countrywide under the Act as determined by the workers compensation law of South Carolina, including contractors subsequently adjudicated to be employees covered under the Act.

IV. Turner's AWW and compensation should not be based solely on her gross receipts when she incurred substantial business expenses to generate her income.

The Court of Appeals reinstated the AWW and compensation rate found by the Single Commissioner- $1130.86 and $753.94, respectively. This calculation is purportedly based on Turner's gross payments received in the four quarters prior to the quarter in which she was injured, specifically, the third and fourth quarters of 2014 and the first and second quarters of 2015 per S.C. Code §42-1-40. However, this preferred statutory method of calculating AWW is not applicable to this case. First, this method only applies reported to the Department of Employment and Workforce ("DEW"). As such, the statute presumes that a claimant's employment status for coverage under the Act is *undisputed* because a purported independent contractor's

wages would never be reportable to DEW. Here, Turner's wages were never reported to DEW within the meaning of this statute and her employment vs. independent contractor status is clearly disputed. Second, the Court of Appeals held that Turner produced evidence of four quarters of completed wages in accordance with the statue is not accurate. The only evidence in the Record regarding her AWW is Turner's yearly 2014 and 2015 federal income tax returns reflecting her gross earnings with Schedule C Profit Loss from Business reflecting her net earnings after business deductions.

Next, the Court of Appeals' holding that the Full Commission Panel failed to make a specific finding of fact to justify its deviation from the preferred statutory method for AWW calculation is erroneous. Specifically, the Commission indeed found that the traditional method for wage calculation based on Turner's gross *income* on tax returns does not accurately reflect her actual *earnings* for AWW calculation purposes. The Commission delivered a thorough discourse with citation to legal authorities over multiple pages in its Order for the proposition that it sufficiently explained the rationale for its decision on the AWW calculation. Indeed, it is difficult to fathom how much more the Commission could have done to justify its findings.

To recap, it is undisputed that Turner deducted numerous business expenses necessary to generate her income. This constitutes "exceptional reasons" within the meaning of S.C. Code §42-1-40 for an alternative AWW calculation to approximate the actual earnings the injured party would be earning but for the injury. *See* Sellers v. Pinedale Residential Center, 350 S.C. 183, 564 S.E.694 (Ct. App. 2002).. The Commission declined to strictly apply the case of Stephen v. Avins Construction Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996), which holds, *inter alia,* that a contractor's compensation rate should be determined based on his net taxable income as reflected on his tax returns because "earnings" of the injured employee means the actual sum paid to the employee as his wages, not the totality of payments received, including reimbursements.

Condustrial submits that the Full Commission in its exclusive role as the ultimate fact finder properly utilized a middle ground approach for wage calculation that can fairly approximate Turner's actual earnings

that she would be earning but for the injury. The Full Commission ruled that some, but not all, business deductions claimed by Turner on her 2014 Form 1099 Schedule C tax return (2014 was the last full year of earnings prior to the accident) should be subtracted from gross earnings to most closely approximate the actual earnings lost due to injury. *See* Sellers v. Pinedale Residential Center, 350 S.C. 183, 564 S.E.694 (Ct. App. 2002) (the worker's compensation statute which sets forth several different methods for calculating the average weekly wage provides an elasticity or flexibility with a view toward achieving the ultimate objective of fairly reflecting probable future earning loss).

Bottom line, the statute affords the Commission tremendous discretion to fashion a fair and equitable wage calculation for compensation purposes. The Full Commission here properly exercised that discretion by reasoning that South Carolina law unequivocally holds that mileage deductions should not be included in wage calculations. Stephen *supra;* Wright v. Wright, 306 S.C. 331, 411 S.E.2d 829 (Ct. App. 1991) (mileage deductions taken on federal income tax returns are not includable as income for calculation of benefits). Moreover, the Commission relied on the Stephen court's favorable citation to a case from North Carolina holding that expenses incurred in producing revenue should be excluded from earnings. *See* Baldwin v. Piedmont Woodyards, 58 N.C. App. 602, 293 S.E.2d 814 (N.C. Ct. App. 1982).

Applying these principles, the Court extrapolated Turner's "earnings" from her 2014 Schedule C by excluding mileage deductions and expenses unequivocally incurred to generate her gross income. Specifically, the 2014 Schedule C reflects gross revenue of $56,180.00. However, Turner deducted $11,020.00 for mileage and vehicle deductions, which per the aforementioned case law clearly cannot be included as earnings. That leaves revised net earnings of $45,160.00. Turner's Schedule C also deducts numerous other business expenses, some of which may or may not have been directly incurred, or only partially incurred, to generate her gross income. The Commission recognized that some deductions, including $2,840.00 for professional liability insurance, $900.00 for contract labor, $2,200.00 for continuing education requirements, and $1,565.00 for nursing uniforms were clearly incurred solely as a result of her occupation as an LPN. Subtraction of these unequivocal business deductions yields net

earnings of $39,635.00, which divided by 52 weeks equals an AWW of $762.21 and a compensation rate of $508.17. Condustrial submits this methodology produces a fair and reasonable approximation of Turner's earnings for compensation purposes under the Act.

Finally, the Court of Appeals usurped the Commission's authority on this issue and has engaged in improper fact finding beyond the scope of its standard of judicial review under the substantial evidence rule. Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981)(in an appeal from the commission, this court may not substitute its judgment for that of the full commission as to the weight of the evidence on questions of fact. S.C. Code Ann. §1-23-380(A)(6)(2005). The Court cannot enter its own findings under the guise of reinstating a prior ruling of a hearing commissioner, especially when the Full Commission, not the single commissioner, is the ultimate fact finder in workers' compensation matters. If the Court thinks that the Full Commission's findings on the AWW issue are insufficient and/or controlled by an error of law, then the proper remedy is remand back Full Commission with instructions to enter sufficient findings based on the Record and/or further consideration under the proper legal standard. Frame v. Resort Services Inc., 357 S.C. 520, 531, 593 S.E.2d 491,497 (Ct. App. 2004)("when the Appellate Panel acts without first making the proper factual findings required by law, **the proper procedure is to remand the case and allow the Appellate Panel to make those findings.**")(emphasis added).

CONCLUSION

Condustrial respectfully request that the Court grant its Petition for a Writ of Certiorari to address the important issues presented in this matter.

Respectfully submitted,

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