

THE STATE OF SOUTH CAROLINA

In The Supreme Court

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**Aug 12 2024**

S.C. SUPREME COURT

Appeal from the South Carolina  
Workers' Compensation Commission

Unpublished Opinion No. 2024-UP-110  
Heard February 6, 2024-Filed March 27, 2024  
Withdrawn, Substituted, and Refiled July 3, 2024

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-Petitioners

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

**PETITION FOR WRIT OF CERTIORARI**

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### **Certificate of Counsel**

The undersigned counsel for the Respondents-Petitioners hereby certify that the Petition for Rehearing was made on April 11, 2024, and finally ruled on by the Court of Appeals on July 3, 2024.

### **Question Presented**

- I. Did the Court of Appeals err in reversing the Workers Compensation Commission's calculation of Petitioner's average weekly wage and compensation rate?

### **Statement of the Case**

Petitioner, Rachel Turner, is a licensed practical nurse who, in February 7, 2013, entered into a relationship with Medustrial Healthcare, Inc., a division or service of Conustrial, Inc., under which Medustrial/Conustrial placed Petitioner as a nurse with various companies with which Medustrial/Conustrial contracted. (R. p. 2980) Petitioner chose which assignments and shifts she would accept, and where. (R. pp. 632-633, 734-736) The wages Petitioner earned through Conustrial were reported on a 1099 rather than a W-2. (R. pp. 3079-3099; 3539-3547) When Petitioner 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) Petitioner'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, Petitioner'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 Petitioner's claimed business expenses, along with other deductions, Petitioner did not pay any income taxes in 2014 or 2015. (R. pp. 3079-3099; 3539-3547)

On or around September 5, 2015, Petitioner 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). On or around September 5, 2015, two inmates held Petitioner 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, Petitioner’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).

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. The hearing on the merits of this claim commenced on July 24, 2017. 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 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. In addition, there were numerous status conferences and conference calls involving the Hearing Commissioner and parties between those dates.

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, Petitioner 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 Petitioner at the time of her work accident; and that liability for the injuries sustained by Petitioner 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 Petitioner'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 Petitioner, Condustrial, and Guarantee Insurance Company/SC Property & Casualty Insurance Guaranty Association.

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

Following the decision of the Commission, Condustrial filed a Motion to Reconsider on April 12, 2021. On May 4, 2021, Petitioner filed a Motion to Submit Additional and Newly Discovered Evidence. On May 17, 2021, the Commission denied Condustrial's Motion to Reconsider. On June 15, 2021, Petitioner filed a Notice of Appeal from the April 6, 2021 and May

17, 2021 Orders of the Commission, and Condustrial filed its own Notice of Appeal from those same Orders on June 16, 2021.

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

On March 27, 2024, the Court of Appeals issued an opinion reinstating the Hearing Commissioner's findings for the average weekly wage and compensation rate and also affirming the Commission's finding that Petitioner was not entitled to temporary total compensation after September 30, 2015. Petitioner, Condustrial and SCDC/State Accident Fund filed Petitions for Rehearing and these petitions were denied on July 3, 2024. On July 3, 2024, the Court of Appeals withdrew, substituted and refiled its opinion.

The Respondents-Petitioners contend that the Court of Appeals erred in reversing the Commission's determination of the average weekly wage and compensation rate of the Petitioner. Therefore, pursuant to Rule 242, S.C.R.C.P., the Respondents- Petitioners respectfully request that the South Carolina Supreme Court grant this Petition to review the decision of the Court of Appeals and issue a new order affirming the Commission's findings regarding the Petitioner's average weekly wage and compensation rate.

## Arguments

### **I. The Court of Appeals erred in reversing the Commission's decision regarding the calculation of the Average Weekly Wage and Compensation Rate.**

The Respondents-Petitioners contend that the Court of Appeals erred in finding that Petitioner's average weekly wage is \$1,130.86 resulting in a compensation rate of \$753.94 is unsupported by the law and is unfair to the employer in violation of S.C. Code Ann. §42-1-40 and should be reversed and an alternative method used to calculate Petitioner's average weekly wage and compensation rate.

In the present matter, Petitioner requested that the Workers Compensation Commission find that she was an employee of Medustrial and/or Condustrial on the date of injury. While Petitioner 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 Petitioner filed her 2014 and 2015 taxes, 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. Petitioner'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. For 2015, Petitioner's alleged business expenses totaled \$30,296.00, and her total business "profit" for that year was \$12,706.00. As a result of Petitioner's claimed business expenses, along with other deductions, Petitioner did not pay any income taxes in 2014 or 2015.

While Petitioner 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. Petitioner 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 Court 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 the Court of Appeals in Stephen v. Avins Constr. Co., 324 S.C. 334, 478 S.E. 2d 74 (Ct. App. 1997), and is wholly unfair to Petitioner's employer.

Pursuant to the South Carolina Workers' Compensation Act, average weekly wages are 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 fifty-two weeks immediately preceding the date of the injury..." S.C. Code Ann. § 42-1-40. Although the Section sets forth four alternative methods to calculate the average weekly wage, the Single Commissioner and the Court of Appeals relied unfairly upon the primary and traditional method of calculation, which requires that the average weekly wage must be calculated by taking the total wages paid for the last four quarters immediately preceding the quarter in which the injury occurred as reported on the Department of Employment and Workforce's Employer Contribution Reports divided by fifty-two or by the actual number of weeks for which wages were paid, whichever is less.<sup>1</sup> Id. In the case at hand, there were no wages reported to the Department of Employment and Workforce on behalf of Petitioner by Condustrial.

However, § 42-1-40 also recognizes that "unusual circumstances relative to employment may occur. An elasticity or flexibility is permitted with a view toward always achieving the

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<sup>1</sup> Although the Court reverts to the Single Commissioner's average weekly wage of \$1,130.86 and compensation rate of \$753.94 because the calculation "complied with the statutory requirement," the Court fails to acknowledge the lack of Contribution Reports from the South Carolina Department of Employment and Workforce to verify the wages reported, if any, pursuant to S.C. Code Ann. § 42-1-40.

ultimate objective of reflecting fairly a claimant's probable future earning loss." Bennett v. Gary Smith Builders, 271 S.C. 94, 98, 245 S.E.2d 129, 131 (1978).

Therefore, S.C. Code Ann § 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 wage may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury." Id.

Despite the Court of Appeal's assertions, the Commission found that the average weekly wage calculated by the Hearing Commissioner via the traditional method by "extrapolat[ing] from gross payments Claimant received before deduction of business expenses for federal income tax purposes" was erroneous because it failed to "fairly approximate Claimant's actual earnings." (R. p. 125). By applying the traditional method for calculating the Petitioner's average weekly wage, the Commission recognized that such a calculation would result in an unfair windfall for the Petitioner and thus, an exceptional reason existed for deviation.

The Commission's rationale for utilizing the fourth methodology to calculate the Petitioner's average weekly wage is clearly stated as it "employed an analysis of [Petitioner's] income tax returns to discern and approximate her 'actual earnings' in accordance with South Carolina law." (R. p. 126). Thus, relying upon Wright v. Wright, 306 S.C. 331, 411 S.E.2d 829 (Ct. App. 1991), and Stephen v. Avins Const. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996), the Commission was able to properly discern the Petitioner's "earnings" from her 2014 Federal income taxes. In Wright, the Court held that a mileage deduction was no different from other expenses of doing business (e.g., hotels, meals, tools, classes, and insurance) and, as such, mileage reimbursements should not be included in wages for purposes of benefits. Wright, 306 S.C. at 334 – 335.

Additionally, in a lengthy analysis and discussion, the Court in Avins found several other examples where various business expenses were not included in computing the earnings for average weekly wage purposes:

[A]utomobile allowances (See Bosworth v. 7-Up Distrib. Co., 355 S.E.2d 339 (Va. Ct. App. 1987)); mileage expenses (See Wright v. Wright, 306 S.C. 331, 411 S.E.2d 829 (Ct.App.1991)); equipment rentals (See Dickerson, Inc., et al. v. McCleary, 498 So.2d 651, 652 (Fla. Dist. Ct. App. 1986) ("[W]hen an employee furnishes both services and equipment, and the furnishing of equipment is a specified and substantial portion of the contract, the amount legally attributable to rental of the equipment should not be included in determining the employee's average weekly wage.")); labor, fuel, repair bills, and insurance (See Id.); and depreciation on business equipment, interest on business debts, and the purchase price of a saw (See Baldwin v. Piedmont Woodyards, Inc., 293 S.E.2d 814 (N.C. Ct. App. 1982) (expenses incurred in producing revenue should be deducted)).

Stephen v. Avins Const. Co., 324 S.C. 334.

Applying these principles, the Commission found several deductions that should be excluded when calculating Petitioner's earnings, including mileage and vehicle deductions, insurance, contract labor, continuing education, and uniforms. (R. p. 126). Based upon these deductions, the Commission properly found Petitioner's average weekly wage was \$762.21 and her compensation rate was \$508.17.

The Court of Appeals found that the Commission erred in failing to make a factual finding as to why the Commission used an alternative method in determining the average weekly wage. Despite that finding, the Court of Appeals reinstated the Hearing Commissioner's calculation of the average weekly wage. The Respondents-Petitioners contend that this constitutes error.

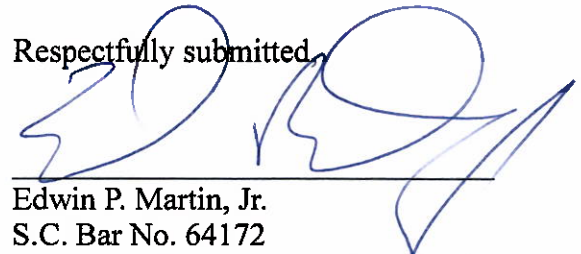
Pursuant to the above, the Respondents-Petitioners believe the Court of Appeals may have overlooked and misapprehended these arguments when issuing its unpublished Opinion on July 3, 2024. Therefore, the Respondents-Petitioners respectfully request the Supreme Court grant this

Petition to review the final Decision and Order of the Commission regarding the Petitioner's average weekly wage and compensation rate.

**Conclusion**

Based on the arguments set forth herein above, the Respondents-Petitioners, the South Carolina Department of Corrections and the South Carolina State Accident Fund, respectfully request that the South Carolina Supreme Court issue a Writ of Certiorari to review the July 3, 2024 Opinion of the Court of Appeals. The Respondents-Petitioners further request that the Supreme Court affirm the final Decision and Order of the South Carolina Workers Compensation Commission regarding the average weekly wage and compensation rate in accordance with the Administrative Procedures Act as it is supported by the substantial evidence in the record and the applicable law.

Respectfully submitted,



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