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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

Opinion Number 2024-UP-110
(Filed March 27, 2024, Withdrawn, Substituted, and Refiled July 3, 2024)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,

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

RESPONDENTS SOUTH CAROLINA PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION ON BEHALF OF GUARANTEE INSURANCE COMPANY AND COUNTRYWIDE STAFFING SOLUTIONS GROUP, INC.'S RETURN TO CONDUSTRIAL, INC.'S CROSS PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

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

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

The Single Commissioner issued a Decision and Order on July 21, 2020, from which all parties appealed the Single Commissioner's Decision and Order to the Appellate Panel in some way. The Guaranty Association requested that the Appellate Panel reverse certain portions of the Decision and Order of the Single Commissioner because the Single Commissioner erred in finding and concluding (1) all four factors of the test used by South Carolina to determine whether a worker is an employee or an independent contractor preponderate in favor of Turner having the status of

employee and concluding Turner was an employee; (2) the primary method of calculating average weekly wage (AWW) should be employed, such that the AWW is $1,130.86 and the compensation rate is $753.94; (3) Turner developed PTSD as a direct result of the assault and surrounding injuries; and (4) Turner was disabled under the Act from September 6, 2015, until September 30, 2016. **(R. pp. 134-68).**

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

By Order dated April 6, 2021, the Appellate Panel affirmed the Decision and Order of the Single Commissioner except for the calculation of Turner's AWW and compensation rate. **(R.**

pp. 124-26). Turner, Condustrial, SCDC and the State Accident Fund appealed various issues from the Appellate Panel's Order to the South Carolina Court of Appeals.

During the appeal, the Court of Appeals granted Turner's Motion for Partial Remand to the Commission to submit additional and newly discovered evidence pursuant to S.C. Code Ann. Reg. 67-707(A). By Order dated September 26, 2021, the Commission denied Turner's Motion to Submit Additional and Newly Discovered Evidence.

Following the Commission's denial, the appeal proceeded before the Court of Appeals. In Unpublished Opinion No. 2024-UP-110, filed March 27, 2024, the Court of Appeals affirmed in part and reversed in part the Appellate Panel. Turner, Condustrial, SCDC and the State Accident Fund filed Petitions for Rehearing. The Court denied rehearing and its March 27, 2024 Opinion was withdrawn, substituted, and refiled July 3, 2024. The Court of Appeals affirmed the Appellate Panel's findings that (1) Turner was not entitled to TTD benefits after September 30, 2015, (2) Turner was an employee rather than an independent contractor, (3) Condustrial was uninsured, (4) Countrywide was not liable for the claim, and (5) Guarantee was not liable for providing coverage in this case. The Court also affirmed the Commission's decision not to consider "newly discovered evidence."

The Court of Appeals reversed the Appellate Panel's finding that Turner's AWW was $761.21 and her compensation rate was $508.17, and reinstated the Single Commissioner's AWW calculation of $1,130.86 and compensation rate of $753.94. According to the Court, this calculation complied with the statutory requirement. This Petition followed.

STANDARD

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

In an appeal from the Appellate Panel, the Court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but it may reverse when the decision is affected by an error of law. *Hopper v. Terry Hunt Const.*, 373 S.C. 475, 479, 646 S.E.2d 162, 164 (Ct. App. 2007), *aff'd*, 383 S.C. 310, 680 S.E.2d 1 (2009). "Certain situations involve a mixed question of law and fact." *Id*. When mixed questions of law and fact are presented, the question of "whether the facts of a case were correctly applied to [the law] is a question of fact, subject to the substantial evidence standard." *Id*. (holding the determination of the requirements to transfer liability to the State Accident Fund under section 42-1-415 was a question of law, but whether the statutory employer and its carrier met those requirements was a question of fact subject to the substantial evidence standard).

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

ARGUMENT

I. The Court of Appeals correctly concluded that substantial evidence supports the Appellate Panel's determination that Turner's employment did not fall under the Selected Staffing Agreement between Condustrial and Countrywide.

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

At the time of the Turner's injury, Tony Durham, President of Condustrial, and Tom Sears, General Counsel for Condustrial, had served in their roles for the company for over fifteen and nine years respectively. They were both involved in the negotiation of the "Contract Labor Services Agreement" and "Procedural Amendment" (collectively, "Selected Staffing Agreement") with Countrywide,[1] as well as intimately familiar with Condustrial's arrangements for workers compensation in the past.[2]

For workers with whom Condustrial wanted to procure workers compensation coverage, the Selected Staffing Agreement required Condustrial to submit timely, complete, and accurate information "each applicable payroll period at least three business days prior to the date on which payroll is to be issued by [Countrywide]" and Countrywide had to approve the employee's class code and location.[3] As the Court of Appeals found, substantial evidence supports the Appellate Panel's conclusion that while Turner was an employee from her first day with Condustrial,

[1] **(R. pp. 2961-70, 3119-21).**
[2] **(R. pp. 931-32, 1946, 1951, 2066).**
[3] **(R. pp. 2961-70 ¶** 2.c**).**

Condustrial never made her a Selected Staff/Employee by submitting her for payroll with Countrywide.

Condustrial admitted too that it failed to include Turner in its payroll under the Selected Staffing Agreement. Tom Sears stated: "I would agree that independent contractors under Medustrial were not covered by the Selected Staffing Agreement."[4] Again, Sears reiterated at the hearing: "I agree that when we made this contract with Countrywide, we did not intend to include independent contractors."[5]

As the Court of Appeals also found, substantial evidence demonstrates that Countrywide never approved the class code that would apply to nurses who work in prison settings like Turner as required by section 2.c of the Agreement. [6] Turner, particularly, was staffed at the Kirkland Correctional Institution, a Level Three Maximum security facility, housing some of the most dangerous inmates in South Carolina.[7] Condustrial never submitted any worker with class code 7720, which applies to workers in prison, under the Selected Staffing Agreement, or for that matter told Countrywide about any worker classified under class code 7720 staffed at the Kirkland Correctional Institution.[8]

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

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

[6] The Appellate Panel likewise concluded, "the credible and reliable evidence in the record demonstrates that [Turner]'s class code and location were never submitted to [Countrywide] for coverage." **(R. p. 112).**

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

[8] **(R. pp. 2462-74)** (Becky Barnette, Guarantee's Vice-President for Underwriting and Manager of the PEO Unit, testified in detail how the proper NCCI classification code for Turner was 7720, for workers in prisons, not the 8829 or 8833, for workers in nursing homes and hospitals respectively); *see also* **(R. p. 117 n.6)** (explaining how Barnette's "experience and expertise in underwriting workers compensation insurance coverage and understanding of PEO arrangements far outweighs that of any other witness having various roles in the insurance process who testified during trial and attempted to interpret the facts, [Agreement], or [Countrywide/Guarantee] Policy . . . ").

Condustrial's emphasis that Countrywide was aware of its Medustrial brokerage line of business, including about 180 nurses, or submission of a few nurses working in hospitals and nursing homes under class codes 8829 and 8833, fails to affect the outcome for Turner under the Selected Staffing Agreement. There is no relationship between providing coverage for workers in prison facilities such as Turner and providing coverage for workers in public and private hospitals and nursing homes in South Carolina.[9] What is more, alleged conversations had before formation of the Selected Staffing Agreement cannot modify or reform the plain language now. The Selected Staffing Agreement "constituted the entire understanding of any of the provision contained in th[e] Agreement" and "may be modified or amended only by a written modification or amendment signed by both parties."[10] "[T]his Agreement supersedes all previous Agreement or understandings between the parties hereto, and all other such Agreements or understandings, whether oral or written, shall become null and void as of the date of the execution hereof."[11]

In the end, there are simply no facts to suggest that Condustrial was ever confused about what was a "Selected Staffing/Employee" or how to submit workers for coverage. Exhibit B says nothing about how an employee could become a "Selected Staffing/Employee" under the Selected

[9] **(R. pp. 2462-75, 2522-27**; **Amended Supp. R. pp. 3408-19).**
[10] **(R. p. 2966 ¶ 20)** ("Entire Agreement, Amendment").
[11] *Id*. ¶ 20 ("Supremacy of the Agreement").

Staffing Agreement and covered for workers compensation purposes.[12] As admitted by Condustrial many times, section 2.a dictated who was covered. Section 2.a required Condustrial to provide "timely, complete, and accurate worker class codes for Select Staffing/Employees at least three banking days prior to the date on which payroll was to be issued by Countrywide."

Condustrial's President Tony Durham and General Counsel Tom Sears, moreover, both testified they understood who was and who was not a Selected Staffing/Employee. Tom Sears admittedly negotiated the Selected Staffing Agreement by which Condustrial would provide compensation codes and locations where employees worked and put that data into Countrywide's system.[13] When asked "You have to submit them for payroll, and their class codes and locations have to be approved before [Countrywide] agrees to become a co-employer with Condustrial under the Agreement; is that correct?," Sears responded, "I think in the normal course of business, yes."[14] Similarly, Tony Durham agreed that Condustrial had to submit the class code and location to Countrywide for Selected Staffing/Employees to be approved and honored under the Selected

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[12] Condustrial makes much ado about nothing with its references to "Exhibit B" missing from the Agreement and creating some alleged confusion about who were Selected Staffing/Employees under the Agreement. Under section 1.a of the Agreement, Countrywide agreed to provide certain services for "Selected Staffing/Employees who perform the type of work described on Exhibit B under [Condustrial]'s supervision at the locations specified on Exhibit B." **(R. pp. 2282-83).** Exhibit B thus describes the type of work "Selected Staffing/Employees" were going to perform and at what locations. The reference in section 1.a to Exhibit B, moreover, is the only reference in the Agreement, and notably, in contrast, Exhibit A, which was attached to the Agreement, was not referenced anywhere in the Agreement. The oddity suggests that the reference to Exhibit B may have been a typo and should have been instead a reference to Exhibit A. To this end, Tom Sears admitted that the Agreement required Condustrial to provide Countrywide a list of National Council on Compensation Insurance (NCCI) codes used to classify Condustrial's workforce and the locations of their work and Exhibit A attached to the Agreement would have been the list that Condustrial would have expected to be covered by the Contract in its inception. **(R. p. 1412)**; *see also* **(Amended Supp. R. pp. 3420-538)** (Condustrial Payroll for August and September 2015); **(R. pp. 3349-51)** (List of locations provided by Condustrial to Countrywide excluding reference to any prison facility).

[13] **(R. pp. 1310-11).**

[14] **(R. pp. 1419-20).**

Staffing Agreement.[15] As Tony Durham admitted, "Q. . . . no one could ever get into this agreement as an employee until you put them in? A. On a weekly basis, that's correct."[16]

The undisputed evidence shows that Condustrial understood and followed the procedures for submitting workers for coverage under the Selected Staffing Agreement including timely providing Countrywide the class codes and the locations of the workers for which it wanted coverage at least three banking days before each payroll period and did not include Turner.

II. The Court of Appeals correctly concluded that substantial evidence supports the Appellate Panel's determination that Condustrial lacks any legal or equitable right to make Turner an employee under the Selected Staffing Agreement because she was found to be an employee by the Appellate Panel after-the-fact.

For the reasons stated in the July 3, 2024 Opinion, the Court of Appeals correctly rejected Condustrial's several arguments that Countrywide should be liable under the Selected Staffing Agreement for any of Condustrial's workers found to be an employee after-the-fact. In response to Condustrial's arguments below, the Court of Appeals correctly reasoned that Countrywide was not action as a "de facto P.E.O." under the Agreement, that the parties did not omit by mistake any terms that would have made the Agreement fall under the P.E.O. statutes, and that Countrywide should not be estopped from denying it is a P.E.O. In its Petition for Writ of Certiorari, Condustrial appears to abandon pursuit of these arguments too, taking no issue with the Court of Appeals on these points but arguing, without reference to any legal or equitable doctrine, that the Selected Staffing Agreement should be liberally construed to include Turner as an employee thereunder here.

[15] **(R. pp. 2282-83).**
[16] **(R. p. 2195).**

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

> [Condustrial] shall make any and all strategic, operational and other business-related decisions regarding its business. Such decisions and related outcomes shall exclusively be the responsibility of [Condustrial] and [Countrywide] shall bear no responsibility or liability for any actions or inactions by [Condustrial].[17]

Sears admitted repeatedly that Condustrial made a "business decision to maintain this [1099] brokerage model."[18] When asked, "It was your business – your company's business decision to have these 1099 employees out there without workers' compensation insurance," Sears responded, "Yes."[19] Knowing that it chose not to submit Turner for workers compensation coverage under the Selected Staffing Agreement too, Condustrial failed to ensure Turner procured her own coverage before staffing her as a nurse in a Level III maximum security facility. Any gap in coverage is not only Condustrial's own doing, but its own problem to bear.

For argument purposes only, even if there were a provision in the Selected Staffing Agreement by which Condustrial could submit employees for coverage after-the-fact (which there is not),[20] Condustrial admitted that Paragraph 6 permitted Countrywide to reject an exposure presenting undue risk of injury or death. Paragraph 6 states in pertinent part:

> [Countrywide] shall have the right to cease providing recruited employees to a third party if, in the reasonable opinion of [Countrywide], after consultation with [Condustrial] and a reasonable time to cure, [Countrywide] believes that the third party's worksite or any portion thereof or any practice or equipment of the third party present an undue risk of injury or death to Selected

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[17] **(R. p. 2961 ¶ 2.a.).**
[18] **(R. p. 1314).**
[19] *Id*.
[20] Tony Durham admitted that the Agreement fails to provide for an audit and retroactive coverage. **(R. p. 2244).**

> Staffing/Employees. . . . Alternatively, [Condustrial] may continue relationship with such third party in its reasonable business discretion if it obtains other insurance coverages for the provision of its Selected Staffing/Employee, apart from those provided under the agreement, and holds [Countrywide] harmless for the provision of any such personnel."[21]

Tony Durham further confirmed that "if [Condustrial] sent [Countrywide] something that was not covered within a code that [Condustrial] had on our [Selected Staffing Agreement], that they would certainly have the reasonable expectation to say, 'hey, that's not cool. Don't do that.'"[22] Likewise, Tom Sears admitted too that Paragraph 6 required Condustrial to provide the locations of its workers and that Countrywide had the ability to reject specific exposures.[23] When asked "But [Countrywide has] a right of prior approval. You can't just give us anybody," Sears responded "The contract does say that, yes."[24] In fact, Countrywide had rejected Condustrial's United States Longshore and Harbor (U.S.L.&H) workers exposure and Condustrial found coverage for these workers elsewhere.[25]

Finally, ample evidence presented at the hearing demonstrated that Countrywide would have rejected any submission of Turner, a prison worker, under the Selected Staffing Agreement. Such exposure was considered by its insurer Guarantee as presenting an unreasonable risk of injury

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[21] **(R. p. 2202).**
[22] **(R. p. 2202)**; *see also* **(R. 2203)** ("Q. And Paragraph six says if you would send them a location that they weren't comfortable with or they didn't want to deal with, they could say, 'No.' A. Yeah.").
[23] **(R. 1335-37, Amended Supp. R. 3383).**
[24] **(R. p. 1354).**
[25] **(R. pp. 181, 2203-04)** (regarding U.S.L. & H coverage).

or death.[26] Therefore, even if there were a process by which Turner could be submitted for coverage after-the-fact (which there is not), it would make no difference to the outcome of this matter, as Turner, a prison worker, would have been rejected by Countrywide and its insurer, Guarantee, as presenting an unreasonable risk of injury or death.

III. The Court of Appeals correctly concluded that substantial evidence supports the Appellate Panel's determination that Guarantee is not liable for providing coverage in this case.

Countrywide was the only named insured under the Guarantee policy. Condustrial had a duty to add Turner as an employee under the Selected Staffing Agreement to obtain coverage for Turner under Guarantee's policy. Condustrial failed to do so, and, for all the reasons discussed above and found by the Court of Appeals and Appellate Panel, Condustrial lacks any legal or equitable right to change that circumstance after-the-fact. Moreover, the Court of Appeals aptly noted that Avery Rebecca Barnett, an underwriter for Guarantee, stated Guarantee would not have provided coverage for nurses like Turner because the risk presented was too extreme. Barnette provided examples wherein Guarantee had rejected other workers in other class codes and locations as too risky that Countrywide submitted for coverage under the Guarantee Policy. To this end, the Selected Staffing Agreement between Condustrial and Countrywide required Condustrial to submit any workers class code and location to Countrywide before being accepted under the Selected Staffing Agreement, and Countrywide could reject such exposure. In fact, as noted above, Countrywide did reject Condustrial's United States Longshore and Harbor

[26] **(R. pp. 2475-76)** (Becky Barnette stating that Guarantee Insurance Company has never insured workers staffed at <u>any</u> prison facility, Maximum Security Level Three or not); **(R. pp. 2497, 2505-06)** (Becky Barnette stating that Guarantee would seek to void a policy for material misrepresentation made by an insured in failing to reveal a 7720 exposure, explaining that workers in this class code "would create an extreme liability for the company from an underwriting perspective").

(U.S.L.&H) workers exposure and Condustrial found coverage for these workers elsewhere. Finally, the Court of Appeals aptly noted that there was no error in the Appellate Panel's assigning great weight to Barnette's testimony.

In considering Condustrial's argument for coverage under the Guarantee Policy, moreover, this Court cannot ignore that before entering into the Selected Staffing Agreement with Countrywide, Condustrial rejected the renewal rates quoted by its direct insurer, which at that time was Guarantee, as being too expensive.[27] It negotiated the Selected Staffing Agreement with Countrywide instead because it wanted something other than and less expensive than a contract with a P.E.O., and something more like a relationship with an ASO.[28]

The 1099 nurse brokerage had a payroll of approximating $800,000.00 dollars.[29] By classifying these nurses as 1099s, instead of employees, Condustrial avoided being their employer of record, providing for workers compensation insurance in the assigned risk pool, as well as various employment taxes. Tom Sears and Tony Durham both knew that Condustrial could not insure nurses working in prison facilities anywhere but in the assigned risk pool too.[30] By charging the South Carolina Department of Corrections for fully insured staff,[31] Condustrial even pocketed

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[27] **(R. p. 2067).**
[28] **(R. p. 2166)**; *see also* **(R. p. 113)**.
[29] **(R. p. 2067).**
[30] **(R. p. 2247)** (Tony Durham admitting his agent stated: "I am not aware of any insurance product that could protect you as brokering 1099ers to the South Carolina Department of Corrections" and admitting that Condustrial ended up after this litigation ensued insuring the 1099 nurses in the assigned risk market); **(R. p. 2258)** ("Q. . . . you set up the 1099 brokerage structure . . . you operated it, correct? A. That's correct. Q. And you knew you couldn't get comp for it? A. That's correct."); **(R. pp. 1400-01)** (Tom Sears admitting after this litigation ensued that Condustrial engaged brokers to find workers compensation insurance for its nurses staffed in prison facilities and ended up with an assigned risk policy); **(R. pp. 1364)** (Tom Sears acknowledging that JoAnn Whitaker came back to him stating, "Workers' comp markets, the assigned risk, nor the P.E.O. want to stick their neck out for a large potential exposure for which they receive twelve-fifty. I haven't even gotten into the class code and the location of their work."); *see also* **(R. p. 3122**).
[31] **(R. pp. 2972-78 ¶ 6).**

the profit of not covering its staff with workers compensation insurance or ensuring that its staff procured the same for themselves.[32]

In 2014, Condustrial also had a high deductible, direct workers compensation insurance policy with Guarantee. When Guarantee's premium audit revealed the Policy's exposure to these 1099s, including nurses working in prison facilities, Condustrial's General Counsel Tom Sears falsely informed Guarantee that the nurses were insured instead by the State of South Carolina, thus keeping these nurses off the Policy, or, perhaps to avoid any effort by Guarantee to void the coverage for material misrepresentation.[33]

CONCLUSION

To the extent Turner was an employee of Condustrial, the Guaranty Association and Countrywide submit that the Court of Appeals correctly concluded that substantial evidence, including the Appellate Panel's adoption of the Single Commissioner's assessment of the credibility of the witnesses at the hearing, as applied to the controlling law leaves only one conclusion: Condustrial knowingly staffed Turner at a prison facility without providing her worker's compensation insurance or ensuring that she had obtained it for herself. This was a

[32] **(R. pp. 1323-26)**; *see also* **(R. pp. 2233-34)** (Testimony of Tony Durham, confirming 2015 email from Tom Sears to insurance broker, Joanne Whitaker, regarding coverage for the 1099 workers staffed at SCDC facilities: "The [SCDC] contract was signed in 2008. There are several provisions that are very ambiguous in light of how we have mutually operated in the last several years. I can explain better on the phone.").

[33] **(R. pp. 2430-31)** (Becky Barnette, Vice-President for Underwriting and Manager of the PEO Unit for The Guarantee Insurance Company providing that an insurer has a right to tell an insured it will not cover risks in certain class codes and issue cancellation notices for any material change of risk); **(R. pp. 2445-52, 2474-75)** (Barnette giving examples where Guarantee rejected Countrywide clients with class codes and locations carrying unacceptable risk); **(R. 2475-76)** (Barnette testifying that it would not write a policy to cover workers in prison under any circumstances, and the company had never done so); **(R. p. 2543)** ("If there is a material misrepresentation made to the underwriting and the insurance company upon soliciting coverages, then the insurance company has the right to seek the ability to void the coverage because it was obtained through misrepresentation.").

business decision of its own making, and one that neither Countrywide nor the Guaranty Association are obligated by contract or law to step in and fix for it. For these reasons, Respondents South Carolina Property and Casualty Insurance Guaranty Association on behalf of Guarantee Insurance Company and Countrywide respectfully request the South Carolina Supreme Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Dated: September 16, 2024