

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM 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Unpublished Opinion No. 2024-UP-110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Withdrawn, Substituted, and Refiled July 3, 2024

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Rachel J. Turner, Employee, Petitioner,

v.

Medustrial Healthcare Staffing Service and Condustrual, 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 Condustrual, Inc. f/k/a Medustrial Healthcare Staffing
Service, Employer, is the Respondent.

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QUESTIONS PRESENTED

- I. Whether the Workers' Compensation Commission correctly held Rachel Turner was an employee when:
 - (A) Condustrial entered into a contract with SCDC whereby it committed to providing nurses who were "employees" covered by Condustrial's workers' compensation insurance;
 - (B) Turner satisfied the four-part *Wilkinson* test for employment, specifically including signing a binding employment at will agreement; and
 - (C) controlling South Carolina law provides she is an employee and is not altered by foreign cases applying a wholly different test for employment.

- II. Whether the Court of Appeals correctly held that Turners's average weekly wage must be based on actual wages paid to her by Condustrial..

ARGUMENT

This case presents novel issues in an underdeveloped area of workers' compensation law. Rachel Turner asked the Court to issue the Writ to address the Commission's denial of temporary total disability compensation on multiple grounds. Condustrial filed a Cross Petition for Writ of Certiorari on the issues of employment status, average weekly wage, and insurance coverage. The Department of Corrections filed a Cross Petition making essentially the same arguments on average weekly wage. While Turner opposes the positions taken in the Petitions from Condustrial and SCDC, she agrees that this case presents important and novel issues which need to be addressed by our State's highest court.

I. Rachel Turner is the direct employee of Medustrial/Condustrial and the statutory employee of SCDC.

Condustrial suggests that "if Turner is not an independent contractor under the facts of this case then there truly is no such thing anymore . . ." [Condustrial Petition for Writ of Certiorari, page 7]. From this hyperbolic opening, Condustrial then goes sets forth a self-serving and one-sided version of the evidence that does not comport with reality. Condustrial simply ignores the extensive evidence contradicting their preferred theory of the case.

The Appellate Panel correctly held Turner satisfied all four factors to be considered an employee rather than an independent contractor. The *right of control* is the lynchpin of the analysis. The factors are: 1) direct evidence of the right or exercise of control; 2) furnishing of equipment; 3) right to fire; and 4) method of payment. Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 676 S.E.2d 700 (2009). The test is not the actual control exercised, but whether there exists the right and authority to control and direct the undertaking. In the instant case, all four factors preponderate in favor of status as an employee.

Public policy favors including injured workers within the ambit of the Act. “[T]he undisputed purpose of the Workers’ Compensation Act is to protect workers, owners, and businesses by requiring a business covered by the Act to insure its workforce against the cost of industrial accidents.” Ramirez v. May River Roofing, Inc., 433 S.C. 519, 860 S.E.2d 680 (Ct.App. 2021). This public policy consideration applies here with even greater force. Turner did not merely face the ordinary risks of nursing in a hospital or clinic setting. She worked in a maximum security prison. The risk and fear of being kidnaped and held hostage became reality for her. Public policy compels the finding that she is an employee subject to the Act.

A. Conustrial is bound by its contract with SCDC providing that Conustrial “shall provide workers’ compensation coverage for [Conustrial’s] employees who are assigned to SCDC.”

On September 11, 2008, Medustrial entered into a contract with SCDC to provide nurses to work in correctional institutions. The contract specifically provided that:

- SCDC hereby engages Contractor [Medustrial] to provide qualified nursing professionals to provide services to Patients who are under the custody and control of the SCDC . . .
- RN’s, LPN’s assigned to SCDC by Contractor are **employees of Contractor** and not SCDC. . . . Contractor shall be responsible for withholding federal and state income taxes, paying federal Social Security taxes, unemployment insurance and **maintaining workers’ compensation insurance** in an amount and under such terms as required by the State of South Carolina.
- **Contractor shall provide workers’ compensation insurance for Contractor’s employees who are assigned to SCDC.** [R.P. 2972, 2976 (emphasis added)].

This contract was in effect on September 5, 2015 when Turner was kidnaped and assaulted.

In violation of the specific terms of this contract, Conustrial obtained no workers’ compensation coverage for these nurses. Instead, it knowingly attempted to misclassify them as independent contractors. SCDC management was unaware that Conustrial was deliberately breaching the contract.

At trial and before the Appellate Panel, Condustrial argued that the contractual requirement to provide employees covered under workers' compensation was altered by a "course of dealing." Tom Sears testified repeatedly that "The parties actually performed the contract in a different way in an amended or altered or changed way from the language here everyday for nine years."¹R.P. 1218, line 6-page 1219, line 10]. Sears contended SCDC "accepted 1099s on a daily basis." However there was no evidence that SCDC was ever informed, let alone consented, to allowing uninsured independent contractors to work in its prisons. Even Sears admitted "workers comp never came up" in any discussion with SCDC representatives. [R.P. 1222, line 24-page 220, line 11].

SCDC representatives were never advised by anyone at Condustrial that the nurses were not covered by workers' compensation insurance. [R.P. 2675, line 25-page 2676, line 4; R.P. 2676, lines 5-14; page 2683, line10-page 2684, line 11; R.P. 869, lines 3-11; R.P. 884, line 15-page 885, line 8]. They further disavowed any knowledge of the "brokerage model" stating they would not have allowed any nurses into the prison who were not covered by the contractor's workers' compensation insurance.

The Commission properly rejected Condustrial's attempt to unilaterally rewrite its contract with SCDC. The fact Condustrial represented to SCDC that the nurses were employees covered by workers' compensation insurance, albeit falsely, is evidence favoring an employment relationship. See Sellers v. Tech Serv., Inc., 803 S.E.2d 731, 421 S.C. 30 (Ct.App.2017) (commission properly considered fact that "In obtaining permits with the City for the job on which Sellers was injured, Tech

¹Sears used the same tactic regarding Condustrial's attempt to obtain post-underwriting coverage from Countrywide and Guarantee. When Sears attempted to obtain coverage to defend Turner's claim, Countrywide's representative sent an email stating: "Tom, we have not misunderstood anything. We were presented with a claim related to an entity called Medustrial that had never before been disclosed to us." Sears alleged the email "accused us of running a shadow company and hiding it from them." [R.P. 1304, lines 2-12].

Service represented that no subcontractors or independent contractors would be involved.”). Thus, even though the contractual requirement for Turner to be a covered employee may not be dispositive in and of itself, it is strong evidence that it was the intent of all parties – save Condustrial – to ensure that Turner and the other nurses were employees protected by workers’ compensation insurance. Whether the Court finds the contractual requirement to provide employee nurses is “direct evidence of the right or exercise of control” or whether it finds Turner is a third-party beneficiary of that contract, the fact the contract was in force at the time of her injury should compel a finding that she is Condustrial’s employee.

Should the Court should grant the Petition on the employment relationship issue, it should be solely for the purpose of affirming the Sellers analysis applied here in a published opinion.

B. Application of the Wilkinson four-factor test.

The factors to be considered by the Court in determining whether there is an employee-employer relationship are: 1) direct evidence of the right or exercise of control; 2) furnishing of equipment; 3) right to fire; and 4) method of payment. Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 676 S.E.2d 700 (2009).

1. Direct Evidence of the Right to Control.

Condustrial contends the Court of Appeals and Appellate Panel erred in finding Turner was an employee when “She was operating under a valid Independent Contractor agreement at the time of her accident.” [Cross Petition for Writ of Certiorari (Condustrial), page 1]. Condustrial argues the “Licensed Professional Independent Contractor Agreement” controls because it states “No other document, including any agreement between the broker and the client, shall be deemed to modify an terms of this agreement unless expressly stated in writing to do so and signed by both the broker

and the independent contract.” [Cross Petition for Writ of Certiorari (Condustrial), page 9]. As a matter of law, the LPCA is not binding on Turner and cannot define the employment relationship. See Kilgore Group, Inc. v. S.C. Employment Sec. Comm’n, 313 S.C. 65, 68-69, 437 S.E.2d 48, 50 (1993)(holding workers were employees despite written contract stating otherwise because “language in the contract merely declaring the relationship is that of an employer/independent contractor is not dispositive”); S.C. Code Ann. 42-1-620 (2007)(“No agreement by an employee to waive his rights to compensation under this Title shall be valid.”).

If there is one specific document which binds Condustrial, it is not the LPCA. On October 9, 2014, Turner was required to sign an *Application Form Waiver* stating:

I further understand that my employment with the Company shall be probationary for a period of ninety days (90) days and further that at any time during the probationary period or thereafter, my **employment relationship with the Company is terminable at will** for any reason by either party.

[R.P. 3014 (emphasis added)].

The significance here is not merely the written acknowledgment that Turner is an at will employee. The document also states the “employment-at-will relationship . . . cannot be altered except by a written instrument signed by the Owner/Managing Member of the Company.” [R.P. 3014]. Tony Durham, Condustrial’s president, testified that this document was the “last page of the employee policy manual.”² Durham admitted “only a document signed by [him] can alter the at will employment relationship described in this exhibit.” There is no such document. The LPCA was signed by Holly Seeby; not Tony Durham. The *Application Form Waiver* trumps the LPCA.

²Durham testified “Those people are my employees, it’s my responsibility to take care of ‘em, you know. So, I want them to be covered for whatever potential hazard that there is out there. I mean, that’s just responsible businessman and a responsible human being, you know.” [R.P. 1966, lines 15-22].

Turner signed numerous other documents describing herself as an employee and showing evidence of control. Indeed, the very first document she filled out was the *Employment Application*. [R.P. 2980-2981]. Turner was told all these documents must be signed as part of her “employee package.” [R.P. 608, lines 11-17]. She signed a *Post-Offer-Of-Employment Medical Injury* form used “to assist your employer in meeting the knowledge requirement of the Insurance Industry’s Second Injury Fund.” [R.P. 2991]. She signed a *Facility and Client Requirements* form stating “Failure to comply with any of the above will prevent you from working as an **employee** of MEDUSTRIAL until such time as the non-compliant issue has been resolved.” [R.P. 2995, 3005(emphasis added)]. She signed a *Terms of Employment* form listing various requirements which if violated were “grounds for termination.” [R.P. 2997]. She signed an *Attendance Policy* stating violations “could/may result in further disciplinary actions up to termination of employment.” [R.P. 3003]. Most significantly, she signed a form stating that she was entering into an “**employment at will relationship**” providing that “the employment relationship with the Company is terminable at will for any reason by either party.” [R.P. 3014 (emphasis added)].

Turner reasonably believed she was an employee for many reasons, not the least of which was the interview and hiring process. Fundamentally, “Employment, like any other contract, presupposes understanding. The new relation cannot be thrust upon the servant without knowledge or consent.” Holloway v. G. O. Colley & Sons, 208 S.C. 234, 37 S.E.2d 666 (1946), quoting Murray v. Union Railway Co. of New York City, 127 N.E. 907 (N.Y. 1920)(Cardozo, J.). She did not learn otherwise until she filed for workers’ compensation and was denied.³ Turner testified:

³Justin Gudvangen also believed he was covered under workers’ compensation when employed by Medustrial. While he knew there was no health insurance or retirement plan, and that he would have to pay his own taxes, “as far as workman’s comp

They haven't contacted me since they told me I was not their employee. I've tried contacting them and they refuse to talk to me. When I applied for food stamps, they refused to say I was ever employed with them. When I applied for different assistance that required employment confirmation, they refused to give it.

[R.P. 775, lines 1-9].

In practice, Condustrial treated its nurses as employees in virtually every aspect – other than paying for workers' compensation, unemployment insurance and withholding taxes. Nurses were required to wear a uniform, scrubs, closed in shoes, and socks or stocking. [R.P. 480-481]. Once the schedule came out, the nurses were required to work the shift. The shifts were set a full month in advance. [R.P. 481-482]. Turner testified, "If they [Condustrial] did not want me to work that shift, I could not work it." [R.P. 634, lines 17-18]. Tom Sears agreed, testifying "with Ms. Turner where she was trying to stay after and get extra shifts, . . . that can't be allowed . . ." [R.P. 1442, lines 1-4]. And while the LPCA stated nurses were to find their own replacement when they could not work a shift, Condustrial replaced the absent nurse just like any other employee. [R.P. 483, lines 6-24].

Condustrial had a written **ATTENDANCE POLICY** "for all employees of Medustrial Healthcare." Turner signed her name above "Employee Signature" on October 9, 2014. The policy stated:

Employees are required to call in 4 hours before the scheduled shift; no text message will be accepted for cancellation of your shift. Employees **MUST** speak to a Medustrial Healthcare Staffing advisor. If an employee leaves a text message it will be considered a No Call/No Show, and the No Call/Not Show policy will be enforced this could/may result in further disciplinary actions up to termination of employment.

The No Call/No Show policy stated "The second separate offense may result in termination of employment with no additional disciplinary steps." [R.P. 3003]. The three current or former Medustrial nurses who testified (Turner, Gudvangen and Sidney) uniformly agreed that Condustrial

insurance is concerned, I was not aware that I didn't have coverage through that." [R.P. 478, lines 9-21]. He added that if he had been set clear on the workers' compensation issue, "I think I would have just worked for an agency that provided it and withheld taxes." [R.P. 501, lines 7-11; page 540, lines 9-17].

enforced this policy.

The simple fact is that Condustrial had the authority to exercise sufficient control over Turner's activities – and actually exercised that authority – for her to be deemed an employee. The Court should issue the Writ and affirm the Panel's finding that "The Direct evidence of a right of control overwhelmingly indicates an employee/employment relationship between Turner and Condustrial/Medustrial." [R.P. 93, Finding of Fact B.3.d].

2. Furnishing of Equipment

The Appellate Panel found the Furnishing of Equipment prong "to be somewhat neutral because Claimant's primary contention is that Condustrial was the direct employer." [R.P. 93] The Panel's analysis overlooks the fact that Turner could not work as a nurse in a prison without a substantial capital investment in facilities and equipment by SCDC. As the Panel notes, "Also, because of security concerns, the nurses placed at the Department of Corrections could not bring in nursing supplies. The items/equipment were provided by the Department of Corrections. Essentially, the nurses assigned to SCDC provide their skill and labor." [R.P. 492]. This is critically important. As the South Carolina Supreme Court stated in Lewis: "Because the Club, and not Lewis, bore the risk of the capital investment in the equipment used by Lewis to perform her work, we find this factor weighs in favor of an employee relationship." Lewis v. L.B. Dynasty, 411 S.C. 637, 770 S.E.2d 393 (2015).

Turner could not have worked as a nurse in a prison without the equipment, supplies and facilities provided by her statutory (and, under Shatto, direct) employer (SCDC). Accordingly, the Court should reverse the finding on this factor and find the provision of equipment prong "weighs in favor of an employee relationship." Id.

3. Right to Fire

The Appellate Panel found the right to fire factor “strongly preponderates for a finding that Turner is an employee.” [R.P. 94-95]. Turner herself testified “she could be terminated by Medustrial.” [R.P. 743, lines 6-16].

Nurse Sandra Sidney was called by Condustrial to “refute [Turner’s] portrayal of the relationship between these nurses and Condustrial.” [R.P. 2613, lines 9-12]. Sidney “[work[ed] for” Condustrial in 2015. [R.P. 2623]. She testified she thought she was an independent contractor nurse based on the LPC she had signed. However, as how the employment relationship actually worked, she too was under a significant degree of control. [R.P. 2634, line 14-page 2639, line 5].

Nurse Sidney testified she signed “a lot of paperwork.” This included many of the same documents signed by Turner – many of which document the right to fire. “It was about our dress code. It was about how we should conduct ourself professionally while we’re on the job and how we should operate within our scope of nursing basically, as well as the dress code, and emergency contact information as well.” She specifically confirmed she had signed the facility expectations form, drug policy, and attendance policy. [R.P. 2637-2639; 2997, 3003, 3005]. Nurse Sidney testified: “If we’re caught using drugs, we will be reported to our immediate supervisor, and then we would be drug screened or *we would eventually be terminated.*” [R.P. 2636, lines 2-13]. She testified “for no show, no call, no show, yes sir, you would be [disciplined and even terminated]. [R.P. 2638-2639, line 6, page 40, line 5].

Turner (and apparently Sidney) signed a ***Terms of Employment*** form listing various requirements which if violated were “grounds for termination.” [R.P. 2997]. She signed an ***Attendance Policy*** stating violations “could/may result in further disciplinary actions up to termination of employment.” The ***Attendance Policy***’s purpose was “To set guidelines regarding No

Call/No Show, Tardiness and Absences for **all employees of Medustrial Healthcare.**” The policy provided a “second separate offense may result in **termination of employment** with no additional disciplinary steps.” [R.P. 3003 (emphasis added)].

Condustrual gives the termination factor short shrift in their Petition. They argue “In Wilkinson, the Court determined that the termination of the parties’ relationship was controlled by their agreement.” [Cross Petition for Writ of Certiorari, page 14]. In this case, the controlling agreement on this issue is set forth in the *Application Form Waiver* stating:

I further understand that my employment with the Company shall be probationary for a period of ninety days (90) days and further that at any time during the probationary period or thereafter, my **employment relationship with the Company is terminable at will** for any reason by either party.

[R.P. 3014 (emphasis added)].

The fact of the matter is that these documents referring to *termination* prove that Condustrual retained the right to fire the nurses. As such, the finding that the Right to Fire factor strongly preponderates for a finding of employment should be affirmed.

4. Method of Payment

The Appellate Panel correctly found the method of payment favors an employment relationship. [R.P. 95-98]. The primary determiner is whether the putative employee was paid by the hour or by the job. “Payment on a time basis is a strong indication of the status of employment,’ while ‘[p]ayment on a completed project basis is indicative of independent contractor status.” Shatto v. McLeod Reg’l Med. Ctr., 406 S.C. 470, 753 S.E.2d 416 (2013)(quoting 3 Larson’s Workers’ Compensation Law § 61.06); South Carolina Industrial Commission v. Progressive Life Ins. Co., 242 S. C. 547, 550, 131 S.E.2d 694, 695 (1963)(insurance agents who were paid guaranteed minimum wage were employees); Spivey v. D.G. Constr. Co., 321 S.C. 19, 467 S.E.2d 117 (Ct.App.1996)(fact

worker was paid \$8.00 per hour was evidence that he was an employee). The rationale underlying this consideration was set forth by Professor Larson and approved by this Court in Lewis:

A moment's reflection will show the realistic connection between payment and control. If an employer in a regular business or industry purchases personal labor by the hour, day, or week, it is almost certain to insist on the right to see that the time is well and efficiently spent. If it pays by the hour, the employer wants to see that it gets a full hours work, and that the hour is applied where it is most needed . . .

By contrast, if the employer makes an agreement to pay a man one hundred dollars to clean out a well, it has no reason to care whether the worker is slow or fast, clumsy or efficient.

Lewis v. L.B. Dynasty, 411 S.C. 637, 770 S.E.2d 393 (2015)(quoting 3 Larson's Workers' Compensation Law § 61.06).

Turner was initially paid \$21.00 per hour. Turner testified she was paid "Twenty-two dollars an hour. I started at twenty-one, but they raised me up, saying that I was a good employee, so they gave me a raise to twenty-two dollars an hour." [R.P. 572, lines 6-11]. She was also paid overtime when she worked more than 40 hours, as was Nurse Sidney. [R.P. 2636, lines 14-21]. Her timesheet stated: "This time sheet must be personally filled out and signed by the employee and supervisor." It also contained the notation relevant to the notice provisions of the Act that "I certify that I obtained no injury or accident while on the assignment." A summary of hours was appended to each timesheet stating "Total for Employee." [R.P. 3018-3021]. These are strong indicators of employment.

Not only did Condustrual pay Turner by the hour, they "required there to be an approval if [she] went over 40 hours." [R.P. 508, lines 7-8; page 946, lines 21-25]. Thus, Condustrual controlled the amount of hours she could work in a given week. See Kilgore Group, Inc. v. South Carolina Employment Sec. Comm'n, 313 S.C. 65, 437 S.E.2d 48 (1993) (fact that "all workers were required to turn their hours in to" the employing agency was evidence of employment).

It is true Condustral chose not to withhold taxes and paid these hourly wages on a 1099. However, Turner signed a W4 to have payroll taxes withheld from her paycheck. The W4 shows she was hired as an employee notwithstanding Condustral's unilateral decision not to honor the withholding request made on Turner's W4.

Condustral argues that because Turner's tax preparer relied on the 1099 to file her taxes as it means she must have been an independent contractor. Our sister state of Georgia addressed a similar issue, albeit in the context of an employee's average weekly wage. Georgia held that where there is an error in the income reporting form (W2 or 1099) completed by the employer, the error is attributable to the employer; not the employee. See Pizza Hut Delivery v. Blackwell, 204 Ga.App. 112, 418 S.E.2d 639 (Ga. App. 1992)(rejecting employers argument that employee's failure to include his tips as income on his tax returns barred him from claiming tips as part of his average weekly wage. "The failure to list [employee]'s tips on his W-2 form is attributable to [employer] and not to [employee]. Any failure to pay income tax on unreported tips is a matter for resolution between appellee and the state and federal governments."). As such, while the tax returns may be evidence in the case, the fact the tax preparer based the return on a 1099 created by Condustral means it cannot be used as evidence that *she* believed she was an independent contractor; only that Condustral misclassified her as such.

As such, the Appellate Panel's finding that the method of payment favors an employment relationship should be affirmed.

C. The foreign cases cited by Condustral are inapposite to the case at bar.

Condustral inaccurately states "The Court of Appeals opinion is an outlier contrary to other states' decisions finding similarly situated contract nurses to be independent contractors." [Cross

Petition for Writ of Certiorari, page 14]. Condustrial relies heavily on the North Carolina Court of Appeals case of Rhoney v. Fele, 518 S.E.2d 536 (NC.Ct.App.1999). Rhoney was not a workers' compensation case; it was a civil case. Indeed, not one of the foreign cases cited by Condustrial are workers' compensation cases.⁴ This matters because when our law or public policy differs, our courts are free to decide cases on the facts, evidence and existing South Carolina law. See Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 580 S.E.2d 100 (2003)("Our view of the South Carolina Workers' Compensation Act, in terms of public policy considerations and equity principles, is materially different from the North Carolina Supreme Court's view of its own statute."). As Rhoney was not a workers' compensation case, the public policy favoring including injured workers' within the Act was not implicated.

The Rhoneys sued Fele and his putative employer, Nursefinders, for the death of their son in an automobile accident caused by Fele. The issue was whether the trial court properly granted summary judgment for Nursefinders on whether Fele was Nursefinders' employee. The North Carolina Court of Appeals ultimately affirmed holding "Nursefinders exercised insufficient control to create an employee-employer relationship between Fele and Nursefinders." Id. at 541.

Superficially, Rhoney would, were it a South Carolina case applying South Carolina law,

⁴ The three reported foreign cases cited by Condustrial all rely on statutory law defining independent contractors as *inter alia* "customarily engaged in an independently established trade, occupation, profession or business." See Contract Management Serv. V. State Dol, 745 So.2d 194 (La. App. 1999)("We also find that nursing is an independently established profession."); Health Care Assoc. v. Employment Sec. Com'n, 26 P.3d 112, (Okla. 2001)("the nurses in this matter are established in an independent profession by virtue of their training and license to practice nursing."); Trauma Nurses, Inc. v. Board of Review, New Jersey Dept. of Labor, 576 A.2d 285 (N.J. Super. App. Div. 1990)("[W]e are convinced that nurses are engaged in an independently established profession, as required by N.J.S.A. 43:21-19(i)(6)(C)."⁴ There is no comparable statute in South Carolina.

might appear to support Condustrual's argument. It is not and does not. South Carolina uses the 4-factor test set forth in Wilkinson to determine the level of control the employer has over the employee. North Carolina uses an 8-factor test which substantially differs from our test.⁵

Of the factors the Rhoney court held *avored* an employment relationship, they encompass three of the four South Carolina factors: (1) "Fele was paid an hourly rate with overtime . . . , rather than a lump sum for a particular assignment;" (2) "Nursefinders received payment for Fele's services from the hospital and, after deducting Nursefinders' share . . . , forwarded the remaining wages to Fele;" (3) Nursefinders could terminate its relationship with Fele;" and (4) "Nursefinders provided Fele with a work packet and directions to the assigned place of work." Id.

As to common factors pointing to an independent contractor relationship, Rhoney also held, as did the Appellate Panel in the instant case, that the fact "Nursefinders did not provide Fele with valuable equipment" indicated he was an independent contractor.

Rhoney also held the fact "Fele exercised his duties and responsibilities as a nurse at the hospital, free from supervision by Nursefinders" supported a finding that he was an independent contractor. Id. However, this conclusion differs from South Carolina law as in our state where the "ability to exercise control over the workers' activities was derived solely from [the vendor's] contracts with [the agency] and [the agency's] contract with the workers[, . . .] it can be inferred [the

⁵The person employed (a) is engaged in an independent business, calling or occupation; (b) is to have the independent use of his special skill, knowledge, or training in the execution of the work; (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he may think proper; (g) has full control over such assistants; and (h) selects his own time. Id.

agency] possessed the right to control the workers' performance and the manner in which it was done and delegated that authority to its clients." Kilgore Group, Inc. v. South Carolina Employment Sec. Comm'n, 313 S.C. 65, 437 S.E.2d 48 (1993).

The most obvious factual difference in Rhoney is that the "Fele's work through Nursefinders was sporadic rather than regular." Id. at 540. Turner was a full-time employee of Condustrial. She worked continually and exclusively for Condustrial from her date of hire on February 7, 2013 until she was assaulted two and a half years later on September 5, 2015. From the payroll records in evidence, she continuously worked full time, frequently working well over 40 hours per work with two occasions where she worked 75.75 and 81.50 hours in a single week. [R.P. 2943-2947].

In a more recent case – decided nineteen years after Rhoney – the North Carolina Court of Appeals distinguished Rhoney largely on this same basis. In McKenzie, the court noted

unlike the nurse in Rhoney whose work with the agency "was sporadic rather than regular, . . . the evidence here shows that Mr. Charlton's work with Mr. Smith was regular. He worked forty (40) hours each week, a typical full week, providing direct caregiving services to Mr. Smith.

McKenzie v. Charlton, 822 S.E.2d 159, 164 (N.C.App. 2018). See, also Youngblood v. N. State Ford Truck Sales, 364 S.E.2d 433, 438 (N.C. 1988) (recognizing requirement that a worker perform his work during a set time is indicative of an employer-employee relationship).

The instant case differs significantly from Rhoney legally, factually and procedurally. Had South Carolina's 4-factor test been applied, three of the four factors would have favored employment. Factually, Turner worked full-time for Condustrial and no other employers whereas in Rhoney, the staffing agency recruited nurses to work at medical facilities short-term. Procedurally, Rhoney was a personal injury case; not a workers' compensation case, thus no public policy interest was at issue. See, e.g., Pierre v. Seaside Farms, Inc., 386 S.C. 534, 689 S.E.2d 615

(2010)(“Common sense indicates that a compensation law passed to increase workers’ rights (because their common law rights were too narrow) should not thereafter be narrowly construed.”); Hill v. Eagle Motor Lines, 373 S.C. 422, 429, 645 S.E.2d 424, 427 (2007)(“In determining jurisdictional questions, doubts of jurisdiction will be resolved in favor of inclusion of employees within workers’ compensation coverage rather than exclusion.”).

Therefore, the Court should issue the writ, reject Condustrial’s arguments and affirm the finding that Turner was an employee of Condustrial on the date she was kidnapped and assaulted.

II. The average weekly wage of an employee must be based on wages paid by the employer.

The Court of Appeals correctly held that the Appellate Panel committed legal error by treating Turner as a business owner or independent contractor for average weekly wage purposes rather than as an employee. The Appellate Panel’s punitive approach was novel, overreaching and completely unsupported by the law of South Carolina – or any other state. To use *any* employee’s net taxable income as a basis for the average weekly wage would be a radical departure from the plain language of the statute as well as long-established practice.⁶ See, e.g. Bazen v. Badger R. Bazen Co., 388 S.C. 58, 693 S.E.2d 436, 440 (Ct. App. 2010)(rejecting employer’s argument that the commission should “consider Claimant’s actual earnings as reported for tax purposes” and holding that § 42-1-40 “requires the average weekly wage be based on the ‘actual number of weeks

⁶Under the tax code in effect in 2015, nurses could take several work related deductions whether they file under a 1099 or a W2. Scrubs and nursing shoes were tax deductible because they are specialized uniforms not normally wearable in public. This distinction explains why nurses can deduct scrubs but attorneys cannot deduct suits. These nuances within the tax law show how impossible and arbitrary it would be were the Commission to review tax returns from employees.

for which wages were paid . . .”); Mozie v. Frazier Pulpwood, 37 8 S.E.2d 61, 29 8 S.C. 34 (Ct. App. 1989)(rejecting employer’s attempt to use tax deductions to show a lower annual income for average weekly wage purposes). See, also Craft v. Bill Clark Const. Co, 474 S.E.2d 808 (N.C. App. 1996)(“Even if such expenses were incurred by the plaintiff, the Commission is not required to deduct those expenses from the income earned to properly calculate the average weekly wages. . . . [It] would be unjust and unfair to treat plaintiff employee as a subcontractor.”). This is particularly so in a case such as this where the Employer paid the Employee on a 1099 as part of a scheme to defraud SCDC and its own insurance carrier.

Condustrial argued below that whether the injured worker is a business owner or an employee “is a distinction without a difference for purposes of determining earnings for a fair and equitable wage calculation.”⁷ [Brief of Respondent-Appellant, page 26]. There is zero support for this proposition anywhere in the compensation laws of South Carolina or any other state.

The cases relied on by the Appellate Panel all deal with *business owners* who elected to be covered under the Act.⁸ See, e.g., Stephen v. Avins Const. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996)(determining “whether a subcontractor’s compensation rate should be computed based on his net, as opposed to gross, earnings.”); Wright v. Wright, 306 S.C. 331, 411 S.E.2d 829 (Ct. App. 1991)(“Danny Joe Wright is a self-employed heating and air conditioning contractor.”); Baldwin v. Piedmont Woodyards, Inc., 293 S.E.2d 814, (N.C. App. 1982)(“the decedent in this case

⁷As SCDC made substantially the same argument, Turner is not filing a separate return. Moreover, she has no objection to the Court granting certiorari on all issues.

⁸S.C. Code Ann. § 42-1-130 (2007) provides “Any sole proprietor or partner of a business whose employees are eligible for benefits under this title may elect to be included as employees [sic] under the worker’s compensation coverage of the business.”

operated his own business . . .”). Stephen and Wright exist *because* business owners are treated fundamentally differently than employees.

The Court of Appeals correctly held “Turner was an employee of Condustrial; therefore, her average weekly wage must be calculated according to section 42-1-40 of the South Carolina Code (2015).” The statute states: “‘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 . . . divided by fifty-two or by the actual number of weeks for which wages were paid, which ever is less.” S.C. Code Ann. § 42-1-40 (2007)(emphasis added). Nowhere does the statute allow, let alone mandate, using net taxable income.

Condustrial argues § 42-1-40 “only applies [to wages] reported to the Department of Employment and Workforce.” [Petition for Writ of Certiorari, page 21]. Condustrial seeks to benefit from its own failure to report wages to DEW as part and parcel of its scheme to defraud SCDC and Turner. The wages Condustrial paid to Turner are in the record and are undisputed. [R.P. 2942-2947]. It requires no weighing of evidence or finding of fact to determine her average weekly wage. It is simple arithmetic.

Condustrial also argues the court erred in “holding the Full Commission Panel failed to make a specific finding of fact to justify its deviation from the preferred statutory method . . .” [Cross-Petition for Writ of Certiorari, page 22]. This misstates the question. The Court of Appeals correctly held it was legal error for the Panel to depart from the mandatory reliance on actual wages because there were no exceptional reasons showing “why the first method was impracticable.”

Condustrial argues “it is undisputed that Turner deducted numerous business expenses necessary to generate her income.” [Cross-Petition for Writ of Certiorari, page 22]. Not so.

Condustrial would have paid Turner the exact same wages no matter how her taxes were filed. She generated her income solely from working full-time as a nurse in a maximum security prison for an hourly wage paid by her employer. Her tax returns are irrelevant to how she earned those wages. Cf. Pizza Hut Delivery v. Blackwell, 204 Ga.App. 112, 418 S.E.2d 639 (Ga. App. 1992)(rejecting employers argument that employee’s failure to include his tips as income on his tax returns barred him from claiming tips as part of his average weekly wage. “The failure to list [employee]’s tips on his W-2 form is attributable to [employer] and not to [employee]. Any failure to pay income tax on unreported tips is a matter for resolution between appellee and the state and federal governments.”).

The Court should appreciate just how far this case departs from the norm. Workers’ compensation is supposed to be fair and just; straightforward and streamlined. The vast majority of claimants are hourly workers, along with some paid on piecework, by the mile, or on salary. The Commission *never* looks at their tax returns. Sometimes it is hard to ascertain someone’s wages because they are paid in cash, there are no payroll records, or no wages were reported to SCDEW. Sometimes pay records or a W2 or 1099 may be used as evidence when a Form 20 is inaccurate or questioned. In all these cases, the Commission follows the statute and uses “total wages” paid by the employer to the employee to set the average weekly wage. It had *never* resorted to using net taxable income for an *employee* until this case.

Should this result stand, not only will it result in hardship for nearly every employee in this state, it will spawn endless litigation over the average weekly wage. The legislature set a simple straightforward formula to determine the compensation rate based on total wages. They did this because it was the most accurate and fair outcome for all parties. The Commission can depart from this simple formula only “[w]hen for exceptional reasons the foregoing would be unfair . . .” S.C.

Code Ann. § 42-1-40 (2007).

The Court should grant certiorari on this issue to correct in a published opinion the misapprehension at the Commission that it can ignore an employee's actual wages and use net taxable income to arbitrarily lower a disabled employee's compensation. The Court should affirm the Court of Appeals holding that the Appellate Panel committed legal error when it employed net taxable income to determine the average weekly wage of an employee nurse paid hourly wages by her employer.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition and issue the Writ of Certiorari on all issues raised by the Parties.

Respectfully Submitted



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