

**BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC FILE NO.: 1315454**

Stacey Sellers,)
)
 Claimant,)
)
 v.)
)
 Tech Services, Inc.,)
)
 Defendant/Employer,)
)
 and)
)
 Builders Mutual Insurance Company,)
)
 Defendant/Carrier.)

APPELLATE PANEL ORDER

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SC Court of Appeals

Having reviewed the record and arguments made by counsel, the Appellate Panel of the Commission hereby finds a **FULL AFFIRMATION** of the Single Commissioner's Decision and Order of August 29, 2014.

STATEMENT OF THE CASE

This matter involves the jurisdictional question of whether Claimant was injured during the course and scope of his employment with Tech Services, Inc. Tech Services, Inc. claimed that Claimant was acting as an independent contractor.

On November 8, 2013, Claimant Stacey Sellers ("Claimant") fell off a ladder while performing HVAC work during the construction of a single-family home located at 751 McKinley Way in the Market Commons subdivision in Horry County. Claimant injured his lower extremities, his back, and his neck as a result of the fall. Claimant alleged that he was a

long time employee of two related HVAC companies, Tech Services of Myrtle Beach, LLC¹ and/or Tech Services, Inc., and that he was working in the course and scope of his employment with Tech Services, Inc. at the time of the accident.

On November 20, 2013, Claimant filed a Form 50 requesting a hearing. Claimant filed an Amended Form 50 on December 13, 2013. Tech Services, Inc. admitted that Claimant was injured as a result of falling off a ladder on November 8, 2013, but denied that Claimant was an employee and that his injuries were compensable under South Carolina Workers Compensation laws. A hearing on Claimant's Amended Form 50 was held on March 25, 2014 before Commissioner Aisha Taylor. On August 29, 2014, Commissioner Aisha Taylor found that Claimant was an employee. Tech Services, Inc. appealed this finding. The Full Commission heard oral arguments on February 25, 2015.

In an appellate review, the Panel shall, pursuant to S.C. Code Ann. § 42-17-50, review the award and, if good grounds are shown, reconsider the evidence and rehear the parties or their representative and, if proper, amend the award. After a thorough and complete review of all the evidence submitted to the Single Commissioner, by unanimous decision, this Panel has determined the Findings of Fact are supported by substantial evidence and the Conclusions of Law are correct.

STIPULATIONS

The parties stipulated to the following:

1. The S.C. Workers' Compensation Commission has exclusive jurisdiction over this matter and the venue is proper in Horry County.
2. All parties received timely and proper notice of the date, time, place and purpose of the hearing.

¹ Tech Services of Myrtle Beach, LLC was dismissed by consent.

3. The Commission's file and the APA Submissions and Exhibits of the parties were made a part of the record subject to the objections set forth at the hearing and as stated below.

4. By Consent Order filed May 7, 2014, Riverpoint Insurance Company was previously dismissed with prejudice.

EVIDENCE

(a) Claimant's APA Submissions & Exhibits

TAB	EXHIBIT DESCRIPTION	PAGE #
1	Photographs of Claimant	1-3
2	Photographs of Uniforms, Tools, and Equipment provided by Employer	4-16
3	Tech Services, Inc. Invoices from Gateway Supply Signed by Claimant	17-78
4	Tech Services, Inc. HVAC Service Order Invoice #: 1562 (10/17/13)	79
5	Claimant's 2010, 2011, and 2012 W-2s from Tech Services, Inc. and Tech Services of Myrtle Beach, LLC	80-82
6	Claimant's 2013 W-2 and 1099 from Tech Services, Inc. and Tech Services of Myrtle Beach, LLC	83-86
7	Claimant's Pay Stubs numbered 380905, 380123, and 380148	87-89
8	Claimant's 2013 Wage Statements from Tech Services, Inc.	90-93
9	Claimant's 2013 Wage Statements from Tech Services of Myrtle Beach, LLC	94-96
10	SC LLR Licensure Information of Tracy Davis	97
11	Money Order	98
12	Letter from Key Risk Insurance Company (11/18/13)	99
13	City of Myrtle Beach Permits and Subcontractor Documentation for 751 McKinley Way	100-113
14	City of Myrtle Beach Permits and Subcontractor Documentation for Various Other Work Performed	114-261

TAB	EXHIBIT DESCRIPTION	PAGE #
	by Claimant	
15	Deposition Transcript of Tracy Davis	262-300
16	2013 2nd Quarter Employee List	301-302
17	Additional Tech Services, Inc. Invoices from Gateway Supply Signed by Claimant	303-706
18	Claimant's Uniform in Plastic Bag (Tech Services shirt, pants, and business card in pocket)	
19	Letter and Subpoena to LeGrande Todd of LeGrande Enterprises	

The above-described Exhibits 1-17, and 19 were admitted without objection. During the hearing, Claimant also introduced as exhibit 18 the actual shirt and pants that was identified as the uniform worn by Claimant at the time of the injury. The actual shirt and pants were in a clear plastic bag from the hospital. The leg portion of the pants appeared to be cut off by medical professionals as testified by the Claimant. Defendants' objection to the introduction of Exhibit 18 was overruled.

(b) Tech Services of Myrtle Beach, LLC's APA Submissions and Exhibits

TAB	EXHIBIT DESCRIPTION	PAGE #
A	Letter from Claimant's Attorney to Tech Service of Myrtle Beach	1-3
B	Form 50	2-3
C	Form 12A	4
D	Certificate of Liability Insurance for Stacey Sellers	5
E	NCCI Workers' Compensation Application and Plan	6-14
F	Berkley Workers Compensation Insurance Policy	15-64
G	Sellers' Heating and Cooling Invoices	65-72
H	Sellers' Heating and Cooling Business Card	73

TAB	EXHIBIT DESCRIPTION	PAGE #
I	Witness Statements	74-77

Claimant objected to the summary prepared of Exhibit G. The summary portion of Exhibit G will not be considered as an exhibit based on an agreement reached between counsel in the pre-hearing conference.

(c) **Tech Services of Myrtle Beach, LLC's APA Submissions and Exhibits**

TAB	EXHIBIT DESCRIPTION	PAGE #
1	Business Card for Stacey Sellers	262
2	Letter from LeGrande Enterprises	263
3	Statement of Jacob Hamilton	264
4	Statement of Mike Patrick	265
5	Statement of Tracy Davis	266
6	Index of Invoices from Stacey Sellers to Tech Services, Inc. with invoices attached	267-447
7	Photographs of various tools and equipment of Tech Services, Inc.	448-499
8	Index of Checks Payable to Stacey Sellers from LeGrande/Router Express with check copies	500-528
9	Certificate of Insurance from Stacey Sellers to Tech Services -2/4/2013	529
10	2013 W-2 and Payroll Journal for Tech Services, Inc.	530-532
11	2013 Form 1099 and Statement for Tech Services, Inc.	533-535
12	2013 W-2 and Payroll Journal for Tech Services of Myrtle Beach, LLC	536-544
13	2013 Form 1099 and Statement for Tech Services of Myrtle Beach, LLC	545-547
14	Deposition Transcript of Claimant	
15	Chilly Pepper, Inc. Employment Records	548-580

Claimant objected Exhibit 4, the Statement from Mike Patrick as hearsay. Since Mike Patrick was not present to testify at the hearing, this exhibit was excluded as hearsay.

TESTIMONY

During the hearing, the following witnesses testified: (a) Claimant (b) Emily Hardee; (c) Kristi Evans; (d) Tracy Davis; (e) LeGrande Todd; and (f) Jacob Hamilton.

Tech Services, Inc. and Tech Services of Myrtle Beach, LLC are heating and air companies in Horry County. These companies are both co-owned by Tracy Davis. Both companies have the same address, phone number, and fax number. Both companies share the same employees.

The accident occurred when Claimant fell off a ladder while performing HVAC work during the construction of a single residence home located at 751 McKinley Way in the Market Commons subdivision in Horry County. Claimant injured his lower extremities, his back, and his neck as a result of the fall.

(a) Testimony of Claimant

Claimant is a 33 old male. (Trs. 47). He is married with children. (Id. p. 42-43). He is a cousin of Tracy Davis, the owner of Tech Services, Inc. and Tech Services of Myrtle Beach, LLC. (Id. at 47). Claimant is not licensed to do business individually, and lacks the required licensing from the State of South Carolina to be a heating and air conditioning contractor. (Id. at p. 16-17, 59). Claimant worked for Tech Services, Inc. and Tech Services of Myrtle Beach, LLC for more than 12 years before the injury occurred. (Id. at p. 46-47, 193, 223).

Claimant testified that in March 2013, Tracy Davis told Claimant that he would be paid without deductions and his wages would be listed on a Form 1099. (Id. at 90, 123). The discussion regarding his wages occurred after Claimant complained about not receiving proper

overtime and deductions from his paycheck. (p. 50-56). For example, Claimant testified that on occasions Tracy Davis would avoid paying time and a half by separating the hours worked between Tech Services, Inc. and Tech Services of Myrtle Beach, LLC. (p. 48-49).

After March 2013, Claimant did not sign an independent contractor agreement and believed that he was continuing to work for Tech Services, Inc. and Tech Services of Myrtle Beach, LLC. (Id. p. 55-56). Claimant testified that Tracy Davis said he had to purchase a workers' compensation insurance policy for Claimant for "tax purposes." (Id. p. 53, 55). Claimant testified that Tracy Davis gave him money to purchase workers' compensation insurance. (Id. p. 54-55, Claimant APA p. 98). The workers' compensation insurance policy that was purchased excluded Claimant from coverage. Claimant testified that he believed he was covered under Tech Services, Inc. and Tech Services of Myrtle Beach, LLC's workers compensation insurance. (p. 130-131). Claimant testified that his employment relationship did not change and he continued to work for Tech Services, Inc. and Tech Services of Myrtle Beach, LLC. (p. 55). Claimant testified that both before and after March 2013 that he had performed "side work" in order to make extra money. (p. 87- 95-99, 119-120).

Claimant testified that after March 2013, Tracy Davis on behalf of his respective companies, Tech Services, Inc. and Tech Services of Myrtle Beach, LLC, controlled, and had the right to exercise control, over the Claimant in the performance of his work. (Id. p. 99). Tracy Davis directed the time, place, degree, and amount of his work. (p. 56-59, 69-71, 87-91, 99-106). He worked alongside other Tech Service employees, he had a supervisor, and that the quality of his work was inspected and monitored (p. 101-103). He never "bidded" for any jobs to work for Tech Services. (Id. at 105). Claimant reported to work in the manner that he was instructed, either coming to the office or directly to the job site. (Id. at p. 57). He reported to

Tracy Davis, or his manager Josh Hamilton. (Id. at p. 58). Claimant ate lunch with other employees, and typically left work around 5:00 pm. (Id. at p. 59).

In addition to providing HVAC construction work, Claimant also performed service calls and entered into service contracts for Tech Services, Inc. both before and after March 2013. (Id. p. 82-87). Claimant provided, as Claimant APA p. 79, a copy of a service contract that he completed for a customer of Tech Services, Inc. He carried service contracts of Tech Services, Inc. as part of his job, and executed an estimate of between 20 and 100 service contracts for Tech Services, Inc. at times after March 2013. (Id. at p. 85-87).

Claimant also testified that Tech Services, Inc. furnished Claimant with uniforms, tools, equipment, and supplies to complete his work. (Id. p. 50, 56, 61-66, 83). Claimant provided as APA Exhibit 2 photographs of the tools that he regularly used while working for Tech Services, Inc. and Tech Services of Myrtle Beach, LLC. Claimant testified that these tools were purchased and furnished by Tech Services, Inc. (Id. p. 70-80). The actual ladder that Claimant fell off was owned by Tech Services, Inc. (Id. p. 70). Claimant testified he was wearing a Tech Services uniform at the time of the fall. (Id. p. 62-66).

Claimant also testified that photographs identified as Tech Services, Inc.'s Exhibit 7 were other tools and equipment that he was familiar with in the course of working for Tech Services, Inc. and Tech Services of Myrtle Beach, LLC. Claimant used, or had access to, many of these tools and equipment on a daily basis at all times before and after March 2013. (Id. p. 72-79).

Claimant had Tech Services, Inc. business cards with him while performing Tech Services, Inc. work. (Id. at p. 67, 69-70). Claimant testified that he made business cards that stated "Sellers Heating and Cooling". (Id. at p. 98). Claimant said that he only gave several of

the "Sellers Heating and Cooling" cards out to, primarily to other Tech Service employees. He described them as an ongoing joke. (Id. at p. 98-99).

Claimant also he had access to supply accounts of Tech Services, Inc., such as Gateway Supply. (Id. at p. 80-83). Claimant testified that he had permission to purchase and sign for supplies on behalf of Tech Services, Inc. Claimant presented as Exhibit 3 numerous invoices that represent supplies that were purchased by Claimant on behalf of Tech Services, Inc. The supplies listed on the invoices were for purposes of completing Tech Services, Inc. jobs, but also included the Claimant purchasing overalls, batteries, and a variety of other items that an employer would typically provide for an employee to complete his work. (Id. at p. 82, APA Exhibit 3). Claimant never had a supply account for himself. (Id. p. at 81).

Before and after March 2013, Claimant was paid on a weekly basis, typically on Thursdays or Fridays. (Id. at p. 88). Prior to March 2013, Claimant was paid on an hourly basis but the hours were based on a preset amount used to complete a certain job based on the "flat rate pricing book." (Id. at p. 87-89, 94, 112-115). Based on this pay structure, Claimant testified that "pretty much you were getting paid by the job." (Id. at 87, 90, 112-115). After March 2013, Claimant was paid based on invoices that he was directed to submit. (Id. at p. 123). The invoices were based on amounts set by Tracy Davis based on a preset time that he determined it should take to complete a job. (Id. at p. 88-91). Claimant testified that he "was getting paid by what [Tracy Davis] had figured up as how long it should take to do the job." (Id. at 123). Mr. Davis of Tech Services "controlled the price on [the invoices]" that Claimant submitted to him for his weekly checks after March 2013. (Id. at 91). Claimant never entered into any bids for jobs. (Id. at p. 227). Several weeks before Claimant fell, Claimant testified that he had a conversation with Tracy Davis about his pay and that Tracy Davis told him that he was planning

to start paying Claimant as he was paid before March 2013 for financial reasons. (Id. at 103-105).

Claimant testified that Tracy Davis had the right to fire him from Tech Services. (Id. at p. 105-106). Claimant testified that if he was fired from Tech Services that he would be required to seek employment with another heating and air company. (Id. at p. 106).

(b) Testimony of Kristi Evans and Emily Hardee

Ms. Kristi Evans and Ms. Emily Hardee are employed by the City of Myrtle Beach. (Id. at p. 14, 35). Ms. Hardee and Ms. Evans testified regarding policies for the issuance of business licenses and permitting for construction work for the City of Myrtle Beach. These witnesses also testified concerning documents introduced as Claimant's Exhibits 13 and 14. (Id. at p. 14-16, 35). Ms. Evans testified that Claimant does not hold a license to do business in the City of Myrtle Beach. (Id. at p. 16-17, 22-23). She testified that any subcontractors or independent contractors that performed work in the City of Myrtle Beach were required to have a business license. (Id. at p. 17). Ms. Hardy, in particular, testified that one is required to have a permit to perform HVAC for a construction project in the City of Myrtle Beach. (Id. at p. 36).

Ms. Evans testified that Tech Services, Inc. was required to list the names of any subcontractors or independent contractors that would perform any work on any projects in which Tech Services, Inc. had pulled a permit for HVAC. (Id. at p. 18-24). She explained that when a licensed contractor pulls a permit to perform construction services, the contractor must disclose on the permit application any sub or independent contractor that would be providing work under the permit. (Id.). As it related to Tech Service Inc.'s permit to provide HVAC to the subject location at 751 McKinley Way, Tech Services did not disclose that any sub or independent

contractor would be working for it on this job site. Rather, Tech Service Inc.'s affirmatively represented that no sub or independent contractor was involved. (Id. at p. 22, 32).

(c) Testimony of LeGrande Todd

LeGrande Todd was the first witness called by the Defendants. Mr. Todd is a cousin of Claimant and Tracy Davis. (Id. at p. 169, 185). Mr. Todd owns several plumbing related companies in the Myrtle Beach area. (Id. at p. 170-171). Mr. Todd testified that *both* prior to and after March 2013 that he hired Claimant to perform "sub work." (Id. at p. 169-170, 177, 184-185).

Mr. Todd testified that he believes Claimant's reputation in the community is "not too good." (Id. p. 174, 186). However, Mr. Todd apparently has a close relationship with Mr. Davis, even helping Mr. Davis get started with the Tech Services business. (Id. at p. 175-177). Also, Mr. Todd assisted the Defendants in producing documents to aid in the defense of this claim, but Mr. Todd did not produce documents that Claimant had requested pursuant to a subpoena. (Id. at p. 178-185).

(d) Testimony of Tracy Davis

Mr. Davis owns Tech Services of Myrtle Beach, LLC and Tech Services, Inc. (Id. at p. 192). He testified that Tech Services of Myrtle Beach, LLC does work for Centex Homes and several other custom builders. (Id. at p. 192). He testified that Claimant at one time worked for both companies for at "least ten, twelve years." (Id. at p. 193, 223). Claimant has never been fired from either company. (Id. at p. 223).

Mr. Davis testified that Claimant was injured on a Tech Services, Inc. job at Market Commons, not a Tech Services of Myrtle Beach, LLC job. (Id. at p. 213, 224). Mr. Davis did not advise or notify Chancel Construction, the general contractor on the project where Claimant

was injured, that Claimant was working as a subcontractor. (Id. at p. 228-229). He admitted that Claimant was wearing his Tech Service's uniform on the date of his fall. (Id. at p. 224). He also knew that Claimant wore a Tech Service uniform. He never saw Claimant wear any other uniform. (Id.).

Mr. Davis testified that prior to March 2013, Claimant was paid by the hour, at \$14 per hour. He explained that his company uses a flat rate pricing book but that he did not use the flat rate pricing book to pay the Claimant. (Id. at p. 195-197). Based on how Mr. Davis had employees working for both Tech Services of Myrtle Beach, LLC and Tech Services, Inc., an employee could work for more than 40 hours a week, but since the employee's time would be shared between two separate entities, an employee may not be paid overtime for any work in excess of 40 hours. (Id. at p. 198-199).

Mr. Davis denied that he gave Claimant money to purchase workers' compensation insurance. (Id. at p. 200). Mr. Davis testified that he selected the amount to pay Sellers for each job. (Id. at p. 202). Mr. Davis gave Claimant a work van that was "about wore out." (Id. at p. 205). He stated that the tools and equipment that Claimant used were from Tech Services. (Id. at p. 206). He testified that it was "not usual" for him to send a "subcontractor" to perform a service call for Tech Services. (Id. at p. 214-215). Claimant had permission to enter service contracts on behalf of Tech Services and to order and purchase supplies on behalf of Tech Services. (Id. at p. 227). He testified that both his "subcontractors" and "employees" had the authority to sell service contracts on behalf of Tech Services. (Id. at p. 228).

(e) Testimony of Jacob Hamilton

Jacob Hamilton assists in the "day-to-day" operations of the Tech Service companies. (Id. a p. 238, 245). Mr. Hamilton's wife works as Mr. Davis' secretary. (Id. at p. 246).

Mr. Hamilton was working in the Market Commons development at the time of Claimant's fall. (Id. at p. 239). Mr. Hamilton received a call from Claimant stating that he had fallen. (Id.). Mr. Hamilton and another employee went to the location where Claimant was working and saw him lying on the floor. (Id. at p. 240-241). He testified that Claimant requested that Mr. Hamilton file the claim under the Tech Service's workers compensation since he "don't have insurance." (Id. at p. 241).

Mr. Hamilton agreed that it was company policy for "employees" of Tech Services to wear a Tech Services uniform. (Id. at p. 247). Mr. Hamilton testified that Claimant was not wearing his Tech Services uniform at the time of the fall. His testimony on this issue directly conflicts with both Claimant and Tracy Davis' testimony that Claimant was wearing a Tech Services uniform when he fell. We note that Mr. Hamilton did not mention in his written statement what the Claimant was wearing on the date of the fall. Also, Mr. Hamilton's testimony about the uniform is further questioned because Claimant actually brought in his blue Tech Services shirt and khaki pants that were cut off of him by medical personnel.

After the close of the hearing, the hearing Commissioner issued order instructions to the parties and requested a proposed Order from Claimant's counsel. Claimant's counsel submitted a proposed Order as requested on July 18, 2014. Pending review of the proposed Order, the undersigned received correspondence from Defense counsel seeking to introduce newly-discovered evidence. A formal Motion to Admit Newly-Discovered Evidence was filed on August 1, 2014. In that Motion, Defendants asserted Claimant had secured subsequent employment and sought to introduce employment records from Chilly-Pepper, Inc. Additionally, Defendants sought to introduce surveillance reports and video evidence, which allegedly showed Claimant working at

his new job. Claimant filed a Response to Motion on August 12, 2014 requesting denial of the Motion and filing of the initial proposed Order.

FINDINGS OF FACT

Single Commissioner:

Based on the stipulations of the parties; testimony and evidence received and produced at the hearing, along with the hearing Commissioner's personal observations and determination of credibility of the witnesses that testified, We, the Appellate Panel, find substantial evidence exists to support the hearing Commissioner's findings of fact and adopt them in full as our own:

1. Defendants' Tech Services, Inc. and Builders Mutual Insurance Company's Motion to Admit Newly Discovered Evidence is granted as to the employment records from Chilly-Pepper, Inc., and will be added to the APA Submissions as Defendants' APA Submission #15 pp. 548 - 580.

2. Defendants' Tech Services, Inc. and Builders Mutual Insurance Company's Motion to Admit Newly-Discovered Evidence is denied as to the introduction of surveillance reports and videos. The surveillance evidence is cumulative as the employment records already confirm Claimant's employment with Chilly-Pepper, Inc. All of the other assertions based on the surveillance evidence is either for impeachment, which is not proper, or it goes to impairment/permanency, which was not before the Commission on the hearing date.

3. We find Claimant was an employee of Tech Services, Inc. on the date of accident. This finding is based on the preponderance of the evidence including (1) the City of Myrtle Beach Business License information, which did not list Claimant as a subcontractor or independent contractor working on the jobsite; (2) the fact that claimant was wearing a Tech Services, Inc. uniform when he was injured (We find this as a fact - additionally Tracy Davis

admitted Claimant was wearing the uniform on the date of injury); (3) all of the witnesses admit Claimant did side work throughout his employment with Tech Services, Inc., both before and after March 2013; and (4) Claimant continued to perform service calls for Tech Services, Inc. while wearing a Tech Services uniform and providing customers with Tech Services, Inc. invoices even after the alleged change in Claimant's employment status. We find that Tech Services, Inc. affirmatively and tacitly represented to the public at large that Claimant was an employee of Tech Services, Inc. This was done through the representations made to the City of Myrtle Beach Business License and Construction Services departments and customers of Tech Services, Inc.

4. We find that Claimant was not working for Tech Services of Myrtle Beach, LLC on the date of injury. This finding is supported by the testimony of the Claimant and Tracy Davis.

5. Tech Services, Inc. exhibited the right and authority to control and direct Claimant's particular work or undertaking. Claimant did not perform the work according to his own methods or discretion. Rather, the scope, degree, performance, and quality of his work were subject to the direct supervision and control of Tech Services, Inc. Claimant had been an employee of Tech Services, Inc. and Tech Services of Myrtle Beach, LLC for over twelve years, and the control exhibited over him by Tracy Davis was pervasive based on the totality of the evidence. Claimant was instructed by Tracy Davis, or the manager Jacob Hamilton on the work to perform and his work performance was directly supervised. Claimant reported to work for Tech Services, Inc. as he was instructed. He also performed the work that he was instructed to perform. Claimant did not bid for the work performed on the project on which he was working when he was injured or on any other projects on which he worked. Tech Services, Inc. did not

advise or notify the general contractor on the project where Claimant was injured that Claimant was working as a subcontractor/independent contractor. Claimant would either report to Tech Services, Inc. office or the various jobsite that he was working on a daily basis. He was not given the option to not perform jobs that were assigned to him. He ate lunch with other employees and kept normal work hours as with other employees. Other Tech Services, Inc. employees performed substantially the same general job duties as the Claimant. The amount of work that he performed for Tech Services, Inc. is also consistent with employee/employer relationship. Claimant performed "sidework" at all times throughout his employment, which is not uncommon for tradesmen. Claimant was directed what to wear to work. He wore a Tech Services, Inc. uniform, as this was the dress code for Tech Service employees. He had Tech Services, Inc. business cards. He has access to Tech Services, Inc. supply accounts. He had authority to order, purchase, and pick up supplies on behalf of Tech Services, Inc. He carried Tech Service, Inc.'s service contracts, and entered into service contracts with customers as an agent of Tech Services, Inc. Based on his access to supply accounts and service contracts, he had the direct authority to act for and bind Tech Services, Inc. in contractual relationships and transactions with third parties. The overwhelming evidence strongly supports that Tech Services, Inc. had the right to, and in fact did, control the Claimant in the performance of his work.

6. Tech Services, Inc. furnished the equipment, tools, and supplies necessary for Claimant to complete his work. A significant amount of the hearing testimony was spent describing pictures of tools used during Claimant's employment with Tech Services. We find that Tech Services, Inc. supplied those tools to Claimant. We find Claimant was not financially capable of owning all of those tools pictured, and that most if not all of the tools were owned by

Tech Services, Inc. and provided to Claimant. Claimant fell off a Tech Services, Inc. ladder. Additionally, Claimant testified he was able to pick up any supplies he needed from Gateway Supply and other supply company using the account of Tech Services, Inc. The supplies listed on the invoices were for purposes of completing Tech Services, Inc. jobs, but also included the purchase of overalls, batteries, and a variety of other items that an employer would typically provide for an employee to complete his work. Claimant did not pay for any of the supplies out of pocket, and did not have a supply account for himself. The evidence is unclear whether Claimant was given a work van by Tech Services, Inc. or if he paid \$500.00 for it.

7. Claimant was paid on a weekly basis, typically on Thursdays or Fridays, both before and after March 2013. Before March 2013, Claimant was paid \$14.00/hr. but the evidence is disputed about how Claimant's wages were calculated which further supports the fact that Claimant and employer had a dispute about how his wages were being calculated. Claimant claimed that his hours were based on preset amount used to complete a certain job based on the flat rate pricing book, in which the hours would have a relationship to the type of job performed. At times after March 2013, Claimant was paid based on invoices that he was directed to submitted to Tracy Davis of Tech Services. The invoices were based on amounts set by Tracy Davis based on a preset time that Tracy Davis determined it should take to complete a job. We find that Tech Services controlled the price and the amount that Claimant was paid for the work that he performed. If Complaint finished an assigned task, he would be directed to perform other tasks, help other employees, or perform service calls.

Claimant's wages from Tech Services, Inc. during 2013 were largely consistent with his wages from prior year. Tech Services, Inc. continued to control the method of payment, in that several weeks before Claimant fell, Tech Service, Inc. had plans to start paying Claimant in the

manner that he was paid before March 2013. The most significant change was the employer's classification after March 2013 was that Claimant would be issued a Form 1099. We recognize that Tech Services, Inc. attempted to classify him for tax purposes under a Form 1099, instead of a Form W-2, but the issuance of a Form 1099 does not necessarily define an employment relationship. When the method and manner of payment is viewed in the greater context in this case, Tech Services, Inc. exhibited overwhelming control of how, and how much, the Claimant was paid.

8. Defendant Tech Services had the right to hire and fire Claimant. Claimant could be fired at any time; and that if Claimant was terminated, he would have to find employment with another HVAC company.

9. Claimant sustained compensable injuries to his back and legs within the course and scope of his employment with Tech Services, Inc. when he fell off of a ladder while "trimming out" a home where Defendant Tech Services, Inc. had contracted to work.

10. Claimant is not at maximum medical improvement.

11. Claimant is entitled to causally-related medical treatment for the injuries sustained from the fall, including but not limited to his back and lower extremities.

12. Claimant is entitled to reimbursement for all causally related out-of-pocket expenses including mileage reimbursement.

13. Claimant is entitled to temporary total disability benefits from the date of injury through April 6, 2014, when he began subsequent employment with Chilly-Pepper, Inc.

14. Claimant has combined wages for 2012 and 2013 resulting from employment with both Tech Services, Inc. and Tech services of Myrtle Beach, LLC. Claimant's average weekly wage is \$783.94, yielding a compensation rate of \$522.63.

15. We specifically decline to give a credibility finding for any of the witnesses. We further find that the credible testimony that was offered at the hearing supports these findings of fact.

CONCLUSIONS OF LAW

Based on a review of the evidence presented and described above, WE THE APPELLATE PANEL fully adopt the Conclusions of Law of the Single Commissioner as follows:

1. Prior to the close of the case, Claimant renewed a Motion for additional discovery to be introduced into the record, which the hearing Commissioner took under advisement. That Motion is denied because no additional discovery was needed based on the hearing Commissioner's finding that Claimant was an employee of Tech Service, Inc.
2. After the close of the case, Defendants Tech Services, Inc. and Builders Mutual Insurance Company filed a Motion to Introduce Newly-Discovered Evidence. That Motion is granted in part and denied in part as outlined in Findings of Fact 1 and 2 above.
3. Tech Services of Myrtle Beach, LLC and StarNet Insurance Company are dismissed from this matter with prejudice. The preponderance of the evidence supports a finding that Claimant was not working for Tech Services of Myrtle Beach, LLC on the date of injury. We base this finding on the testimony of all of the witnesses as well as the City of Myrtle Beach Business License and Contractor information included in the APA submissions.
4. Pursuant to S.C. Code Ann. §42-1-130, Claimant was an employee of Tech Services, Inc. on the date of injury. "No award under the Workers' Compensation Law is authorized unless the employer-employee or master-servant relationship existed at the time of the alleged injury for which claim is made." *McLeod v. Piggly Wiggly Carolina Co.*, 280 S.C. 466,

469, 313 S.E.2d 38, 39 (Ct. App. 1984) (citing *Cooper v. McDevitt*, 260 S.C. 463, 196 S.E.2d 833 (1973); *Alewine v. Tobin Quarries*, 206 S.C. 103, 33 S.E.2d 81 (1945)). The Claimant bears the burden of proving an employment relationship existed by the greater weight of the evidence. *Marlow v. E. L. Jones & Son, Inc.*, 248 S.C. 568, 151 S.E.2d 747 (S.C. 1966). We conclude that Claimant has met this burden of proof by the greater weight of the evidence.

5. “South Carolina’s policy is to resolve jurisdictional doubts in favor of the inclusion of employers and employees under the Workers’ Compensation Act.” *Spivey v. D. G. Constr. Co.*, 321 S.C. 19, 21, 467 S.E.2d 117, 117 (Ct. App. 1996); *Pikaart v. A & A Taxi, Inc.*, 393 S.C. 312, 713 S.E.2d 267, 270 (S.C. 2011).

6. “Under settled law, the determination of whether a claimant is an employee or independent contractor focuses on the issue of control, specifically whether the purported employer had the right to control the claimant in the performance of his work.” *Shatto v. McLeod Reg’l Med. Ctr.*, 406 S.C. 470, 475, 753 S.E.2d 416, 419 (S.C. 2013) (citations omitted). “Under the controlling common law rubric of the right of control, “the Court examines four factors which serve as a means of analyzing the work relationship as a whole: (1) direct evidence of the right or exercise of control; (2) furnishing of equipment; (3) method of payment; (4) right to fire.” *Id.* (citations omitted). As *Shatto* requires, we have applied these factors “in an evenhanded manner in determining whether the questioned relationship is one of employment or independent contractor.” *Id.*

7. As to the first factor, “*direct evidence of the right or exercise of control*”, we find that the preponderance of the evidence weighs heavily in favor of employer-employee or master-servant relationship. “While evidence of actual control exerted by a putative employer is evidence of an employment relationship, the critical inquiry is ‘whether there exists the *right and*

authority to control and direct the particular work or undertaking.” *Id.* at 477, 753 S.E.2d at 420. (emphasis added in original). “The right to control does not require the dictation of the thinking and manner of performing the work. It is enough if the employer has the *right* to direct the person by whom the services are to be performed, the time, place, degree, and amount of said services.” *Id.* (emphasis added in original).

8. As to the second factor, “*furnishing of equipment*,” we conclude that the preponderance of the evidence weighs heavily in favor of employer-employee or master-servant relationship. “When it is the employer who furnishes the equipment, the inference of right of control is a matter of common sense and business.” *Id.* at 479, 753 S.E.2d at 421 (citing 3 Arthur Larson & Lex K. Larson, *Larson’s Workers’ Compensation Law* § 61.07[2] (2013)).

9. As to the third factor, “*method of payment*,” we conclude that the preponderance of the evidence tips slightly in favor of an employment relationship than an independent contractor status. We recognize that Tech Services, Inc. attempted to classify Claimant for tax purposes under a 1099, instead of a W-2, but how Claimant was paid in the greater context of the facts demonstrates the Tech Services, Inc.’s overall right and exercise of control of how he was paid. The significant amount of control exhibited over Claimant is evident by Tech Services Inc.’s directing how, the manner, and the amount Claimant would be compensated for his work. In *Shatto*, the South Carolina Supreme Court held that “Payment on a time basis is a strong indication of the status of employment while payment on a completed project basis is indicative of independent contractor status.” *Id.* at 480, 753 S.E.2d at 421 (citations omitted). *Larson* explains the rationale that “[i]f an employer...purchases personal labor by the hour...it is almost certain to insist on the right to see that the time is well and efficiently spent...[T]he employer wants to see that it gets a full hour’s work, and that the hour is applied where it is most

needed....if there is not enough of one kind of work to fill the workers' time, the employer will if possible direct the use of time at some other point." 3 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 61.06 (2013)). Here, Claimant was paid on a weekly basis based on work performed. The evidence suggests that at times prior to March 2013, Claimant was not paid strictly on a time basis, because Tech Services, Inc. utilized a flat rate pricing book to calculate the time for each job. Claimant was directed to perform multiple tasks for Tech Services, Inc. in the course of a day, or a week, the same tasks that other individuals that were admittedly employees of Tech Services, Inc. If Claimant finished an assigned task, he would be directed to perform another task, help other employees, or perform service calls. It was apparent based on the evidence that Tech Services, Inc. attempted to get a full day's work out of Claimant.

10. As to the fourth factor, "*right to fire*," we conclude that the preponderance of the evidence weighs in favor of an employment relationship more than an independent contractor status. "The power to fire, it is often said, is the power to control. The absolute right to terminate the relationship without liability is not consistent with the concept of independent contract, under which the contractor should have the legal right to complete the project" *Id.* at 481, 753 S.E.2d at 422 (citations omitted). The evidence to support this factor favors an employment relationship, but not overwhelming so in recognition of the fact that "a punitive employer generally has the ability to terminate both employees and independent contractors." *Id.* Thus to the extent this factor carries weight, we conclude that it does tend to support the finding of an employment relationship.

11. We conclude as a matter of law that the greater weight of the evidence in the application of the above-mentioned four factors supports a finding of an employment relationship between Claimant and Tech Services, Inc. at the time of the accident. In sum, the

fact that Claimant was employed for many years with Tech Services, wore Tech Services uniforms, fell off a Tech Services ladder, used tools, equipment and supplies purchased by Tech Services, had Tech Services business cards, performed the same duties as other employees, had the authority to bind Tech Services in contract, and that Tech Services did not list him as an subcontractor/independent contractor for permits and licensure documentation with the City of Myrtle Beach overwhelmingly establish that Claimant was working as an employee of Tech Services, Inc.

12. Pursuant to S.C. Code Ann. 42-1-160, Tech Services, Inc. and Builders Mutual Ins. Co. are liable for all the Claimant's causally-related medical treatment for the injuries sustained from the fall, including but not limited to his back and lower extremities.

13. Pursuant to S.C. Code Ann. 42-15-60, Claimant is entitled to reimbursement by Defendant Tech Services, Inc. and Builders Mutual Ins. Co. for any out-of-pocket medical expenses incurred to date.

14. Pursuant to S.C. Regulations 67-1601, Claimant is entitled to reimbursement for travel expenses.

15. Pursuant to S.C. Code Ann. 42-9-10, Claimant is entitled to temporary total disability benefits, with interest, payable from the date of injury through the present and continuing until he reaches maximum medical improvement.

16. Pursuant to S.C. Code Ann. 42-1-40, Claimant's average weekly wage is \$783.94, yielding a compensation rate of \$522.63.

AWARD

Based upon the above Findings of Fact and Conclusions of Law of this Appellate Panel, it is hereby ordered that the Decision and Order of the Single Commissioner is **AFFIRMED**, and further:

IT IS HEREBY ORDERED that Tech Services, Inc. and Builders Mutual Ins. Co. shall immediately and without delay provide Claimant's causally-related medical treatment for the injuries sustained from the fall, including but not limited to his spine and lower extremities;

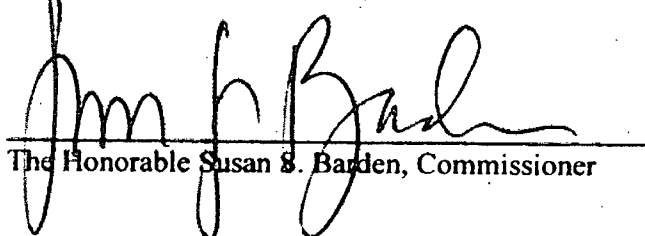
IT IS HEREBY ORDERED that Tech Services, Inc. and Builders Mutual Ins. Co. shall immediately and without delay fully reimburse and pay for any causally-related medical expenses incurred by the Claimant to date;

IT IS HEREBY ORDERED Tech Services, Inc. and Builders Mutual Ins. Co. shall immediately and without delay pay Claimant temporary total disability benefits, with interest, from the date of injury through the present and continuing until he reaches maximum medical improvement, including any travel-related expenses.

IT IS HEREBY ORDERED that Defendant Tech Services of Myrtle Beach, LLC and Star Net Insurance Co. are dismissed from this claim.

AND IT IS SO ORDERED.

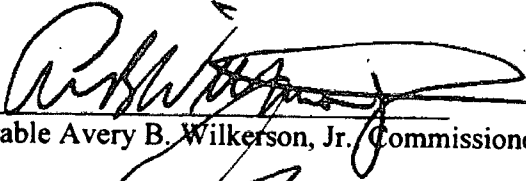
AND IT IS SO ORDERED.


The Honorable Susan S. Barden, Commissioner

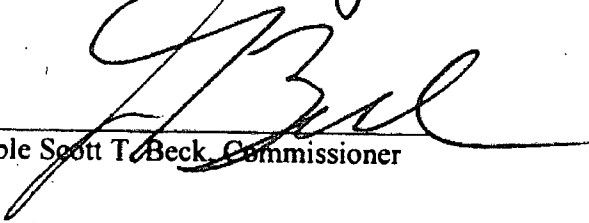
Columbia, South Carolina

July 17th, 2015

CONCURRING:



The Honorable Avery B. Wilkerson, Jr. Commissioner



The Honorable Scott T. Beck, Commissioner

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Kim Falls on July 17, 2015

**JUDICIAL QUALIFICATIONS COMMITTEE
CONFIDENTIALITY OATH**

I, _____, agree to preserve the confidentiality of the Judicial Qualifications Committee in all activities related to determining the qualifications of candidates. I agree to hold in strict confidence all communications and information received from members of the Bar and others. I further agree to hold in strict confidence all deliberations of the Committee concerning the qualifications of all candidates.

Signature

Date