THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2015-001676

Stacey Sellers ..... Respondent,

v.

Tech Services, Inc., Employer,
and
Builders Mutual Insurance Company, ... Carrier/Appellants.

BRIEF OF APPELLANTS

CALLISON, TIGHE & ROBINSON, LLC
Richard C. Detwiler (S.C. Bar 6473)
Jacqueline M. Pavlicek (S.C. Bar 100556)
Post Office Box 1390
Columbia, SC 29202-1390
Tel: (803) 404-6900
Fax: (803) 404-6901
rickdetwiler@callisontighe.com
pavlicek@callisontighe.com

ATTORNEYS FOR APPELLANTS

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STATEMENT OF ISSUE ON APPEAL

Did the South Carolina Workers' Compensation Commission ("the Commission") err when it determined Stacey Sellers ("Claimant") was an employee and not an independent contractor?

STATEMENT OF THE CASE

This is an appeal in a workers' compensation case. The sole issue on appeal is whether the Commission erred when it determined that Claimant was an employee and not an independent contractor at the time of his accident.

On November 8, 2013, Claimant sustained injuries while performing HVAC work by himself during the construction of a single-family residence located at 751 McKinley Way in Myrtle Beach (a/k/a "17 Market Commons"). (R. pp. 109, 125, 138–39, 335; 1233.) Claimant fell from a ladder while he was "trimming out [the] house" and sustained injuries to his legs and back. (R. pp. 138–39.) Claimant was hospitalized following his injuries. (R. p. 138.)

On November 9, 2013, the day following Claimant's accident, Claimant notified his own workers' compensation insurance carrier, Riverport Insurance Company,[1] of his accident. (R. p. 373.) Riverport filed a First Report of Injury with the Commission on November 14, 2013, listing Claimant's Federal Employer I.D. Number—a number distinct from Claimant's Social Security Number. (R. p. 373.) Riverport was the first named party in this case. (R. p. 373.) On November 20, 2013, Key Risk, Riverport's third-party claims administrator, notified Claimant that it had denied his claim because

[1] By consent order filed May 7, 2014, Riverport was dismissed from this case. (R. p. 31.)

Claimant "knowingly and voluntarily" excluded himself from his own workers' compensation insurance policy. (R. pp. 1235–36, 1248.)

Also on November 20, 2013, Claimant filed a Request for Hearing ("Form 50"), naming Tech Services of Myrtle Beach, LLC as a party to this case. (R. p. 375.) Claimant's Form 50 stated, "Claimant was a subcontractor for Tech Services of Myrtle Beach, LLC." (*Id.*) On December 5, 2013, Claimant filed an Amended Form 50, for the first time naming Tech Services, Inc. as a party to this case. (R. p. 377.)

At a hearing held on Claimant's Amended Form 50, held on March 25, 2014, the single commissioner heard testimony on the issue of whether Claimant was an employee or independent contractor at the time of his November 8, 2013 accident. (R. pp. 96–100.) Claimant presented his own testimony and testimony from two City of Myrtle Beach employees. Tech Services, Inc. presented the testimony of its owner, its manager, and a local business owner for whom Claimant had also performed work as a subcontractor/independent contractor. The single commissioner issued an order on August 29, 2014, finding Claimant was an employee. (R. pp. 29–54.) The single commissioner also dismissed Tech Services of Myrtle Beach, LLC, finding that Claimant's injuries occurred while he was working on a job for Tech Services, Inc. (*Id.*)

Tech Services, Inc. appealed the single commissioner's order to the Commission's Appellate Panel. (R. pp. 55–76.) On July 17, 2015, the Appellate Panel issued its order affirming the single commissioner's determination that Claimant was an employee of Tech Services, Inc. (R. pp. 4–28.) Neither the single commissioner nor the Appellate Panel made any credibility findings. (R. pp. 4–54.)

Tech Services, Inc. timely appealed the Appellate Panel's order to the South Carolina Court of Appeals.

STATEMENT OF FACTS

Claimant first began working for Tech Services, Inc. ("Tech Services") as a teenager. (R. p. 141.) Claimant's first cousin, Tracy Davis, is the sole owner of Tech Services, which performs general HVAC work in the Myrtle Beach area, including service calls. (R. pp. 287–88.) Davis is also the co-owner of another HVAC company, Tech Services of Myrtle Beach, LLC ("TSMB"), which is a sister company to Tech Services. (R. p. 287.) Tech Services has approximately seven or eight employees, which Tech Services shares with TSMB, and Tech Services has used various subcontractors over the years. (R. p. 298.) Each business has its own clientele, and before Tech Services sends an employee to a particular jobsite, they are informed of which business the job is for so that the employee can record their time accordingly. (R. pp. 293–294.)

Claimant had been an employee of Tech Services and TSMB for more than ten years, until early 2013, when Claimant decided he wanted to go into business for himself as an independent contractor/subcontractor. (R. pp. 141, 294–295.) Davis testified Claimant first approached him in January 2013, about his desire to work for himself as a subcontractor. (R. pp. 294–95.) According to Davis, Claimant wanted to go out on his own because Claimant believed he could make more money that way. (R. p. 294.) Claimant corroborated this, indicating he and Davis had had various discussions regarding his pay, and that they had met in Davis's office to discuss how Claimant could make more money, which included reporting Claimant's wages using a 1099 instead of a

W-2 and by paying Claimant a flat-rate based on the job he was doing instead of paying Claimant hourly. (R. pp. 146, 222.) According to Claimant, he had concerns regarding amounts being withheld from his paychecks, and he had gripes regarding overtime, which he claimed he never got paid for.[2] (R. pp. 143, 145–46.) Davis testified he tried to explain to Claimant how difficult it is to make it in the HVAC industry; however, Claimant assured Davis that he had other clients who would give him business. (R. pp. 294–95.) Davis testified he told Claimant that he could begin working as a subcontractor for Tech Services after Claimant obtained his own workers' compensation insurance policy. (R. p. 295.) Claimant purchased his own workers' compensation policy on February 21, 2013, for $1,250.00. (R. pp. 495, 1244–47.) In Claimant's policy application, it notes Claimant is a sole proprietor with 100% ownership interest in the business, and it provides Claimant's business's Federal Employer I.D. Number. (R. p. 1240.) Davis explained that Claimant waited until he got his income tax refund in February 2013,[3] to purchase his own workers' compensation policy. (R. pp. 295–96.)

Although Claimant asserted Davis gave him $1,250.00 in cash to purchase a workers' compensation policy (R. pp. 148–49.), Davis adamantly denied giving Claimant the money, explaining that if he was going to give Claimant any money for the policy, he would have given Claimant a check so that Davis could document that expenditure for his business records (R. p. 295).

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[2] Although Claimant asserted he did not get paid overtime prior to March 2013, Claimant's pay records show he was paid for overtime in January and February 2013. (R. pp. 143, 211, 486–87, 490–91.)

[3] Employers must provide employees with their W-2s by January 31. 26 U.S.C. § 6051.

According to Claimant, Davis told him to get the cheapest workers' compensation policy available "because it was for tax purposes only." (R. pp. 148, 150.) Claimant testified that he bought his own policy "from the first people [he] called and got a price from." (R. p. 149.) Claimant chose the company from which he purchased the policy, went by himself to meet with the insurance agent and purchase his policy, provided his company's Federal Employer I.D. Number, signed the application by himself, and the policy was in his own name. (R. pp. 221–222, 224–225, 1240–43.) Notably, Claimant made his own business decision to exclude himself from the policy as an owner and sole proprietor, and the price of Claimant's policy reflected that decision. (R. pp. 224–225, 1235–36, 1240–43.) Nothing in the record before the Commission indicates Davis told Claimant to exclude himself from his own workers' compensation policy.

After Claimant purchased his own workers' compensation policy, he testified he provided Davis with proof of insurance, although Claimant could not recall whether he had provided the same to other individuals for whom he provided subcontractor services. (R. p. 227.) Davis testified that after Claimant provided him with proof of coverage, he cautioned Claimant that he would have to find other companies to work for; however, Claimant told Davis that he would prioritize Davis's work because Davis, Claimant's first cousin, had helped him all of his life. (R. p. 296.) Claimant emphasized to Davis that he would have no problem finding additional work. (R. p. 296.)

Although Claimant's status changed from an employee to a subcontractor in March 2013, the status of Tech Services' remaining employees did not. Davis testified that no other employee's status changed when Claimant began working for himself,

belying Claimant's insinuation throughout his testimony that Davis was trying to save money or scam Claimant by this change. (R. pp. 145–48, 299–300.)

On November 8, 2013, nine months after Claimant purchased his own workers' compensation insurance and began working as a subcontractor for Tech Services, Claimant sustained injuries after falling from a ladder while performing HVAC work by himself unsupervised during the construction of a single-family residence located at 751 McKinley Way in Myrtle Beach (a/k/a "17 Market Commons"). (R. pp. 109, 125, 138–39, 335, 1233.) Claimant testified he fell while he was "trimming out [the] house," explaining the ladder fell out from under him as he was screwing in a vent. (R. pp. 138–39.) It was a job for Tech Services. (R. pp. 139, 308.) According to Claimant, he did not recall anything that happened after he fell. (R. p. 139.)

At the time of Claimant's accident, Claimant did not have a license to conduct business in the City of Myrtle Beach. (R. pp. 111–12.) However, two City of Myrtle Beach employees testified it was not uncommon for people to do business in the City without a license. (R. pp. 125–26, 134–35.) After reviewing one of the invoices that Claimant submitted to Tech Services for work he did at the jobsite where he fell days before his accident, the City's Business License Supervisor opined that Claimant was operating a business in the City without a license. (R. pp. 109, 125–26, 1417.)

The permit for the jobsite where Claimant's accident occurred did not list any subcontractors on the subcontractor roster (R. pp. 112–14); however, Davis testified that he does not provide a list of his subcontractors to the general contractor and did not do so for Claimant (R. pp. 323–24).

Jacob Hamilton, the manager for Tech Services, testified he was working at a nearby jobsite when Claimant called him for help after his fall.[4] (R. pp. 333–35, 1233.) He stated he ran to Claimant's aid after getting Claimant's call for help; and upon arriving at Claimant's jobsite, he found Claimant lying on the floor. (R. pp. 334–35.) Hamilton stated that after finding Claimant, Claimant asked him, "Is there any way possible that you could file this under [Tech Services'] workman's comp because I'm effed because I don't have insurance. It doesn't cover me." (R. p. 336.) Hamilton told Claimant that he should not worry about it; however, Claimant told him "I'm gonna lose everything I've got. The insurance don't cover me." (R. p. 336.) Hamilton stated that he told Claimant, "No, we can't do that. I mean, you're not under our records or what have you of an employee anymore when you started subbing. You're on your own." (R. p. 336.) Hamilton testified that he called an ambulance for Claimant, flagged down the ambulance when it arrived, and led the paramedics to Claimant. (R. p. 338.)

Hamilton testified Claimant called him later that evening from the hospital because Hamilton had to return work. (R. pp. 337–38.) He stated he told Claimant that he had put all of Claimant's tools back in Claimant's van and moved Claimant's van into a different parking space, locking it up. (R. p. 338.) According to Hamilton, Claimant asked him again if "he could call it in under [Tech Services'] workman's comp," and Hamilton again told Claimant that he could not, noting it was illegal and that Claimant was no longer an employee. (R. p. 338.)

[4] Hamilton understood that on the date of Claimant's fall, Claimant was a subcontractor. (R. pp. 336–37.) He testified Claimant had told him about his discussion with Davis and that they had worked out some pricing. (R. p. 337.)

Davis testified he first learned that Claimant had fallen from Hamilton. (R. pp. 302–08, 1234.) According to Davis, Claimant called him after he got to the hospital. (R. pp. 303–04.) Davis testified that Claimant said, "I need a favor . . . I need to turn it in on your insurance 'cause I'm not covered on my insurance." (R. p. 304.) Davis stated that he told Claimant he could not file it under Tech Services' insurance because he had just undergone an audit showing that Claimant was a subcontractor. (R. p. 304.) Davis acknowledged that Claimant was worried about paying his medical bills; however, he asserted he could not lie for Claimant. (R. pp. 304–05.)

After March 2013, Claimant also began doing a substantial amount of HVAC work for another family member, LeGrande Todd. (R. pp. 265–66.) Todd is Claimant's second cousin, and Todd, Davis, and Claimant are all "close cousins." (R. p. 280.) Todd owns a number of companies, including Rooter Express, LLC. (R. pp. 265–66.) Todd testified he had helped Davis get started in the HVAC business, and indicated that they were still close. (R. pp. 270–271.) Todd testified he had known Claimant "all of his life," and that although Claimant's reputation for truthfulness and veracity in the community was "not too good," he still wanted to help Claimant's fledgling business because "the boy's had a hard life, and I got – I had a heart to help him." (R. pp. 269, 280–81.)

Before March 2013, Claimant had done some side work for Todd and others, although Claimant asserted it was "very little" work. (R. pp. 190, 227–28.) For example, Claimant testified that before March 2013, he had done some side work on Todd's home after Todd's dog destroyed the duct work under Todd's home and he had helped Todd

change out an HVAC unit on his home. (R. pp. 191, 272–73.) According to Claimant, the total amount of side work he did before and after March 2015, amounted to about five percent of the work he did, and Claimant asserted the amount of work he did for Todd did not change after March 2013. (R. pp. 227–28.) However, from March 2013 to August 2013, Todd paid Claimant over $5,000 for Claimant's services, and Claimant admitted the amount of money he made working for Todd in 2013 was "not chump change." (R. pp. 229–30, 1423–39.) Moreover, Todd testified that he began to use Claimant as a subcontractor for HVAC work "quite a bit" beginning in March or April 2013. (R. p. 265.) Todd also testified that Claimant provided him with a certificate of worker's compensation insurance coverage around that time, although Claimant did not recall whether he had done so. (R. pp. 227, 267–68, 273.)

Claimant testified that Davis took a hard stance on employees moonlighting by doing side work. (R. p. 193.) According to Claimant, if Davis found out that an employee was doing HVAC work for someone else, "he'd fire us in a heartbeat." (R. p. 151.) He asserted that other Tech Services workers did side work too; however, it was "just a matter of if you get caught or not." (R. p. 190.) Claimant admitted that prior to March 2013, Hamilton and Davis warned him repeatedly about doing side work, noting that he knew Davis considered it like stealing from the company, yet he did it anyway. (R. p. 214.)

Davis testified that before March 2013, he had many conversations with Claimant about doing side work, and he had previously fired an employee for it. (R. p. 289.) According to Davis, he had caught Claimant doing side work while he was still an

employee, and he would have fired Claimant if he was not his cousin. (R. p. 289.) Davis stated that after he confronted Claimant about doing side work, Claimant promised he would not do it anymore, and to Davis's knowledge, Claimant had not done any more while Claimant was still an employee. (R. p. 289.) Hamilton, Davis's manager, testified he suspected Claimant was doing side work before March 2013; however, he did not have any evidence of it. (R. p. 344.)

After March 2013, Claimant testified that he no longer needed to worry about Davis or Hamilton accusing him of going to work on side jobs. (R. p. 253.)

Before March 2013, Tech Services reported wages it paid to Claimant using a W-2, and after March 2013, Tech Services reported the amounts it paid to Claimant using a 1099. (R. pp. 218, 475–78.) Claimant maintained that before March 2013, he was paid $14 per hour based on time assigned for particular jobs in a flat rate pricing book. (R. p. 182.) After March 2013, Claimant was paid by the job. (R. p. 218.) Claimant also testified that about a week or two before his accident, Davis told him, "We're probably gonna have to go back to paying you by the hour like we were originally paying you." (R. p. 200.)

Davis testified that before March 2013, Claimant was paid hourly and he had never paid his employees using the flat rate pricing book, explaining the book is something used in the HVAC industry to bill customers. (R. p. 290–93.) Davis asserted that if he were to pay his employees based on the time set forth in the flat rate pricing book, his employees' weekly pay checks would vary widely from $300 to $1,800.[5] (R. p.

[5] Claimant's combined weekly pay from Tech Services and TSMB from January 2013 to early March 2013 ranged from $595 to $280, based on the hours he worked and the

292.) Davis testified that when Claimant was still an employee, he was paid $14 an hour "every hour from the hour he left the office until the last job, when he left the last job." (R. pp. 292–93.) Hamilton also acknowledged that Tech Services employees were paid hourly. (R. p 337.)

Claimant testified that in late February, he and Davis met to address changing the way he got paid. (R. pp. 146, 222.) Although Claimant did not bid for particular jobs, he admitted he and Davis met and discussed how Claimant would be paid going forward. (R. pp. 222–223.) Moreover, Hamilton testified that after March 2013, Claimant told him that he had spoken with Davis, and that they had worked out some pricing. (R. p. 337.) According to Davis, he and Claimant addressed how much Davis was willing to pay Claimant for various jobs, and that Davis agreed to pay Claimant the same amount that he paid other subcontractors. (R. p. 297.)

Claimant began submitting his own invoices when he began working for Tech Services as a subcontractor in early March 2013. (R. pp. 300–01.) Claimant created his own invoices, bearing the name of his company, "Seller's Heating and Cooling." (R. pp. 185–86.) Claimant testified he submitted invoices in order to get paid, and he indicated that Davis, his first cousin, advised him the invoices were necessary for tax purposes and that they needed to "look like an invoice." (R. pp. 185–86.) The bottom of each of Claimant's invoices states, "Thank you for your business!" (R. pp. 1249–1422.)

From March 2013 through November 2013, Claimant submitted over 140 invoices to Tech Services, and 6 invoices to TSMB. (R. pp. 1249–1422.) Claimant's

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commissions he earned. (R. pp. 486–87, 490–91.) Claimant's income from Tech Services and TSMB for 2010, 2011, and 2012 was $29,214, $32,995, and $28,840, respectively. (R. pp. 471–73.)

invoices are sequentially numbered, beginning at 10001 and ending at 10188. (R. pp. 1249–1422.) However, over 30 of Claimant's invoices are missing,[6] and the dates corresponding with many of the missing invoices reflect substantial gaps in Claimant's work with Tech Services and TSMB.

Although Claimant testified that he was expected to go to work for Tech Services "every day" after March 2013, (R. p. 151.), Claimant's invoices submitted to Tech Services reflect the following gaps in Claimant's work from March 2013 to November 2013:

- Invoices 10009 through 10027 (following Invoice 10008, dated 03/14/13; Invoice 10028 is dated 04/25/13)—**Six Week Gap**
- Invoice 10030 (following Invoice 10029, dated 04/25/13; Invoice 10031 is dated 05/06/13)—**Two Week Gap**
- Invoice 10063 (following Invoice 10062, dated 05/30/13; Invoice 10064 is dated 06/07/13)—**One Week Gap**
- Invoice 10074 (following Invoice 10073, dated 06/12/13; Invoice 10075 is dated 06/20/13)—**One Week Gap**
- Invoice 10095 (following Invoice 10094, dated 07/15/13; Invoice 10096 is dated 07/26/13)—**Ten Day Gap**
- Invoice 10130 (following Invoice 10129, dated 08/21/13; Invoice 10131 is dated 09/04/13)—**Two Week Gap**

(R. pp. 1249–1422.) Notably, many of the checks issued by Todd's company, Rooter Express, LLC to Claimant after March 2013, were issued during the gaps in time that Claimant did not invoice work for Tech Services or TSMB. (R. pp. 1423–39.) Claimant

[6] Although Claimant produced invoices he submitted to Tech Services and TSMB in response to a subpoena, he admitted he did not produce any invoices that he sent to other persons or entities. (R, pp. 235–36.)

testified he may have issued invoices to Todd or other people, indicating "[i]t wasn't nothing major"; however, he could not recall how many there might have been and he could not recall who else he may have issued invoices to. (R. pp. 233–35.)

Although Claimant testified the work he performed for other companies (i.e. not Tech Services or TSMB) before and after March 2013 constituted less than five percent of his work, the work Claimant performed for Todd's company from March 2013 to August 2013, yielded over $5,100.[7] (R. pp. 191–92, 1423–39.) The record does not indicate how much income Claimant yielded from the work he did for other entities and individuals while he was in business for himself.

Before March 2013, when Claimant was still an employee of Tech Services and TSMB, Claimant had his own personal truck, but he would drive to Tech Services' jobs in a company van. (R. pp. 217, 268.) Tech Services paid for the insurance, registration, and gas for the company van. (R. pp. 298–99.) Claimant testified that a friend of his had ridden with him in the company van on occasion, noting it got boring riding around without anyone to talk to. (R. pp. 196, 246–47.)

Around the time Claimant began working as a subcontractor, Claimant purchased an old work van from Davis, which Claimant used to drive to jobs as a subcontractor. (R. pp. 217, 220.) Although Claimant asserted he borrowed $500 from Davis to purchase the van, Todd testified he was the one who loaned Claimant the $500 to buy it. (R. pp. 244, 268.) According to Claimant, the amount allegedly borrowed would be deducted from

[7] By way of comparison, in the nine months that Claimant worked as a subcontractor for Tech Services and TSMB in 2013, even with Claimant giving himself at least 13 weeks off of work, Claimant's 1099 income from Tech Services and TSMB yielded approximately $28,000. (R. p. 477–78.)

his checks; yet, the record contains no documents evidencing this, and according to Claimant, the purpose of him switching to being paid on a 1099 was so that he would no longer have any amounts withheld from his pay. (R. pp. 146, 244.) Davis testified that Claimant brought him $500, "purchased the van, and got his own insurance and everything on the van." (R. p. 300.) After Claimant began working as a subcontractor, Tech Services did not pay the insurance, registration, or gas for Claimant's van. (R. p. 300.)

Claimant testified that before March 2013, when he was using the company van, he had to keep it clean and get it inspected every Friday before he could pick up his paycheck. (R. p. 253.) However, by driving his own vehicle and working as a subcontractor, he did not need to worry about Davis or Hamilton saying anything about him having a friend ride with him or them worrying about him driving to side jobs. (R. p. 253.) Moreover, by having his own work van, Claimant had control over its appearance. Claimant testified he removed the Tech Services decals from the van after he purchased it. (R. pp. 238–39.)

In addition to having made his own invoices with his business's name on them after March 2013, Claimant testified he also had his own business cards made. (R. pp. 193–94, 1237.) Although Claimant asserted he had his own cards made "as a joke" after March 2013, he could not recall anything specific about having them made. (R. pp. 193, 248–49.) He testified he had "some boy" make them for him, but could not recall the boy's name, when he had them made, where he picked them up, whether he picked them

up at a home or a business, how much he paid, or how many he had made. (R. pp. 247–49.)

According to Claimant, Tech Services supplied him with tools and equipment, including the ladder that he fell from on November 8, 2013. (R. pp. 140, 165.) Claimant testified he did not purchase any tools for himself, that he used the Tech Services supplied tools before and after March 2013, and that he had access to other tools in the Tech Services supply room if he needed them. (R. p. 165.) According to Claimant, he took the ladder from the company van when he switched to driving his own van. (R. p. 238.)

Claimant admitted he wrote "Tech Service" on the tools he had in his van at some time after March 2013, using a permanent marker that he kept in his van. (R. pp. 213, 238, 392–403.) On the other hand, Davis testified that he did not have Tech Service written on any of his company's tools. (R. pp. 301, 1440–91.) Davis believed the tools that Claimant wrote "Tech Service" on were tools that Claimant had accumulated over the years, and he thought some of them were likely tools that Claimant took from the company van after Claimant started working as a subcontractor and stopped driving the company van. (R. p. 301.) Davis explained that after Claimant switched vans, "I didn't check behind him that strongly **because he was family and I was trying to help him**." (R. p. 301 (emphasis added).) Davis testified he had never noticed that Claimant had written "Tech Service" written on any tools; however, he had never instructed anyone to write anything on the company's tools, and his company's tools did not have "Tech Service" written on them. (R. pp. 302, 1440–91.) Notably, nothing in the record before

the Commission indicates that Claimant returned the tools to Tech Services, and importantly, the record indicates that Claimant later applied for a job with a different HVAC company, Chilly- Pepper, and represented in his application that he had his own tools. (R. pp. 1492–93.)

When Claimant fell on November 8, 2013, he was wearing a sweater over a Tech Services uniform. (R. pp. 157, 160–161.) Although Hamilton did not believe Claimant was wearing a uniform at the time of his fall, he remembered that Claimant was wearing a brown sweater, khaki pants, and brown shoes. (R. pp. 342–43.) Claimant testified he had Tech Services cards in his pocket at the time of his fall, and that he usually passed them out when he was working on Tech Services jobs. (R. p. 162.)

Claimant testified that after March 2013, he went on several service calls for Tech Services. (R. pp. 178–80.) According to Davis, he generally sends subcontractors on service calls when his employees are busy working on other jobs or are working on jobs across town, and he confirmed he had sent Claimant on service calls as a subcontractor. (R. pp. 308–09.) As an example, Claimant testified about an October 17, 2013 service call that he went on for Tech Services wherein he performed warranty work on an HVAC unit and he sold the customer a service contract. (R. pp. 177–78.) He stated he used a service order invoice provided by Tech Services, and he filled it out and gave a copy to the customer. (R. pp. 178–79.) According to Claimant, he gave Tech Services the check that the customer gave him for the service contract and he submitted an invoice to Tech Services to get paid for the work he performed. (R. pp. 178, 469.) Davis testified that

subcontractors are able to sell service contracts and that subcontractors going on service calls are provided blank service order invoices. (R. p. 323.)

According to Claimant, he regularly picked up materials for his Tech Services jobs at Gateway Supply, which he would sign for on behalf of Tech Services. (R. pp. 140, 176.) He testified he had permission to sign for materials at Gateway Supply, and he stated that Tech Services paid the bills for the materials. (R. pp. 176–77.) Claimant admitted that subcontractors can pick up materials at Gateway Supply if they are authorized to do so. (R. pp. 237–38.) Davis corroborated this, testifying that Claimant had permission to sign for materials at Gateway Supply, and that it was his standard practice to allow subcontractors to sign for materials. (R. pp. 322, 332.)

Claimant testified that after March 2013, he had damaged a customer's home when he was "changing out a unit" in the customer's attic. (R. p. 187.) He stated that he had issues picking up the unit by himself, so he called a friend to help him. (R. p. 187.) Claimant explained that as he and his friend were moving the unit, his foot stepped over the edge of the plywood attic floor and damaged the sheetrock of the customer's ceiling. (R. p. 187.) According to Claimant, he paid for the cost of the repairs to the customer's home. (R. p. 188.) Davis corroborated this, noting that he usually follows up with customers to ensure they are satisfied with the work done on their homes; however, he found out about the damage to the customer's ceiling because the customer called him and complained. (R. p. 307.) Davis testified Claimant had his friend help him with the job, although he did not know whether Claimant paid his friend for helping him. (R. p. 307.)

According to Claimant, Hamilton would often call him to let him know his services were needed on a particular jobsite at a particular time. (R. p. 196.) He testified Davis and Hamilton determined when he was supposed to work, where he was supposed to work, and what work Claimant was to perform on a particular jobsite. (R. p. 195.) Claimant stated that Davis and Hamilton inspected the quality of the work he provided, and on occasion, they asked him to correct his work when there were issues with its quality. (R. pp. 196–97.) Davis also testified that whenever he had a job for Claimant, he would tell Claimant what type of job it was, the size of the job, and when the job had been scheduled with the customer. (R. p. 306.) According to Davis, after Claimant told him he had finished a particular job, either he or Hamilton would follow up with the customer to ensure they were satisfied with the work. (R. p. 307.) Hamilton testified that on occasion there were issues with the quality of Claimant's work product: sometimes Claimant would fix it, and if he did not, Hamilton would have to send an employee to fix it. (R. p. 344.)

Claimant testified that he believed he could be fired from Tech Services after March 2013. (R. p. 201.) Claimant asserted that if he was fired from Tech Services after March 2013, he would have to find another HVAC company to work for. (R. p. 201.) Davis admitted he had never fired Claimant. (R. pp. 142–43, 318.) However, Davis testified that Claimant "came to me wanting to go into business for himself, so he didn't get terminated. That's called quitting." (R. p. 324.)

ARGUMENT

This appeal addresses the jurisdictional question of whether Claimant was an independent contractor or employee for Tech Services, Inc. ("Tech Services") at the time of Claimant's accident. The Commission erroneously resolved this question against Tech Services, finding Claimant was an employee of Tech Services at the time of his accident. This Court should reverse the Commission's decision because a genuine examination of Claimant's relationship with Tech Services reveals that an employment relationship did not exist at the time of Claimant's accident.

In order for an injured individual to receive workers' compensation benefits, an employer-employee relationship must have existed at the time of the injury. *Shatto v. McLeod Regional Medical Center*, 406 S.C. 470, 475, 753 S.E.2d 416, 419 (2013). In the workers' compensation context, the question of whether an employment relationship existed at the time of an alleged injury is jurisdictional; thus, the Court "may take its own view of the preponderance of the evidence." *Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 299, 676 S.E.2d 700, 702 (2009)). Accordingly, the standard of review in appeals from the Commission addressing the jurisdictional question of whether a claimant was an employee or independent contractor at the time of injury is *de novo*. *Paschal v. Price*, 392 S.C. 128, 131-32, 708 S.E.2d 771, 773 (2011). The Court is not required to give any deference to the findings of the Commission, particularly where the Commission declines to make findings concerning the credibility of witnesses. *Id.* at 133, 708 S.E.2d at 773.

"Under settled law, the determination of whether a claimant was 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." *Wilkinson*, 382 S.C. at 299, 676 S.E.2d at 702. "It is not the actual control then exercised, but whether there exists the right and authority to control and direct the particular work or undertaking, as to the manner or means of its accomplishment." *Young v. Warr*, 252 S.C. 179, 189, 165 S.E.2d 797, 802 (1969). In contrast, "'An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods, without being subject to the control of his employer except as to the result of his work.'" *Id.*

In determining whether the purported employer had the right to control the worker in the context of workers' compensation, the South Carolina Supreme Court has set forth "four factors to 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; [and] (4) right to fire." *Wilkinson*, 382 S.C. at 299, 676 S.E.2d at 702. Importantly, the Court considers each factor with equal force, and the mere presence of one factor indicating an employment relationship is not dispositive of the inquiry. *Id.*

I. A GENUINE EXAMINATION OF THE RELEVANT FACTORS SHOWS CLAIMANT DID NOT HAVE AN EMPLOYMENT RELATIONSHIP WITH TECH SERVICES AT THE TIME OF HIS INJURY, AND THAT CLAIMANT WAS, IN FACT, IN BUSINESS FOR HIMSELF.

The evidence before the Commission, when viewed as a whole, shows that Claimant knew he was in business for himself and did not have an employment relationship with Tech Services at the time of his injury. The evidence before the

Commission further shows that at the time of his injury, Claimant knew he had his own workers' compensation policy, that he had excluded himself from it, and that he knew he was not covered under Tech Services' policy because he was not an employee of Tech Services. Moreover, a genuine examination of the four employment factors shows Claimant was not an employee of Tech Services at the time of his injury.

A. At the time of Claimant's injury, Tech Services did not control the details of Claimant's work.

The testimony and evidence before the Commission, when viewed as a whole, shows that Tech Services did not control the details of Claimant's work. (R. pp. 29–54.) Claimant, through his own testimony, painted a stark picture of the degree of control exercised by Tech Services before and after Claimant decided to go into business for himself. First, Claimant testified about the hard stance that Davis took on employees moonlighting, and he testified that if Davis found out that an employee was moonlighting, "he'd fire us in a heartbeat." (R. pp. 151, 193.) Claimant admitted that before March 2013, he was warned repeatedly by Davis and Hamilton about doing side work, yet he did it anyway, noting it was "just a matter of if you get caught or not." (R. p. 190.) Davis testified he had caught Claimant doing side work while Claimant was still an employee, and he stated that he would have fired Claimant but for the fact that Claimant is his first cousin. (R. p. 289.)

Also compelling is Claimant's testimony about the extent of control that Tech Services exercised over its employees. Claimant testified that before employees could pick up their weekly paychecks, they had to have their company-issued work vehicles inspected for cleanliness. (R. pp. 252–53.) According to Claimant, one of the benefits of

not driving the company van was that he no longer had to undergo those inspections. (R. p. 253.) Moreover, another benefit of working as a subcontractor was that he no longer had to worry about Davis or Hamilton giving him grief for having a friend ride with him, and he no longer had to worry about Davis or Hamilton asking him if he was going to a side job when they saw him driving his own vehicle around town. (R. pp. 247, 253.) After Claimant purchased his own workers' compensation insurance, started working as a subcontractor, and started driving his own vehicle, Claimant no longer had to undergo the control that Tech Services exerted over its employees because Claimant was no longer an employee.

Further, although Claimant testified that after March 2013, he was expected to work for Tech Services "every day," the evidence in the record before the Commission does not support Claimant's testimony. (R. p. 151.) Claimant submitted his invoices to Tech Services weekly, beginning with his first invoice submitted on March 4, 2013. (R. pp. 185, 1249–1422.) Notwithstanding Claimant's unsupported assertion that he was expected to work for Tech Services "every day" after March 2013, the invoices that Claimant created and submitted on his own show that Claimant managed to give himself over thirteen weeks off from work in the approximately nine months he worked as a subcontractor for Tech Services. (R. pp. 151, 1249–1422.)

While Claimant asserted Tech Services controlled the performance of his work after March 2013, Davis testified about the manner in which he would engage Claimant's services. (R. pp. 194, 306–07.) According to Davis, he would inform Claimant that he had a particular job for Claimant, such as "a change out", provide details regarding the

nature of the job, let Claimant know the location of the job and when the work was scheduled with the customer, and "from that point he would let me know when he got it done." (R. p. 306.) Davis explained that either he or Hamilton would follow up with the customer afterwards to ensure they were satisfied with the quality of the work performed by Claimant. (R. p. 307.) Claimant admitted that Davis and Hamilton inspected the quality of his work product, and on occasion, they would ask Claimant to fix his work. (R. pp. 196–97.) Hamilton confirmed this too, noting that he had previously had some issues with the quality of Claimant's work product, and that sometimes Claimant would fix it and other times he would have to send an hourly employee to do it. (R. pp. 344–45.) Although Tech Services took responsibility for the quality of its subcontractor's work product, the evidence in the record does not show that Tech Services directed how Claimant was to do that work.

When viewed as a whole, the record does not support Claimant's assertion that Tech Services controlled the details of the work that it contracted Claimant to perform. Instead, a genuine examination of the record shows that Tech Services did not direct the manner or means in which Claimant performed the jobs that Tech Services contracted with Claimant to perform. Instead, the record shows that after Tech Services engaged the services of Claimant's business, Claimant did the work according to his own methods, at times inviting a friend to assist him in his work, and the only control Tech Services exercised over the jobs it contracted Claimant's business to perform was as to the end result of the work.

B. At the time of Claimant's injury, Claimant had furnished himself with the equipment he needed to perform the job Tech Services contracted Claimant to perform.

As is common in the industry, Tech Services required Claimant to provide it with a certificate showing Claimant's business was covered by a workers' compensation insurance policy before it would engage Claimant's subcontractor services. (R. p. 295.) This is ostensibly because if Tech Services failed to do so, it could be held liable for injuries sustained by Claimant's business's employees under the Workers' Compensation Act as a statutory employer. S.C. Code Ann. § 42-1-415(A); *Barton v. Higgs*, 381 S.C. 367, 370-71, 674 S.E.2d 145, 146-47 (2009). Here, Claimant obtained a workers' compensation insurance policy for his business, which was in effect at the time of Claimant's injuries. (R. pp. 1244–48.) However, the record also shows that Claimant excluded himself from his own policy, and it shows that at the time of Claimant's injury, Claimant knew he was not covered under his business's policy. (R. pp. 224–25, 304, 336, 1235–36, 1240–48.)

The record also shows that Claimant had furnished himself with his own van, which Claimant drove to the job where he was injured. (R. pp. 231, 238, 252–53.) Before Claimant began working as a subcontractor, he drove a company van supplied by Tech Services. (R. pp. 298–99.) Claimant was not responsible for gas, maintenance, insurance, or registration for the company van; however, after Claimant began working as a subcontractor, he supplied his own vehicle and he was responsible for its gas, maintenance, insurance, and registration. (R. pp. 253, 298–99.) Without the vehicle

supplied by Claimant, Claimant would not have been able to provide his services—it was Claimant's most essential piece of equipment.

Further, Claimant's own testimony shows he supplied himself with the ladder that he fell from on November 8, as he admitted he took the ladder from the company van and transferred it to his own vehicle when he stopped driving the company van. (R. pp. 140, 238.) Although Claimant testified Tech Services supplied him with other tools, Davis maintained that the tools that Claimant had, which Claimant wrote "Tech Service" on after March 2013, were ones Claimant had accumulated over the years and transferred to his own van after Claimant began working as a subcontractor. (R. pp. 140, 165, 213, 238, 301.) Davis admitted he did not check behind Claimant after he started working as a subcontractor, explaining, "he was family and I was trying to help him." (R. p. 301.) There is no explanation in the record for why the only ladder and equipment bearing the name "Tech Service" were the ones in Claimant's possession, but a fair inference would be that Claimant wrote "Tech Service" on the equipment *after* his accident. Moreover, nothing in the record shows that Claimant ever returned the tools to Tech Services, and Claimant subsequently represented in a job application that he had his own tools. (R. pp. 1492–93.) Regardless of whether Claimant took the tools or Davis implicitly gave them to Claimant in an attempt to help his cousin's fledgling business, as of the date of Claimant's injury, Claimant supplied himself with the tools he needed to get the job done.

It is undisputed that Claimant was wearing a Tech Services uniform when he fell from the ladder; however, the Court's examination of the facts in this case should not occur in a vacuum. Claimant worked for Tech Services for over a decade until he went

into business for himself in March 2013. It is understandable that Claimant would still have his old Tech Services uniforms to wear. Furthermore, in the HVAC repair industry, it is important for customers allowing service technicians to enter their homes to know who the stranger at the other end of the door is. The uniform and business cards help customers understand that the person at their door was sent by the same HVAC company they called for service—they are symbols of affiliation, not control. Finally, nothing in the record even implies that Davis or Tech Services required Claimant to wear the uniform or even cared whether or not Claimant wore the uniform after March 2013.

C. At the time of Claimant's injury, the method in which Tech Services paid Claimant strongly favors an independent contractor relationship.

The facts in the record show that the method in which Tech Services paid Claimant strongly favors an independent contractor relationship. "When considering this prong, typically a court looks to whether the claimant was paid by the job or by the hour and how the claimant filed her taxes." *Lewis v. L.B. Dynasty*, 411 S.C. 637, 645, 770 S.E.2d 393, 397 (2015). "[T]he payment prong reflects the putative employer's interest in a worker's productivity and efficiency and whether it would indicate the retention of control over the manner in which the job is performed." *Id.*

Before March 2013, Claimant was paid $14.00 per hour and his wages were reported on a W-2. (R. pp. 218, 292–93, 299.) Claimant asserted his hours were based on time set forth in a flat rate pricing book, whereas Davis maintained that Claimant's hours were based the actual time that Claimant worked and that he has never paid his employees using the flat rate pricing book. (R. pp. 182, 292–93.) Although the parties

dispute how the hours that Claimant worked were calculated, his pre-March 2013 pay was based on the amount of time he worked, and his wages were reported on a W-2. However, after March 2013 and at the time of Claimant's injuries, Claimant was paid by the job based on the invoices he submitted to Tech Services, and the amounts Tech Services paid Claimant were reported on a 1099. (R. pp. 1249–1422.)

D. At the time of Claimant's injury, Tech Services did not have the right to terminate Claimant without liability

The facts in the record unambiguously establish that Tech Services did not have the right to terminate Claimant from a job without incurring liability under contract law. "[I]n any relationship there exists some right to terminate the arrangement." *Lewis v. L.B. Dynasty*, 411 S.C. 637, 645, 770 S.E.2d 393, 397 (2015). "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 645-46, 770 S.E.2d at 397. "In essence, examining this factor requires the Court to look to whether liability exists if the work is prematurely interrupted." *Id.* at 646, 770 S.E.2d at 397.

Claimant testified that Hamilton, the manager at Tech Services, typically engaged Claimant's services by calling Claimant and letting him know his services were required at a particular jobsite at a particular time. (R. p. 196.) Davis also testified that whenever he had a job for Claimant, he would give Claimant the basic details regarding the job, and that after Claimant let him know he had finished his work on the job, either he or Hamilton would follow up with the customer to ensure they were satisfied with the work product. (R. pp. 306–07.) If Tech Services, after engaging Claimant's services for a

particular job, decided to terminate its relationship with Claimant, it would remain liable to Claimant under principals of contract law. Thus, Tech Services could not terminate Claimant without liability.

Although Claimant testified he believed he could be fired after March 2013, that testimony does not support the "right to fire" factor of the employment relationship inquiry. The inquiry is not whether the relationship can be terminated; rather, the inquiry focuses on whether the relationship can be terminated without liability. *Lewis*, 411 S.C. 646, 770 S.E.2d at 397. Admittedly, Claimant was never fired from Tech Services. However, Davis testified that when Claimant decided to go into business for himself, "That's called quitting." (R. p. 324.)

II. THE COMMISSION'S DETERMINATION THAT AN EMPLOYMENT RELATIONSHIP EXISTED BETWEEN CLAIMANT AND TECH SERVICES WAS BASED ON IMMATERIAL INFORMATION

The Commission relied heavily upon information that is not relevant to the four factors of the employment relationship inquiry. (R. p. 29–54.) *Wilkinson*, 382 S.C. at 299, 676 S.E.2d at 702. Information pertaining to whether or not Claimant had a business or HVAC license at the time of his accident, what Tech Services represented to the City of Myrtle Beach in regards to whether it would be using subcontractors on the job where Claimant's accident occurred, and Claimant's authority to bind Tech Services in contracts with third parties does not speak to Tech Services' right to control Claimant in the performance of his work. *Wilkinson*, 382 S.C. at 299, 676 S.E.2d at 702.

Although Claimant's lack of proper licensing arguably limited the ability of Claimant to grow his business and increase his clientele, it does not establish that Tech

Services had any degree of control over Claimant in the performance of his work. This Court cannot hold Tech Services responsible for Claimant's poor business decisions.

Moreover, Claimant's authority to sell service contracts to Tech Services' customers when he was on Tech Services' service calls and to sign for materials at Gateway Supply also does not establish that Tech Services had any degree of control over Claimant in the performance of his work. Nothing in the record before the Commission indicates Tech Services required Claimant to offer service contracts to Tech Services' customers, although the record does show that Claimant billed Tech Services for his work in selling service contracts when he closed a sale. (R. pp. 178, 1406.) Moreover, nothing in the record indicates Tech Services required Claimant to obtain materials at Gateway Supply, although the record clearly shows that Claimant was authorized to do so. (R. pp. 140, 176–77, 237–38, 322, 332.)

Furthermore, the Court's four-factor employment inquiry does not encompass representations concerning affiliation made to third parties—the focus is on the relationship between the worker and the purported employer. Tech Services' failure to check a box on a permit application with the City of Myrtle Beach has no bearing on whether Tech Services' relationship with Claimant was such that it had the right to control Claimant in the performance of his work.

CONCLUSION

For the reasons set forth herein, this Court should reverse the Commission's determination that Claimant was an employee of Tech Services because the record

establishes that Claimant was in business for himself as a subcontractor at the time of his accident.

Respectfully submitted,

CALLISON, TIGHE & ROBINSON, LLC
Richard C. Detwiler (S.C. Bar 6473)
Jacqueline M. Pavlicek (S.C. Bar 100556)
Post Office Box 1390
Columbia, SC 29202-1390
Tel: (803) 404-6900
Fax: (803) 404-6901
rickdetwiler@callisontighe.com
pavlicek@callisontighe.com

ATTORNEYS FOR APPELLANTS

February 4, 2016

Columbia, South Carolina

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

February 4, 2016

CALLISON, TIGHE & ROBINSON, LLC
Richard C. Detwiler (S.C. Bar 6473)
Jacqueline M. Pavlicek (S.C. Bar 100556)
Post Office Box 1390
Columbia, SC 29202-1390
Tel: (803) 404-6900
Fax: (803) 404-6901
rickdetwiler@callisontighe.com
pavlicek@callisontighe.com

ATTORNEYS FOR APPELLANTS