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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
APPELLATE PANEL, WORKERS' COMPENSATION COMMISSION

Opinion No. 4865 (S.C. Ct. App. filed Aug. 10, 2011)

Mildred H. Shatto Petitioner,

v.

McLeod Regional Medical Center Respondent,

and

Staff Care, Inc., and
Travelers Insurance Defendants.

APPENDIX - VOLUME I

Blake A. Hewitt
Margaret Miles Bluestein
BLUESTEIN, NICHOLS,
THOMPSON & DELGADO
Post Office Box 7965
Columbia, South Carolina 29202
(803) 779-7599

Attorneys for Petitioner

Walter H. Barefoot
TURNER PADGET GRAHAM & LANEY
Post Office Box 5478
Florence, South Carolina 29502
(843) 662-9008

Carmelo B. Sammataro
TURNER PADGET GRAHAM & LANEY
Post Office Box 1473
Columbia, South Carolina 29202
(803) 254-2200

Attorneys for Respondent

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Walter H. Barefoot
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(843) 662-9008

Carmelo B. Sammataro
TURNER PADGET GRAHAM & LANEY
Post Office Box 1473
Columbia, South Carolina 29202
(803) 254-2200

Attorneys for Respondent

INDEX

(VOLUME I)

Op. No. 4865 (S.C. Ct. App. filed Aug. 10, 2011)	1
Petition for rehearing	17
Order denying rehearing	28
Brief of Appellant (McLeod)	30
Brief of Respondent (Ms. Shatto)	63
Amended Brief of Respondents (Staff Care & its carrier)	94
Reply Brief of Appellant (McLeod)	119

(VOLUME II)

(Materials from the Record on Appeal)

Orders and Judgments

Appellate Panel Decision and Order	133
Hearing Commissioner Decision and Order	161

Pleadings

McLeod's June 12, 2008, Form 51 (Answer)	217
McLeod's May 29, 2008, Form 51 (Answer)	218
Staff Care's May 20, 2008, Form 51 (Answer)	219
Ms. Shatto's June 2, 2008, Form 50 (Request for Hearing)	221
McLeod's Form 30 (Request for Commission Review)	222

Court Transcripts

Transcript (appellate panel hearing)	232
Transcript (hearing commissioner)	256

Exhibits and Other Materials

Deposition transcript (Ms. Shatto)	366
APA submissions (McLeod)	412
APA submissions (Staff Care & its carrier)	548
APA submissions (Ms. Shatto)	626
Certificate of Counsel	627

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Mildred H. Shatto
Employee/Claimant, Respondent,

v.

McLeod Regional Medical
Center and Key Risk
Management Services, Inc.,
Employer/Carrier, Appellants,

and

Staff Care, Inc., and Travelers
Insurance, Employer/Carrier, Respondents.

Appeal From Richland County
Appellate Panel, Workers' Compensation Commission

Opinion No. 4865
Submitted March 1, 2011 – Filed August 10, 2011

REVERSED AND REMANDED

Walter H. Barefoot and Carmelo B. Sammataro, of
Columbia, for Appellants.

Blake A. Hewitt and Margaret Miles Bluestein, of Columbia, for Respondent Mildred H. Shatto; Candace G. Hindersman, Richard B. Kale, and Michael W. Burkett, all of Columbia, for Respondent Staff Care.

WILLIAMS, J.: On appeal, McLeod Regional Medical Center (McLeod) argues the Appellate Panel of the Workers' Compensation Commission (Appellate Panel) erred in concluding (1) Mildred H. Shatto (Shatto) was an employee of McLeod and (2) Shatto's fall was compensable and not idiopathic in nature. We reverse and remand.¹

FACTS

On March 26, 2007, Staff Care, Inc. (Staff Care), a temporary medical service staffing company located in Irving, Texas, entered into an agreement (the Staffing Agreement) to provide temporary medical services for McLeod Physician Associates.² Pursuant to the Staffing Agreement, Staff Care acted as a placement agent for McLeod and was required to use its best efforts in identifying temporary health care professionals acceptable to McLeod. In addition, the Staffing Agreement required Staff Care to verify the health care providers' medical licenses, arrange and complete travel and housing accommodations, provide malpractice insurance, and pay health care providers on behalf of McLeod.

Shatto, a certified registered nurse anesthetist (CRNA), contacted Staff Care after finding a posting on the internet. Shatto was unaware that Staff Care was going to assign her to McLeod. Shatto sent Staff Care her resume, copies of her licenses and medical certifications, her health record, and references. On October 10, 2007, Shatto entered into a Provider Services Agreement (the Provider Agreement), which specifically indicated Shatto was an independent contractor with Staff Care. The next day, Shatto signed an independent contractor declaration form, stating Staff Care "does not have

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

² McLeod Physician Associates is listed as the Client in the Staffing Agreement. For ease of reference, we refer to McLeod Physician Associates and McLeod Regional Medical Center as McLeod throughout this opinion.

the right to direct or control the manner in which I practice my profession." Additionally, the independent contractor declaration form provided that Shatto was not an employee of Staff Care; Shatto was responsible for paying local, state, and federal taxes; and Shatto was not entitled to unemployment and workers' compensation benefits from Staff Care. On October 24, 2007, Staff Care sent Shatto a confirmation letter regarding her assignment to provide temporary medical services as a CRNA for McLeod from November 2007 to February 2008. The letter also indicated Staff Care agreed to pay an hourly rate of \$95 and a \$25 per diem. Additionally, Shatto chose which shift she wanted to work while at McLeod.

On the first day of her assignment, Shatto reported to Keith Torgerson, the chief CRNA of McLeod, and received an orientation of the layout of the operating and supply room. During her assignment, Shatto underwent a McLeod employee drug screening and employee health assessment, received an identification badge, and signed several forms, including McLeod's health employee validation form, dress code, parking, and corporate integrity program policies. Shatto acknowledged she received a copy of her job description and completed a temporary employee emergency information sheet, a medical history form, and a mandatory Occupational Safety and Health Administration Respirator Medical Evaluation Form. McLeod also furnished Shatto with scrub suits, disposable paper hats, paper booties, anesthesia machines, monitoring equipment, blood pressure cuffs, pulse oximeters, a stethoscope, drape clamps, laryngoscopes, and blades.

On December 21, 2007, Shatto fell on the operating room floor while assisting in the anesthetization of a patient. She did not recall tripping over any items but believed she tripped over either the bed cords or an I.V. pole. Shatto was treated in McLeod's emergency room and diagnosed with a contusion to the right eye. At the end of December 2007, Shatto's assignment with McLeod was terminated.

On April 30, 2008, Shatto filed a Workers' Compensation Commission Form 50 (Employee's Notice of Claim and/or Request for Hearing) against McLeod and Staff Care. Shatto filed an amended Form 50 on June 2, 2008. Shatto's requests for a hearing against McLeod and Staff Care were consolidated, and a hearing was held on August 21, 2008. The Workers'

Compensation Commissioner (the Single Commissioner) concluded Shatto was entitled to workers' compensation benefits as a result of her fall.

The Single Commissioner found an employer-employee relationship existed between McLeod and Shatto and further held (1) McLeod controlled the details of Shatto's work; (2) McLeod furnished Shatto with equipment; (3) McLeod fired Shatto; (4) McLeod was responsible for paying Shatto; and (5) Shatto sustained an injury by accident while in the course of employment. Additionally, the Single Commissioner concluded Shatto was a "borrowed servant" under the borrowed servant doctrine and found (1) a contract, even if it was implied, existed between Shatto and McLeod; (2) Shatto was contracted to provide specific health care services as a CRNA, and McLeod is a general hospital healthcare provider with nurse anesthetists; and (3) McLeod controlled the details of Shatto's work. McLeod appealed the Single Commissioner's decision, and the Appellate Panel affirmed the Single Commissioner. This appeal followed.³

STANDARD OF REVIEW

The existence of an employment relationship is a jurisdictional issue for purposes of workers' compensation benefits and is reviewable under a preponderance of the evidence standard. Brayboy v. WorkForce, 383 S.C. 463, 466, 681 S.E.2d 567, 568 (2009).

LAW/ANALYSIS

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 or her work. Wilkinson ex. rel. Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 299, 676 S.E.2d 700, 702 (2009). In evaluating the right of control, the court examines four factors that serve as a means of analyzing the work relationship as a whole: (1) "direct

³ Pursuant to a statutory modification of section 42-17-60 of the South Carolina Code (2010), injuries occurring on or after July 1, 2007, are appealed directly to this court.

evidence of the right or exercise of control"; (2) "furnishing of equipment"; (3) "method of payment"; and (4) "right to fire."⁴ Id.

A. EMPLOYER-EMPLOYEE RELATIONSHIP

At the outset, McLeod contends Shatto's employment did not create an employer-employee relationship because the only contract of employment in this case was the Provider Agreement between Staff Care and Shatto.

Despite McLeod's argument, we find the existence of an employer-employee relationship is not conclusively based on the existence of a contract of employment. See Spivey v. D.G. Constr. Co., 321 S.C. 19, 22, 467 S.E.2d 117, 119 (Ct. App. 1996) ("[An employment] contract may be oral or written, and also may be implied from the conduct of the parties. It is enough if the circumstances show unequivocally that the parties recognize the relationship."). Because the crucial question is the right to control, we find the dispositive question is whether the four-factor test from Wilkinson is satisfied.

1. Direct evidence of the right or exercise of control

In deciding whether McLeod had the right to exercise direct control over Shatto, the Appellate Panel found (1) Shatto did not have control over which patients she would anesthetize or the order in which she would

⁴ In analyzing the right to control factors, the Appellate Panel's decision cited to Dawkins v. Jordan, and noted that "any single factor is not merely indicative of, but, in practice, virtually proof of, the employment relation; while, in the opposite direction, contrary evidence is as to any one factor at best only mildly persuasive evidence of contractorship, and sometimes is of almost no such force at all." 341 S.C. 434, 439, 534 S.E.2d 700, 703 (2000). This proposition was expressly overruled by our supreme court in Wilkinson. The Wilkinson court stated, "We overrule Dawkins' analytical framework, for it most assuredly skews the analysis to a finding of employment. We return to our jurisprudence that evaluates the four factors with equal force in both directions." Wilkinson, 382 S.C. at 300, 676 S.E.2d at 702 (footnote omitted). Therefore, in determining whether Shatto was an employee of McLeod, we apply the standard enunciated in Wilkinson.

anesthetize patients because she received her assignments from her supervisor; (2) Shatto was required to report to Torgerson or the head CRNA on duty; (3) Torgerson had to sign Shatto's time sheet before she submitted it to Staff Care; (4) Shatto had to administer anesthesia and manage patients after surgery per McLeod's standards; (5) Shatto provided instruction and education to McLeod's student nurse anesthetists; (6) Shatto was required to attend at least 50% of departmental and information meetings; (7) Shatto was required to begin work at 9:00 a.m.; and (8) Shatto was required to sign a statement acknowledging that she understood her job description at McLeod and would comply with McLeod's dress code, corporate integrity program, confidentiality, parking, and name tag policies.

McLeod argues the right to control factor does not favor an employment relationship with Shatto because its control over Shatto was mandated by law. Shatto does not dispute that McLeod was required by law to give Shatto a job description, conduct a drug screening and orientation, and provide Shatto with an identification badge. Nevertheless, Shatto contends McLeod's control over Shatto exceeded the amount required by law because Shatto provided instructions to student nurse anesthetists, McLeod presented Shatto with a dress code, and McLeod had to sign Shatto's time sheets. We find Shatto's argument unpersuasive based on our review of the preponderance of the evidence.

We are aware that hospitals are subject to an array of legal and governmental regulations to ensure proper medical standards for healthcare professionals providing optimal patient care. However, because McLeod's control over Shatto was, in substantial part, derived by law, we find the right to control factor does not favor an employer-employee relationship based on the preponderance of the evidence in the record. See Wilkinson, 382 S.C. at 302, 676 S.E.2d at 703 (noting that requiring a worker to comply with the law is not evidence of control by the putative employer).

First, we find Shatto was required to comply with McLeod's anesthesia standards during her assignment. See S.C. Code Ann. § 40-33-20(20) (2011) (stating a CRNA shall practice pursuant to approved written guidelines within the facility where practice privileges have been granted). McLeod was also legally required to provide Shatto with a job description and an

identification badge. See S.C. Code Ann. § 40-33-34(H)(2)(b)(ii) (2011) (stating a CRNA must be provided a copy of the job description); see also S.C. Code Ann. § 44-7-3430 (Supp. 2010) (stating all clinical staff, clinical trainees, medical students, interns, and resident physicians of a hospital shall wear badges clearly stating their names, their department, and their job or trainee title).

Moreover, McLeod was required to provide Shatto with an orientation and to ascertain Shatto's health history and health status, as well as her educational and training background pursuant to the Minimum Standards for Licensing Hospitals and Institutional General Infirmaries regulations under the South Carolina Code of Regulations. See 24A S.C. Code Ann. Regs. 61-16 § 204(A) (1976) (stating applications for employment at a hospital or institutional general infirmaries shall contain age, education, training, experience, health, and personal background of each employee); 24A S.C. Code Ann. Regs. 61-16 § 204(B) (Supp. 2010) (stating all new employees and volunteers who have contact with patients shall have a physical examination within one year prior to employment including a tuberculin skin test no more than three months prior to employment, unless a previously positive reaction can be documented); 24A S.C. Code Ann. Regs. 61-16 § 204(C) (1976) (stating all new personnel shall be oriented to acquaint them with the organization and environment of the facility, their own specific duties and responsibilities, patients' needs, and the emergency/disaster plans of the facility).

Furthermore, even though Torgerson, McLeod's chief CRNA, signed Shatto's time sheets, Staff Care required a McLeod representative's signature on the provider invoices for payment and malpractice documentation. Shatto testified she was told to take the provider invoice to Torgerson. Specifically, in a November 13, 2007 letter to Shatto, Staff Care stated, "[Staff Care] cannot present your Provider Invoice for payment without [the Client Representative] signature." Staff Care's requirement that a McLeod representative sign a provider invoice does not equate to the right of control.

Additionally, we note Shatto was treated differently from McLeod's CRNA employees. In contrast to CRNAs employed by McLeod, Shatto was never "on call" for work and was only permitted to work in the operating

room. Torgerson testified McLeod CRNAs are allowed to work in the main operating room, cardiac area, obstetrics department, the emergency room, radiology suites, and the catheterization lab. Due to safety concerns and the complexity of different medical environments at McLeod, Torgerson testified contract workers like Shatto were prohibited from working in these areas. Accordingly, we find McLeod did not have the right to control Shatto.

2. Furnishing of Equipment

McLeod contends it was legally required to provide certain medical equipment to Shatto and, as a result, McLeod asserts the furnishing of equipment factor does not favor an employment relationship with Shatto. We agree.

The Appellate Panel found McLeod furnished Shatto with anesthesia and monitoring equipment, blood-pressure cuffs, pulse oximeters, thermometers, scrub suits, disposable paper hats, and paper booties. Further, the Appellate Panel stated:

There is no indication in any of the exhibits, deposition, or hearing testimony that [Shatto] was required to bring her own anesthetics, needles, syringes, tourniquets, inhalation anesthetic masks, tubing, rubber gloves, or other instruments required to perform her duties as a nurse anesthetist, as all of these materials were supplied by McLeod.

During the workers' compensation hearing, Shatto indicated she never owned an anesthesia machine, and temporary CRNAs do not bring anesthesia equipment while on assignment. Shatto estimated McLeod's anesthesia equipment weighed approximately five hundred pounds or more. Shatto further testified she was required to wear scrubs in the operating room and that Torgerson informed her that she did not need to bring a stethoscope, clamps for the drape, laryngoscopes, and blades because McLeod had "plenty." According to Torgerson, a CRNA on assignment has never brought anesthesia equipment because the law mandates McLeod is responsible for

anesthesia equipment. Torgerson also indicated that individuals are required to wear scrubs prior to entry into the operating room.

We find McLeod's furnishing of equipment does not favor an employment relationship with McLeod. Pursuant to the Staffing Agreement, McLeod was required to supply Shatto with customary equipment and supplies according to her specialty. Moreover, the regulations governing the minimum standards for hospitals require McLeod to maintain anesthesia equipment in operable condition. See 24A S.C. Code Ann. Regs. 61-16 § 901 (1976) ("An institutional structure, its components parts, facilities, and all equipment, such as sterilizers, anesthesia machines . . . shall be kept in good repair and operating condition.").

Further, the fact McLeod provided Shatto with sterile clothing prior to entering the operating room is in tandem with the regulatory scheme's emphasis on maintaining a sterile environment in the operating room. See 24A S.C. Code Ann. Regs. 61-16 § 606.2 (1976) ("The operating rooms shall be separated from non-sterile areas and shall be located so as not to be used as a passageway between, or subject to contamination from, other parts of the hospital."). Based on the foregoing, we find McLeod did not provide Shatto's equipment for purposes of creating an employer-employee relationship.

3. Method of Payment

Additionally, McLeod contends the method of payment factor does not favor an employment relationship with Shatto. Particularly, McLeod argues Staff Care (1) directly deposited Shatto's hourly wages; (2) provided Shatto with a per diem, a rental car, and medical malpractice insurance; and (3) paid Shatto overtime wages. McLeod further argues it did not provide Shatto with any employee benefits such as group health insurance, vacation and sick days, or a 401K retirement plan. We agree.

During the hearing, Shatto testified Staff Care deposited her hourly wages into her account and provided a per diem, malpractice insurance coverage, a rental car, and housing. In regard to McLeod's employee benefits, Shatto acknowledged McLeod did not provide her with group health insurance, vacation and sick days, or a 401K retirement plan. Torgersen

testified McLeod employees receive benefits, including vacation time, group health insurance, a 401K retirement plan, continuing education, and medical malpractice insurance. Further, Torgerson indicated McLeod reimbursed Staff Care for Shatto's lodging during her assignment, rental car expenses, medical malpractice insurance coverage, and Shatto's hourly wages. Ms. Diane Bryant of McLeod's payroll department testified a search of McLeod's payroll records did not reveal any payment of wages or earnings directly from McLeod to Shatto.

The Appellate Panel found the method of payment factor favored an employment relationship between McLeod and Shatto and specifically held:

Although McLeod did not directly pay [Shatto], McLeod was ultimately responsible for payment of [Shatto's] salary and expenses per the terms of the [Staffing] Agreement which states [McLeod] shall provide or directly reimburse [Shatto] through [Staff Care] for cost of housing outside [McLeod's] facility, local transportation, en route lodging, en route meals, and reasonable transportation costs to and from [McLeod's] location.

Despite Staff Care paying Shatto's hourly wages and expenses relating to her rental car and lodging, McLeod issued several checks for "contract labor" to Staff Care for payment of Shatto's wages, housing, and rental car expenses. McLeod's payment is consistent with the Staffing Agreement provision which states, "[McLeod] shall provide or directly reimburse [Shatto] through [Staff Care] for cost of housing outside [McLeod's] facility, local transportation, en route lodging, en route meals, and reasonable transportation costs to and from [McLeod's] location." Notwithstanding McLeod's payment to Staff Care for Shatto's services, transportation, and housing expenses, the preponderance of the evidence necessitates our finding that Shatto was not an employee of McLeod.

In reaching this conclusion, we find it particularly noteworthy Shatto did not receive employee benefits. Additionally, Staff Care provided Shatto with a 1099 form indicating her nonemployee compensation of \$13,916 from

Staff Care. Shatto filed a 2007 1040 Profit or Loss From Business (Sole Proprietorship) Schedule C form and listed her nonemployee compensation income of \$13,916, \$3,168 for car and truck expenses, and \$1,342 for supplies. Shatto expended \$94 for continuing education courses, \$595 for dues and subscriptions, \$50 for a registration fee, \$130 for licenses and permits, \$192 for uniforms, and traveled 6,532 business miles. Consistent with Shatto's tax filings as a sole proprietor, Shatto indicated she never thought of herself as an employee of Staff Care but only as an "independent locums looking for a job." As noted above, Shatto submitted a 1099 form, which lends support that she was not an employee of McLeod. See Wilkinson, 382 S.C. at 303, 676 S.E.2d at 704 (finding method of payment did not bear any indicia of an employment relationship when claimant was furnished with 1099 tax forms and filed as a sole proprietorship). Based on the foregoing, we conclude the method of payment factor does not favor an employment relationship.

4. Right to Fire

Pursuant to Wilkinson, McLeod argues the right to fire factor tilts in favor of finding Shatto was not an employee of McLeod because the agreement between McLeod and Staff Care only granted McLeod a right to terminate. We agree.

In finding McLeod had the right to fire Shatto, the Appellate Panel stated the following:

McLeod had the right to fire [Shatto] if they did not find her services to be appropriate. According to the [Staffing Agreement], McLeod had 48 hours in which to notify Staff Care of its intention to accept [Shatto's] services McLeod ultimately fired [Shatto] on December 28, 2007.⁵

⁵ The Appellate Panel finding is based on section B.4 of the Duties of Client section of the Staffing Agreement, which provides that McLeod must notify Staff Care of its intention to accept or not to accept Shatto's services within 48 hours after her presentment to McLeod.

In determining whether McLeod had the right to fire, we find Wilkinson provides guidance on this issue. Initially, our supreme court noted in Wilkinson that the right to fire factor was the most difficult to evaluate because the parties did not confront this issue. Wilkinson, 382 S.C. at 304, 676 S.E.2d at 704. Nonetheless, our supreme court recognized a right to terminate in some form exists in an independent contractor arrangement. Id. However, in analyzing the right to fire factor, our supreme court stated, "[t]he critical inquiry is the term 'fire,' for it embraces the employment relationship." Id. The court then examined the contractual terms between Wilkinson and Palmetto and concluded Palmetto did not have a right to fire. Id. Specifically, the court noted either party could terminate the contract upon thirty days' notice, and the contract stated, "[i]n the event either party commits a material breach of any term of this Agreement . . . the other party shall have the right to terminate this Agreement immediately and hold the party committing the breach liable for damages." Id.

In this case, Torgerson testified Shatto's assignment was terminated because McLeod hired full-time employees, which obviated the need for temporary CRNAs. Shatto admitted Torgerson informed her around the end of November or beginning of December 2007 her services would no longer be needed after the holidays because McLeod hired full-time CRNAs who were slated to start working in the beginning of 2008.

The cancellation section of the Staffing Agreement and the Termination section of the Provider Agreement governed the parties' right of termination. Section C.2 of the cancellation section of the Staffing Agreement provided:

[McLeod] may terminate this AGREEMENT or the services of . . . [Shatto] at any time in writing, subject to the limitations included below in Section D.6,⁶ provided once [McLeod] has accepted [Shatto]

⁶ Section D.6 provided, "[McLeod] agrees that it will not seek to terminate [Shatto's] placement, nor will it refuse [Shatto's] service, for a discriminatory reason, including [Shatto's] race, sex, national origin, religion, age, disability, marital status, veteran status, or any other protected classification."

through verbal or written communication, termination by [McLeod] shall not be effective until 30 days after written notice of termination was received by [Staff Care], [McLeod] will be invoiced, in accordance to the rates agreed upon in the ORDER, for all scheduled time through the effective date of termination. Upon termination, [McLeod] also remains obligated for any and all fees and expenses that are due and owing to [Staff Care] under this AGREEMENT, as well as any other fees, expenses or other charges in connection with services performed by [Shatto] through the effective date of termination.

(emphasis in original)

Section C.3 provided in pertinent part:

If, at any time during the course of this AGREEMENT . . . [McLeod] does not reasonably find the performance of [Shatto] to be appropriate; [McLeod] shall provide written notice of such determination to [Staff Care] and [Staff Care] shall attempt to replace [Shatto]. [McLeod] shall be solely responsible for terminating [Shatto] due to [her] poor performance, including, but not limited to intentional or unintentional dereliction of duties, gross negligence, or loss of hospital privileges, as determined by [McLeod] in its sole discretion. [McLeod] may request that [Staff Care] on [McLeod's] behalf deliver a notice of termination to [Shatto], but under no circumstances shall [Staff Care] have the unilateral right or authority to terminate [Shatto's] assignment.

(emphasis in original).

Section 3.02(a) of the termination section of the Provider Agreement, which Shatto initialed and signed, provided in pertinent part:

Either party may terminate this Agreement and [Shatto] or [McLeod] may terminate an assignment with or without cause by giving at least thirty (30) days prior written notice; provided, however, Staff Care shall not have the right to terminate an assignment for [McLeod] for which [Shatto] is performing services.

Section 3.02(d) of the Provider Agreement stated:

[McLeod], at its sole discretion, will have the right to terminate the services of [Shatto] for any assignment if [McLeod] does not reasonably find the services of [Shatto] to be appropriate; provided, however [McLeod] will be liable to [Shatto] for payment for services performed by [Shatto] prior to termination. [Shatto] will not be entitled to payment for any scheduled services not actually performed by [Shatto] as a result of the termination of an assignment.

Similar to the employer in Wilkinson, we hold McLeod did not have a right to fire and the parties' right of termination was controlled by the Staffing and Provider Agreements, respectively.⁷ Therefore, we find the "right to fire" factor favors McLeod.

⁷ The record does not contain a written notice of McLeod's termination of Shatto as prescribed by the Staffing Agreement and the Provider Agreement. In Wilkinson, the court concluded the contract's language only granted the parties the right to terminate the contract. 382 S.C at 304, 676 S.E.2d at 704. Therefore, even though there is no written notice in the record, the Staffing Agreement and Provider Agreement provided a right of termination, rather than a right to fire. Additionally, Shatto testified Torgerson informed her around the end of November 2007 that McLeod hired four CRNAs who were

Based on the foregoing analysis, we find Shatto was not an employee of McLeod. Because we find Shatto was not an employee of McLeod, we need not address whether Shatto was a borrowed servant because McLeod did not control Shatto's work. Moreover, because we find Shatto was not an employee of McLeod, we need not address whether Shatto's fall was idiopathic in nature. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues when a decision on a prior issue is dispositive).

CONCLUSION

Based on the foregoing, we reverse the Appellate Panel's decision that Shatto was an employee of McLeod and remand for further proceedings on the issue of whether Shatto was an employee of Staff Care.

Accordingly, the Appellate Panel's decision is

REVERSED and REMANDED.

GEATHERS and LOCKEMY, JJ., concur.

scheduled to begin employment in January 2008. Shatto testified Torgerson told her that he had to give her thirty days' notice before termination.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

G. Bryan Lyndon, Commissioner

W.C.C. File Nos.: 0724433 and 0724543

RECEIVED

AUG 25 2011

SC Court of Appeals

Mildred H. Shatto Respondent,

v.

McLeod Regional Medical Center
and Key Risk Management
Services, Inc., ... Appellants,

And

Staff Care, Inc., and
Travelers Insurance Respondent.

PETITION FOR REHEARING

This is an appeal in a workers' compensation case. On August 10, 2011, this Court filed an opinion reversing the South Carolina Workers' Compensation Commission's decision that Mildred Shatto was an employee of McLeod Regional Medical Center when she fell and was injured while working at McLeod as a nurse. *Shatto v. McLeod Reg'l Med. Ctr.*, Op. No. 4865 (S.C. Ct. App. filed Aug. 10, 2011) (Shearouse Adv. Sh. No. 27 at 140). Ms. Shatto files this petition for rehearing pursuant to Rule 221, SCACR.

In reversing, the Court may have overlooked or misapprehended three points.

First, the Court may have overlooked the principle that the workers' compensation system is designed to be over-inclusive as opposed to under-inclusive. Doubts about someone's status are to be construed in favor of a finding of "employee" and not "independent contractor." This benefits injured workers and employers.

Second, the Court may have overlooked or misapprehended the fact that McLeod's having treated Ms. Shatto differently from regular McLeod employees does not illustrate that McLeod did not have the right to control the details of Ms. Shatto's work. There is a specific rationale behind each prong of the employment test. The Court may have overlooked or misapprehended the reasons behind parts of this test in its decision.

Third, the Court may have overlooked that although McLeod treated Ms. Shatto differently than other workers in some respects, Ms. Shatto worked with McLeod employees and did work that was an important part of McLeod's business. The workers' compensation system was designed to include this sort of worker, and this also tends to show McLeod had the right to control Ms. Shatto, just like it had the right to control its staff nurses.

I. Workers' Compensation Is Supposed to Be Over-inclusive as Opposed to Under-inclusive. This Protects the Worker and the Purported Employer, and Gives Effect to Legislative Intent.

The Court's opinion does not mention the principle that doubts about an injured workers' employment status are to be construed in favor of a finding that the worker is an employee. Ms. Shatto raised this principle on pages 16 and 17 of her brief.

The Workers' Compensation Act is remedial legislation "adopted to protect industrial workers against the hazards of their employment[] and to cast upon the industry in which

they are employed a share of the burden resulting from industrial accidents.” *Marchbanks v. Duke Power Co.*, 190 S.C. 336, 362, 2 S.E.2d 825, 836 (1939). The Supreme Court’s decision in *Wilkinson ex rel. Wilkinson v. Palmetto State Transportation Co.*, a decision this Court cited several times in its opinion, described this as “the general principle sanctioned by the Legislature that workers’ compensation laws are to be construed liberally in favor of coverage.” *Wilkinson*, 382 S.C. 295, 300, 676 S.E.2d 700, 702 (2009).

The importance of this principle appears only after examining the reasoning behind it. In their treatise, Arthur and Lex Larson explain society faces three options in deciding how to deal with a disabled worker: (1) it can force the worker to assume the cost of a workplace accident himself; (2) it can “put the worker on county relief, or some other form of direct handout”; or (3) it can grant the worker workers’ compensation. 1 Arthur Larson & Lex K. Larson, *Larson’s Workers’ Compensation Law* § 1.03[2] (2004). Through workers’ compensation, society shifts the financial burden of workplace injuries from the worker to the consumer. This financial burden becomes part of the cost of producing goods or services. 3 Larson & Larson, *supra*, at § 60.05[1]. This is a desirable result because manufacturing the product or providing the service is the occasion for workplace injury.

The idea is that “the general welfare is promoted and conserved by requiring the employer and the workman to yield something of their respective rights toward the establishment of a principle and plan of compensation for their mutual protection and advantage.” *Marchbanks*, 190 S.C. at 352, 2 S.E.2d at 832 (quoting *State v. Benjamin F. Bldg. Co.*, 140 A. 52, 53 (Md. 1928)). For the worker, the Workers’ Compensation Act advantages him by providing modest but immediate compensation. See, e.g., Larson &

Larson, *supra* p. 3, at § 1.03[2] (“There is an attempt to ensure that claimant continues to receive the bare minimum income and medical care to keep the claimant from destitution.”); see also *Cokeley v. Robert Lee, Inc.*, 197 S.C. 157, 168-69, 14 S.E.2d 889, 893-94 (1941) (same principle). For the employer, the Act provides a benefit by relieving him of liability at common law to any employee injured in the course and scope of his work. See, e.g., *Marchbanks*, 190 S.C. at 352-53, 2 S.E.2d at 832.

At its core, this appeal is a question of statutory construction; it calls on the court to construe the Workers’ Compensation Act. The intent of this Act is to cover injuries that occur in the course and scope of producing goods and services, and this intent is expansive for a reason. Construing the Act broadly protects workers who, in general, do not insure themselves against the cost of a workplace accident; it protects employers, by providing them with immunity against common law liability for workplace injuries; and it distributes the financial burden of workplace accidents by building it into the cost of the goods or service that led to the injury. Today, McLeod benefits because its insurance carrier is relieved of the financial liability for Ms. Shatto’s injury. But McLeod also loses the immunity the legislature intended to provide, and the cost of Ms. Shatto’s injury are hers to bear. The facts sometimes command this result, but the Court should take these principles into account.

II. The Fact That McLeod Treated Ms. Shatto Differently from Workers That Were Admittedly McLeod Employees Does Not Illustrate McLeod Did Not Have the Right to Control the Details of Ms. Shatto’s Work.

In two places, the Court placed special emphasis on the fact that McLeod treated Ms. Shatto differently from other nurses that were admittedly McLeod employees. Under the

section of the opinion describing the direct evidence of the right to control, the Court noted that Ms. Shatto “was never ‘on call’ for work and was only permitted to work in the operating room.” Slip op. at 7-8; (Shearouse Adv. Sh. No. 27 at 146-47). In the section of the opinion describing the method of Ms. Shatto’s payment, the Court found it “particularly noteworthy [Ms.] Shatto did not receive employee benefits.” Slip. op. at 10; (Shearouse Adv. Sh. No. 27 at 149).

If McLeod treated Ms. Shatto exactly like a McLeod staff nurse, this would probably be an easy case. The argument would go that Ms. Shatto was indistinguishable from every other nurse in all respects except for her title. But the fact that McLeod treated Ms. Shatto differently from McLeod’s regular employees does not really say anything about the question whether Ms. Shatto qualifies as an employee under the common law. The Court correctly observed that in deciding whether a worker qualifies as an “employee,” the determinative question is “whether the purported employer had the right to control the claimant in the performance of his or her work.” Slip. op. at 143; (Shearouse Adv. Sh. No. 27 at 143) (citing *Wilkinson*, 382 S.C. 299, 676 S.E.2d at 702). This has been described as the power to control not just the result of the work, but “the performance of his work and the manner in which it is done.” *Kilgore Group, Inc. v. South Carolina Employment Sec. Comm’n*, 313 S.C. 65, 68, 437 S.E.2d 48, 49 (1993). Courts look for the right of control using a four factor test, and none of these factors take special account of the fact that the purported employee was treated differently from admitted employees. There is a good reason: disparate treatment does not, in and of itself, really say anything about the presence or absence of the right to control the details of someone’s work.

For example, the reason courts examine the method a worker is paid is because “[p]ayment on a time basis is a strong indication of the status of employment. . . . [and] [p]ayment on a completed project basis is indicative of independent contractor status.” (Brief of Respondent, p.19) (quoting *Larson & Larson*, *supra* page 3, at § 61.06); see also *Youngblood v. North State Ford Truck Sales*, 364 S.E.2d 433, 437-38 (N.C. 1988) (stating the same principle). The justification behind this test is 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.” (Brief of Respondent, p.19) (quoting *Larson & Larson*, *supra* page 3, at § 61.06). This is common sense. A merchant paying someone by the hour is likely to retain the right to control how the worker spends that hour.

Under this reasoning, it should not be particularly noteworthy that Ms. Shatto did not receive employee benefits. There are examples in South Carolina and other jurisdictions of workers being classified as employees despite the fact that they were not given employee benefits or had wages treated as non-employee compensation. See, e.g., *Kilgore*, 313 S.C. at 67, 437 S.E.2d at 49 (no taxes withheld from wages); *Youngblood*, 364 S.E.2d at 436; *Pikaart v. A & A Taxi, Inc.*, Op. No. 27003 (S.C. Sup. Ct. filed July 11, 2011) (Shearouse Adv. Sh. No. 22 at 88, 97-98). Ms. Shatto was paid *by the hour*, and that ought to say something. As the rationale behind examining method of payment describes, this makes it look like Ms. Shatto was *somebody's* employee. The commission thought it import that McLeod ultimately bore the full cost of Ms. Shatto's hourly work, and the commission was justified in thinking this way. The fact that McLeod was being billed hourly for Ms. Shatto's work indicates that McLeod had the right to direct what Ms. Shatto was doing at work.

In a similar fashion, it should not be particularly noteworthy that Ms. Shatto was never “on call” and could only work in the operating room. McLeod treated Ms Shatto differently, there is no question about that. And there is also no question that the reason McLeod required some things of Ms. Shatto (like requiring her to wear scrubs and a name tag, and to undergo a drug screen), is that these things were required by law. Some jobs come with more government regulation than others, and the principle that requiring someone to follow the law does not count as exercising control over them is not a new one. See *Young v. Warr*, 252 S.C. 179, 195, 165 S.E.2d 797, 805 (1969).

But if McLeod exercised *any* more control than the control required by law, that ought to count in favor of a finding of employment. Contra Slip op. at 6; (Shearouse Adv. Sh. at 145) (“[B]ecause McLeod’s control over Shatto was, *in substantial part*, derived by law, we find the right to control factor does not favor an employer-employee relationship[.]”) (emphasis added). The question is not whether most of the control was required by law. In the medical field, a lot of the control would, of necessity, be supplied by law. McLeod did more than require Ms. Shatto to have a physical evaluation and be familiar with its disaster plan (both are required by law). As the Court’s opinion notes, McLeod required Ms. Shatto to attend department meetings and instruct McLeod’s student nurses. Slip op. at 6; (Shearouse Adv. Sh. No. 27 at 145). Ms. Shatto started each day by *reporting to someone else*, and this same someone else signed her timesheet. The parties acted according to contracts – Ms. Shatto’s with Staff Care, and McLeod’s with Staff Care – but what drove the commission’s decision was that the day-to-day operation of this relationship looks substantially more like employment than it does a worker hired to do a specific piece of work

according to her own means. Keith Torgerson, McLeod's chief CRNA, looks a lot more like a boss than someone who hired a contractor to complete a specific job.

III. The Commission's Decision That Ms. Shatto Was an Employee Is Also Supported by the Fact That Ms. Shatto Worked with People Who Were Admittedly McLeod Employees and Her Work Was Necessary to McLeod's Business.

In general, a merchant cannot avoid its obligation to provide workers' compensation benefits to someone who performs work that is part of the merchant's trade or business by farming that work out to an independent contractor. Describing this rule, the Supreme Court has observed:

It was evidently realized by the General Assembly that it would not be fair to relieve the owner of compensation to employees doing work which was a part of his trade or business by permitting such owner to sub-let or sub-contract some part of said work. Doubtless in many instances such contractor would be financially irresponsible, or the number of employees under him would be so small, as in this case, that such contractor would not be required under the Act to carry compensation insurance.

Marchbanks, 190 S.C. at 343-344, 2 S.E.2d at 828. This is commonly referred to as the "statutory employee" doctrine, and Ms. Shatto raised it on page 17 of her brief. There, Ms. Shatto repeated the example from *Larson's Workers' Compensation Law* illustrating where a worker takes a regular part of the production of the owner's business, and where the circumstances demonstrate the worker cannot be expected to bear the cost of industrial accident, that worker is as deserving of workers' compensation as anyone. (Brief of Respondent, p.17) (quoting *Larson & Larson, supra* p.3, at § 60.04[2]).

McLeod is in the business of being a hospital, and there does not appear to be any dispute that McLeod employs staff nurses. Ms. Shatto performed the same type of work

these nurses did—this was, in fact, how McLeod and Staff Care characterized the job. (R.p.495) (McLeod’s order for a “CRNA”). For three months, McLeod used Ms. Shatto *in place of* a regular staff nurse; in fact, McLeod asked Ms. Shatto to *teach* its student nurses. (R.pp.471-73). The services Ms. Shatto provided were (presumably) a necessary part of McLeod’s anesthesia/surgeon team. If they were not, McLeod would not employ any CRNA’s. Like all other nurses, she used McLeod’s equipment, and like all other nurses, McLeod gave her scrubs.

The thing that gives the Court’s resolution of this case surface level appeal is the fact that Ms. Shatto said she sought out this kind of work because, among other reasons, as a locum tenens worker, “you are not an employee under their rules.” (R.p.171). This sort of sentiment is sometimes used by the employer, as McLeod would use it here, to defeat a workers’ compensation claim, and it is sometimes used by the worker, to angle for the right to sue in tort. Eg., *Gentry v. Milliken & Co.*, 307 S.C. 235, 414 S.E.2d 180 (Ct. App. 1992). It should not be given too much credence. The Workers’ Compensation Act is designed to include (not exclude) people and businesses and to channel the costs of workplace accidents into the cost of a business’s goods or services. The question to ask is whether Ms. Shatto thought (or should have thought) that as a locum tenens worker, she would be removed from the system that distributes the cost of workplace accidents among the consuming public.

As Ms. Shatto pointed out in her brief, this is what drove the Supreme Court’s decision in *Wilkinson*. See (Brief of Respondent, p.22). Like Ms. Shatto, Mr. Wilkinson bargained for a higher rate of pay and had a written agreement that was an arms-length negotiation. But unlike Ms. Shatto, Mr. Wilkinson expressly assumed responsibility for the

methods of performance of his work and he agreed in writing to carry workers' compensation coverage. 382 S.C. at 298, 676 S.E.2d at 701. Mr. Wilkinson agreed – expressly – to bear the cost of his own industrial accident. It would not have been fair to sweep him into the coverage of the Act when he had purposefully agreed to be excluded.

Ms. Shatto's record does not contain this sort of assumption of risk. She is more like the consultant in *Youngblood*, who was hired for a short term to install equipment and train employees how to use it. See 364 S.E.2d at 436. Unlike *Wilkinson*, the circumstances of Ms. Shatto's case do not indicate she intended to bear the cost of her workplace accident as a result of bargaining for a higher wage. After all, she was not even bearing the cost of her own malpractice insurance. Staff Care provided that insurance, and Staff Care's contract with McLeod instructed that Staff Care would pass that cost on to McLeod. (R.p.282). Considering again that the purpose of the Workers' Compensation Act is to build the cost of industrial accident into the cost of goods and services, McLeod presumably factors the cost of providing compensation insurance for nurses into the cost of its anesthesia/surgical services. These are the same services Ms. Shatto was performing and McLeod was presumably charging to patients. Ms. Shatto looks like a normal nurse hired to do a limited nursing job over a limited period of time.¹ When the circumstances are taken in this light, the most just and fair conclusion is the conclusion the hearing commissioner and the appellate panel of the Workers' Compensation Commission reached: McLeod had the right to control Ms. Shatto, and under the common law, she is deemed to be an employee.

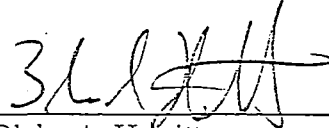
¹The term "limited" is a bit deceiving. Ms. Shatto's "assignment" at McLeod was 40 hours of work per week, for three months. See (R.pp.492-494).

CONCLUSION

Ms. Shatto respectfully submits that the Court's decision overlooked (1) the principle that the workers' compensation system is designed to be over-inclusive as opposed to under-inclusive; (2) the fact that McLeod's having treated Ms. Shatto differently from regular McLeod employees does not illustrate that McLeod did not have the right to control the details of Ms. Shatto's work; and (3) that although McLeod treated Ms. Shatto differently than other workers in some respects, Ms. Shatto worked with McLeod employees and did work that was an important part of McLeod's business. The South Carolina Workers' Compensation Commission examined the circumstances of this situation and determined that McLeod had the right to control Ms. Shatto. In light of the purpose of the Workers' Compensation Act, this was the correct conclusion.

August 25, 2011

Respectfully submitted,



Blake A. Hewitt
Margaret M. Bluestein
BLUESTEIN, NICHOLS,
THOMPSON & DELGADO, LLC
Post Office Box 7965
Columbia, South Carolina 29202
(803) 779-7599
(803) 779-8995 (facsimile)
bhewitt@bntdlaw.com
mmbluestein@bntdlaw.com

Attorneys for Respondent
Mildred H. Shatto

The South Carolina Court of Appeals

Mildred H. Shatto, Employee/Claimant, Respondent,

v.

McLeod Regional Medical Center and
Key Risk Management Services, Inc.,
Employer/Carrier, Appellants,

and

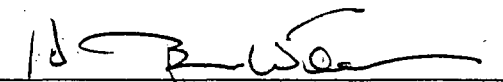
Staff Care, Inc., and Travelers
Insurance, Employer/Carrier, Respondents,

Appellate Panel
Richland County
Trial Court Case No. 2007-WC-40-02443
2007-WC-40-02543

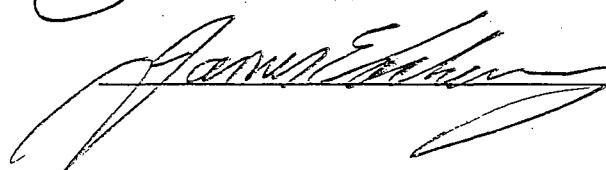
ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing.

It is, therefore, ordered that the Petition for Rehearing be denied.

 J. Williams

 J. Geathers

 J. Lockemy

Columbia, South Carolina

cc: Walter H Barefoot, Esq.
Carmelo B. Sammataro, Esq.
Blake Alexander Hewitt, Esquire
Candace G. Hindersman, Esquire
John S. Nichols, Esquire
Margaret Miles Bluestein, Esquire

FILED

September 22, 2011

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

G. Bryan Lyndon, Commissioner

W.C.C. File Nos.: 0724433 and 0724543

Mildred H. Shatto, Employee/Claimant, ... Respondent,

v.

McLeod Regional Medical Center, Employer/Carrier Appellant,

and

Staff Care, Inc., Employer and Travelers Insurance, Carrier, ... Respondents.

FINAL BRIEF OF APPELLANT

Walter H. Barefoot
Turner Padgett Graham & Laney P.A.
Post Office Box 5478
Florence, SC 29502
Phone: (843) 662-9008
Fax: (843) 667-0828

Carmelo B. Sammataro
Turner Padgett Graham & Laney P.A.
Post Office Box 1473
Columbia, SC 29202
Phone: (803) 254-2200
Fax: (803) 799-3957

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	4
ARGUMENT	7
I. The Commission Misapplied South Carolina Law And Committed Legal Error In Its Determination That Respondent Was Appellant's Employee, Rather Than An Independent Contractor, On The Date Of The Alleged Incident.....	7
A. The Commission's Claimant-Friendly Analysis Has Been Rejected And Expressly Overruled.....	8
B. Respondent Was Not McLeod's Employee Under South Carolina Law.....	9
1. Right To Or Exercise Of Control.....	13
2. Provision Of Equipment	20
3. Method Of Payment.....	23
4. Right to Fire	25
II. The Commission Erred As A Matter Of Law In Holding Respondent's Idiopathic Fall Constitutes A Compensable Injury By Accident Arising Out Of And In The Course And Scope Of Respondent's Employment	28
CONCLUSION.....	29

TABLE OF AUTHORITIES

State Cases

<i>Alewine v. Tobin Quarries</i> , 206 S.C. 103, 33 S.E.2d 81 (1945)	9
<i>Chavis v. Watkins</i> , 256 S.C. 30, 180 S.E.2d 648 (1971).....	10
<i>Crosby v. Wal-Mart Store, Inc.</i> , 330 S.C. 489, 499 S.E.2d 253 (Ct. App. 1998)	28
<i>Dawkins v. Jordan</i> , 341 S.C. 434, 534 S.E.2d 700 (2000)	8
<i>Kilgore Group, Inc. v. S.C. Employment Sec. Comm'n.</i> , 313 S.C. 65, 437 S.E.2d 48 (1993)	<i>passim</i>
<i>Lake v. Reeder Constr. Co.</i> , 330 S.C. 242, 498 S.E.2d 650 (Ct. App. 1998)	9, 10
<i>Nelson v. Yellow Cab Company</i> , 349 S.C. 589, 564 S.E.2d 110 (2002).....	8
<i>Porter v. Labor Depot</i> , 372 S.C. 560, 643 S.E.2d 96 (Ct. App. 2007).....	9, 10
<i>S.C. Workers' Comp. Comm. v. Ray Covington Realtors, Inc.</i> , 318 S.C. 546, 459 S.E.2d 302 (1995)	10
<i>Universal Am-Can, Ltd. v. Workers' Comp. Appeal Bd.</i> , 563 Pa.480, 762 A.2d 328 (2000)	23
<i>Wilkinson v. Palmetto State Transportation Company</i> , 382 S.C. 295, 676 S.E.2d 700 (2009), <i>reh'g denied</i> (May 29, 2009)	<i>passim</i>

Other Authorities

42 U.S.C. § 1395bb(a)	19
42 C.F.R. § 482.11	19
42 C.F.R. § 482.23(b)(6).....	19
2 Arthur Larson & Lex K. Larson, <i>Larson's Workers' Compensation Law</i> , § 61.04 (2000).....	8
<i>S.C. Code Ann.</i> § 40-33-34	17
<i>S.C. Code Ann.</i> § 42-1-130	9
<i>S.C. Code Ann.</i> § 44-7-3410	21
<i>S.C. Code Ann.</i> § 44-7-3430	21
<i>S.C. Code Reg.</i> § 61-16(C).....	18
<i>S.C. Code Reg.</i> § 404.5	20

STATEMENT OF ISSUES ON APPEAL

- I. DID THE COMMISSION MISAPPLY SOUTH CAROLINA LAW AND COMMIT LEGAL ERROR IN ITS DETERMINATION THAT RESPONDENT WAS APPELLANT'S EMPLOYEE, RATHER THAN AN INDEPENDENT CONTRACTOR, ON THE DATE OF THE ALLEGED INCIDENT?
- II. DID THE COMMISSION ERR AS A MATTER OF LAW IN HOLDING RESPONDENT'S IDIOPATHIC FALL CONSTITUTES A COMPENSABLE INJURY BY ACCIDENT ARISING OUT OF AND IN THE COURSE AND SCOPE OF RESPONDENT'S EMPLOYMENT?

STATEMENT OF THE CASE

Appellant McLeod Health ("McLeod") challenges the order of the full South Carolina Workers' Compensation Commission finding it responsible for compensation benefits awarded to a temporary worker employed by third-party staffing agency Respondent Amn Health Care d/b/a Staff Care, Inc. ("Staff Care"), to provide short-term assistance in McLeod's operating room in Florence, South Carolina.

Respondent claims entitlement to benefits resulting from an incident that occurred when she fell to the floor of McLeod's operating room on December 21, 2007, allegedly injuring her face, right eye, nose, right hand, right arm, right shoulder, neck, back, right hip, right knee, along with numbness in her face and right hand and general left-sided weakness. She filed her Form 50, Request for Hearing, on April 30, 2008, seeking additional medical treatment and temporary total disability benefits. McLeod filed its Form 51, Employer's Answer, on May 29, 2008, in which it admitted Respondent's fall but denied Respondent sustained an injury by accident arising out of and in the course of employment or that Respondent sustained impairment, disability, or disfigurement.

Respondent filed an Amended Form 51 on June 2, 2008, to clarify the date she provided notice of her claim to McLeod. McLeod filed a timely Form 51, Answer to Respondent's Amended Form 50, on June 12, 2008, in which it denied an employer/employee relationship given Respondent's status as a temporary contract employee hired by Staff Care. Thereafter, McLeod successfully implead Respondents Staff Care and its carrier Travelers Insurance Company ("Travelers"). In their Form 51 dated May 20, 2008, Staff Care and Travelers denied Respondent's claim on the basis that she was an independent contractor or, in the alternative, an employee of McLeod.

Following a hearing on August 21, 2008, Commissioner G. Bryan Lyndon issued his December 3, 2008, order finding Respondent's alleged injury compensable and holding McLeod solely responsible for payment of temporary total disability benefits. (R. p. 30-85) Thereafter, McLeod filed a timely Form 30, Request for Commission Review, on December 16, 2008. Following a March 24, 2009, hearing, the appellate panel fully affirmed the single commissioner in a decision and order dated May 19, 2009. (R. p. 1-29) Because the commission relied upon an overly claimant-friendly analysis expressly overruled by the South Carolina Supreme Court to conclude Respondent was McLeod's employee, the order constitutes legal error and must be reversed.

STATEMENT OF THE FACTS

Respondent is a sixty-six year old Caucasian female, with a date of birth of November 12, 1942. (R. p. 236, lines 17-18) She received a diploma in 1974 from the Pennsylvania Hospital School of Nursing and completed anesthesia school at the Carlyle Hospital School of Anesthesia in Pennsylvania. (R. p. 237, line 7 - p. 238, line 6) She is credentialed by the American Association of Nurse Anesthetists to work as a certified nurse anesthetist ("C.R.N.A."). (R. p. 128, lines 22-24; p. 134, line 25 - p. 135, line 2; p. 238, lines 7-10, 17-24) Respondent is divorced and has no dependents. (R. p. 130, line 22 - p. 131, line 4) Her medical history prior to the alleged incident includes two open surgeries to her left shoulder, a coccygectomy, and three lower spine surgeries. (R. p. 267, lines 6-17; p. 268, lines 6-21; p. 281)

Respondent has worked in the nursing profession her entire career, including twenty-one years at the Carlyle Hospital. (R. p. 239, lines 2-23; p. 292 - 296) Following a divorce, Respondent worked in short-term nursing jobs in Hawaii and the Marshall Islands. (R. p. 239, line 24 - p. 240, line 19; p. 241, lines 5-11; p. 242, lines 1-10) Thereafter, she moved to the Lake Wylie, South Carolina, area to care for an ailing sister and continued to work short-term nursing jobs, including "a couple of freelances" with staffing agencies. (R. p. 242, line 20 - p. 243, line 4; p. 243, line 23 - p. 244, line 17; p. 292 - 296) Her longest engagement was a six year position with Pain Management and Anesthesia in Charlotte, North Carolina; however, she left that post after approximately five years because of "stress" and "burnout." (R. p. 244, line 18 - p. 245, lines 1, 6-13)

After leaving Pain Management and Anesthesia, Respondent began a "relationship" with Staff Care. (R. p. 245, lines 14-20) Staff Care is an agency that

places temporary, or *locum tenens*, employees with medical facilities like McLeod. (R. p. 272, lines 18-20; p. 306-319) Respondent prefers *locum tenens* work because it pays "a lot better" and provides "a little bit of autonomy [because] [y]ou're not the hospital employee under their rules." (R. p. 272, lines 10-15) Respondent found Staff Care on the internet and began a "dialogue" with Staff Care employees relating to what they needed from her in the way of paperwork. (R. p. 246, lines 7-15; p. 402-416)

Respondent communicated with Staff Care employees extensively via phone, electronic mail, and facsimile transmission and provided them with her résumé, copies of her licenses and certifications, health care records, and references. (R. p. 247, lines 7-21) Respondent did not request placement at McLeod; rather, she "simply asked [Staff Care] for a position that would allow [her] to be home on the weekends." (R. p. 248, lines 1-5) In fact, the on-line job postings she reviewed did not disclose the name of the facility at which she would ultimately be placed. (R. p. 248, lines 6-10) Staff Care placed Respondent at McLeod in November 2007. (R. p. 273, lines 4-8)

Staff Care guaranteed Respondent's wages based on a 40 hour work week. (R. p. 274, lines 12-19) Staff Care paid those wages via direct deposit into Respondent's checking account. (R. p. 275, lines 3-6; p. 320-363) Information regarding when she was to work and how many hours per week she would work came from Staff Care, and she communicated her work schedule preferences directly to Staff Care personnel. (R. p. 248, line 20 - p. 250, lines 2, 14-24) Staff Care provided Respondent with a rental car and a \$25 daily stipend. (R. p. 254, lines 22-23; p. 255, lines 3-7) Staff Care also provided malpractice insurance, overtime pay, and arranged for Respondent's out-of-town lodgings. (R. p. 162, lines 20-22; p. 165, lines 14-21; p. 391-394)

On December 21, 2007, the date of the alleged incident, Respondent assisted in anesthetizing a patient and placing him on the operating table for surgery. (R. p. 276, lines 6-15) Respondent fell as she began moving from the head of the patient's bed around to the left hand side, and she does not recall anything else until she found herself on the floor of the operating room. (R. p. 276, lines 16-22) Respondent was uninsured on the date of the accident, but was immediately treated in the McLeod emergency room, where she was diagnosed with a contusion to the right orbit. (R. p. 259, line 11 - p. 260, line 15; p. 266, lines 17-18; p. 303-304) She was discharged home with instructions to use Tylenol and follow up with her physician as needed. (*Id.*)

Respondent returned to work at McLeod on the Wednesday after the accident and worked the following Thursday and Friday, at which point she was released. (R. p. 264, line 11 - p. 265, line 20) Because McLeod was required to provide Respondent and Staff Care with thirty days notice prior to termination of the *locum tenens* service, McLeod informed Respondent and Staff Care in November that it had hired four full-time C.R.N.A.s and that Respondent's services at McLeod would not be necessary after the holidays. (R. p. 265, lines 3-23; p. 273, line 15 - p. 274, line 2; p. 298, 429-430).

ARGUMENT

The commission erred in determining Respondent sustained a work-related injury arising out of and in the course and scope of her employment because she was not employed by McLeod on the date of the alleged incident. McLeod did not recruit, screen or select Respondent, and it had no contract for hire, either oral or written, with her. McLeod did not pay Respondent's wages or provide her with any of the benefits conferred upon its regular employees. Rather, it was Staff Care that screened and interviewed Respondent, reviewed her credentials, arranged the logistics of her assignment at McLeod, and paid her salary.

Staff Care required Respondent to keep it apprised of her availability to accept assignments and to submit timely verification of her hours in order to receive payment. Respondent understood that she could be penalized if she accepted a direct employment position from a Staff Care client like McLeod within two years of accepting a *locum tenens* assignment at the client's facility. Moreover, Respondent claimed her income as "business income," further emphasizing that she was an independent contractor and not a McLeod employee. Even if this Court determines Respondent enjoyed an implied employment contract with McLeod, which she admittedly did not, Respondent was, at most, McLeod's statutory employee. Accordingly, Staff Care, as Respondent's direct employer, remains primarily responsible for payment of any benefits to which she may be entitled.

- I. The Commission Misapplied South Carolina Law And Committed Legal Error In Its Determination That Respondent Was McLeod's Employee, Rather Than An Independent Contractor, On The Date Of The Alleged Incident.

A. The Commission's Claimant-Friendly Analysis Has Been Rejected And Expressly Overruled.

The commission's decision and order pre-dates publication of the South Carolina Supreme Court's decision in *Wilkinson v. Palmetto State Transportation Company*, 382 S.C. 295, 676 S.E.2d 700 (2009), *reh'g denied* (May 29, 2009), which rejects the unduly claimant-friendly approach to employee versus independent contractor analysis announced and applied in the line of cases beginning with *Dawkins v. Jordan*, 341 S.C. 434, 534 S.E.2d 700 (2000). *Wilkinson* also signals a return to a more even-handed approach to that analysis in which evidence of any one factor is not necessarily unequivocal proof of employment status. Without the benefit of the court's opinion in *Wilkinson*, the commission's order improperly relies upon the claimant-friendly (and now overruled) proposition that "for the most part, any single factor (regarding status as an employee versus an independent contractor) is not merely indicative of, but, in practice, virtually proof of, the employment relation, while in the opposite direction, contrary evidence is as to any one factor at best only mildly persuasive evidence of contractorship, and sometimes is of almost no such force at all." (R. p. 27-28) (citing *Nelson v. Yellow Cab Company*, 349 S.C. 589, 564 S.E.2d 110 (2002); *Dawkins v. Jordan*, 341 S.C. 434, 534 S.E.2d 700 (2000); 2 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law*, § 61.04 (2000))

In *Wilkinson*, the court rejected, and expressly overruled, the "framework for weighing the standard factors in a manner that favored, unduly . . . , a finding of employment." 382 S.C. at 301, 676 S.E.2d at 702. Thus, it is no longer the case that any single factor is virtually proof of an employment relationship. Rather, the supreme court signaled a "return to our jurisprudence that evaluates the four factors with equal force in

both directions.” *Id.* Turning to the facts, the court observed that, in evaluating the relevant factors, the analysis is initially guided by the parties’ independent contractor agreement. “But more importantly, [the analysis is] guided by the parties’ conduct. . . .” 382 S.C. at 300, 676 S.E.2d at 702, citing *Kilgore Group, Inc. v. S.C. Employment Sec. Comm’n.*, 313 S.C. 65, 68-69, 437 S.E.2d 48, 50 (1993) (noting that “in determining the nature of [the parties’] relationship,” the contract has “considerable weight” but recognizing that “language in the contract merely declaring the relationship is that of an employer/independent contractor is not dispositive.”).

B. Respondent Was Not McLeod’s Employee Under South Carolina Law.

McLeod contends the commission lacked jurisdiction because McLeod had no contract of hire or employment with Respondent, either express or implied, as required by *S.C. Code Ann.* § 42-1-130. As there was no contract between McLeod and Respondent, a fact Respondent readily concedes, it is unnecessary to engage in further analysis. It is black letter law in this State that “[u]nless an employment relationship existed between the parties at the time of the alleged injury, an award cannot be granted.” *Alewine v. Tobin Quarries*, 206 S.C. 103, 109, 33 S.E.2d 81, 83 (1945). Alternatively, and to the extent an employment relationship is deemed to exist, the only basis to impose liability upon McLeod is if this Court concludes Respondent was not acting as an independent contractor and was instead McLeod’s statutory employee, with Staff Care retaining its status as her direct employer.

The existence of an employer-employee relationship is a jurisdictional question, and this Court may take its own view of the preponderance of the evidence. *Porter v. Labor Depot*, 372 S.C. 560, 567, 643 S.E.2d 96, 100 (Ct. App. 2007); *Lake v. Reeder*

Constr. Co., 330 S.C. 242, 247, 498 S.E.2d 650, 653 (Ct. App. 1998); *S.C. Workers' Comp. Comm. v. Ray Covington Realtors, Inc.*, 318 S.C. 546, 547, 459 S.E.2d 302, 303 (1995) (the existence of an employer-employee relationship is a jurisdictional question; an injured worker's employment status, as it affects jurisdiction, is matter of law for decision by the court and includes findings of fact that relate to jurisdiction) (additional citations omitted). Thus, the reviewing court may reverse the jurisdictional analysis of the lower tribunal where the decision is infected with an error of law. *Porter, supra*.

As reiterated by the *Wilkinson* Court, the general test of whether or not an employment relationship exists is measured by an even-handed analysis of the extent of control the employer exercised over the putative employee. *Wilkinson*, 382 S.C. 295, 296, 676 S.E.2d 700, 702, citing *S.C. Workers' Comp. Comm'n v. Ray Covington Realtors*, 318 S.C. 546, 547, 459 S.E.2d 302, 303 (1995); *Chavis v. Watkins*, 256 S.C. 30, 32, 180 S.E.2d 648, 649 (1971). The four elements that are determinative of the control question are: "(1) direct evidence of the right or exercise of control; (2) furnishing of equipment; (3) right to fire; and (4) method of payment." *Id.* (additional citations omitted)

An examination of the right to exercise control is fact-intensive, and most analogous to the facts in *Kilgore*, 313 S.C. 65, 437 S.E.2d 48 (1993). *Kilgore Group, Inc.*, much like *Staff Care* in this case, was in the business of providing temporary workers. *Kilgore* brought suit challenging the South Carolina Employment Security Commission's determination that its temporary workers were employees rather than independent contractors, thus triggering *Kilgore's* obligation to pay additional employment taxes. *Id.* at 67, 437 S.E.2d at 49. Citing the applicable standard of review

(substantial evidence) and test (exercise of control, method of payment, provision of equipment, and right to fire), the court affirmed the commission's finding that the temporary employer's (e.g., Kilgore's clients) ability to control employees was derived solely from their contracts with Kilgore. *Id.* at 69, 437 S.E.2d at 50. Further, the court inferred that Kilgore possessed the right to control the workers' performance and the manner in which the work was done, which it in turn delegated to its clients. *Id.* Kilgore paid the workers, Kilgore's clients provided them with equipment, and the clients believed that Kilgore could terminate the employees if Kilgore's clients were dissatisfied with the workers' job performance. *Id.* at 67, 437 S.E.2d at 49.

When clients contacted Kilgore with their specific employment needs, Kilgore negotiated with the client a fee for providing a worker or workers to meet the client's demands. *Id.* Kilgore then contracted with individual workers to fill the positions required by the client. *Id.* According to Kilgore's president, the contract could be based on an hourly wage or on a fixed amount for the job. *Id.* However, all workers were required to turn their hours in to Kilgore. *Id.* Hourly workers were permitted to take "draws" on the amount they had worked. *Id.* Kilgore's president testified that the contracts expressly provided that the relationship is one of an independent contractor. *Id.* The court went on to note that Kilgore's clients "controlled the day-to-day" activities of workers and that Kilgore provided workers' compensation coverage but did not withhold taxes from their wages. *Id.* In the event a client had a problem with the worker provided to them, the client "went through the agency and did not deal directly with the worker." *Id.*

Using the same analysis applicable in a workers' compensation case, the court assessed whether Kilgore's temporary workers qualified as its employees versus independent contractors, noting:

The contract entered into by the parties must be considered in determining the nature of their relationship and has considerable weight. However, neither party controls the legal effect of the contract. The primary test of its character is the intention of the parties, which is to be gathered from the whole scope of the language used. Accordingly, language in the contract merely declaring the relationship is that of an employer/independent contractor is not dispositive.

Id. at 68, 437 S.E2d at 50.

While the workers' performance and the manner in which the work was done was controlled by Kilgore's clients, the clients had no contracts with the temporary workers. In fact, "[t]heir ability to exercise control over the workers' activities was derived *solely from their contracts with Kilgore* and Kilgore's contract with the workers. Therefore, it can be inferred *Kilgore possessed the right to control the workers' performance and the manner in which it was done and delegated that authority to its clients.*" *Id.* at 69, 437 S.E.2d at 50 (emphasis added) (citations omitted). The court also found persuasive the facts that the workers were paid by the hour, received compensation prior to completion of the job, and that equipment was provided by the client rather than the temporary workers. *Id.* Additionally, "[t]he clients believed the workers could be terminated at any time based upon their dissatisfaction of the workers' performance." *Id.* On this record, the court had no difficulty concluding the workers were Kilgore's employees and not merely independent contractors.

Analyzing the facts of this case in light of the analytical framework set out in *Wilkinson*, and guided by the *Kilgore* court's application of those factors to temporary,

contract laborers like Respondent in this case, it becomes abundantly clear that Respondent was an independent contractor and not McLeod's employee on the date of her accident. Rather, if she qualifies as anyone's employee, she is an employee of Staff Care and not merely its independent contractor.

1. Right To Or Exercise Of Control.

The only employment contract in this case is the contract Respondent signed with Staff Care on October 11, 2007. (R. p. 282-283) Pursuant to the terms of that contract, Staff Care agreed to arrange Respondent's temporary housing, covered her under its malpractice insurance policy, and informed Respondent that it would conduct screenings, including drug screenings, to ensure the accuracy of her credentials. (*Id.*) Most importantly, the agreement clearly establishes that Respondent was not McLeod's employee because it contains a penalty provision, including a substantial fee, in the event Respondent went to work as a direct employee of a Staff Care client. (*Id.*) The contract also required Respondent to notify Staff Care "immediately" in the event she was unable to take an assignment. (*Id.*) Respondent also completed a Staff Care application, as well as a Release and Authorization for the release of her credentials and other relevant information to Staff Care. (R. p. 288-291)

Respondent never pursued direct employment with McLeod. Rather, she found the temporary Staff Care position on the internet and initiated contact with Staff Care. (R. p. 158, lines 8-11) Respondent dealt exclusively with Staff Care in setting up the temporary work assignment at McLeod. (R. p. 150, lines 9-15) While she never travelled to Staff Care's offices in Texas, she communicated extensively with Staff Care's employees via phone, electronic mail, and facsimile. (R. p. 150, line 20 - p. 151,

line 4; p. 402-416) In order to accept the assignment at McLeod, Respondent had to complete voluminous paperwork and return it to Staff Care before it could place her in the field. (R. p. 151, lines 8-10) Respondent forwarded copies of her résumé, along with copies of her licenses and certifications to Staff Care, not McLeod. (R. p. 158, line 25 - p. 159, line 3; p. 191, lines 16-19) She did not specifically request to be sent to McLeod in Florence; in fact, Staff Care's posting did not initially identify the name of the facility. (R. p. 159, lines 8-10, 13-15) To complete the transaction, Respondent was required to sign a contract with Staff Care and, going further, was required to initial every page. (R. p. 160, lines 18-20; p. 282-286) Respondent's contract with Staff Care does not mention McLeod. (R. p. 161, lines 16-18; p. 282-286) Most importantly, Respondent concedes she did not have any sort of contractual relationship with McLeod. (R. p. 161, lines 19-21)

Various items of correspondence also confirm Respondent's status as an independent contractor or, alternatively, as an employee of Staff Care rather than of McLeod. For example, in a confirmation letter from Staff Care to Respondent dated October 24, 2007, the writer confirmed the parties' verbal agreement, provided Respondent with contact information for her Staff Care "logistics coordinator," and set her rates. (R. p. 297-298) In an email dated November 13, 2007, a Staff Care logistics coordinator provided Respondent with hotel accommodations and instructions regarding check-in and check-out. (R. p. 299) In a letter also dated November 13, 2007, Staff Care provided Respondent with "required forms" to use while "on assignment for Staff Care." (R. p. 300) (emphasis added) This same packet included instructions for submitting provider invoices, expense repayment requests, a precautionary notice form

used to "report any unanticipated patient outcome that could lead to a malpractice suit," information regarding her rental car (including specific instructions about declining insurance, signing an extended rental agreement, upgrades, additional drivers, and responsibility for fuel). (R. p. 301, 398, 400)

Staff Care provided Respondent with after-hours emergency contact information. (R. p. 302) Staff Care further instructed Respondent to "contact [Staff Care's Risk Manager] immediately if you are noticed for peer review, a deposition, etc., so that Staff Care may provide you with legal counsel if necessary." (R. p. 391) (emphasis added) The record also contains correspondence from a Staff Care employee to Respondent discussing the benefits of establishing herself as an L.L.C. for tax purposes, as well as from a Staff Care employee offering Respondent a choice of shift options. (R. p. 403, 407) The complete record of contract documents and correspondence between Respondent and Staff Care highlights the level of screening Staff Care engaged in before sending its employees, including Respondent, into the field, as well as the degree of control it exercised over her daily activities thereafter.

At the same time, Respondent readily concedes that she was not a hospital employee and that she was not paid by McLeod. (R. p. 171, lines 5-7; p. 278, lines 16-21; p. 279, lines 13-14) Rather, "Staff Care advertised the job, and I called for information about it." (R. p. 178, lines 15-18) Staff Care arranged the details of the job and explained to Respondent when the job would begin. (R. p. 179, lines 17-22) McLeod's Director of Anesthesia further clarified that Staff Care presented Respondent to work at McLeod pursuant to separate contract for temporary staffing services between McLeod and Staff Care entered into in November 2007. (R. p. 206, lines 11-16; p. 429-430). As

confirmed by Respondent herself, she never had any contractual relationship with McLeod. (R. p. 206, lines 17-20) In fact, Respondent acknowledged that if she became a direct McLeod employee within two years of her first *locum tenens* placement at the hospital, either she or McLeod would have been required to pay a \$22,000 penalty to Staff Care. (R. p. 163, lines 2-6; p. 206, line 21 - p. 207, line 1; p. 282-286, 429-430) The contractual provision allowing Staff Care to penalize its clients and limit Respondent's prospective employment is yet another clear indication that Staff Care, and not McLeod, had the ability to exercise control over Respondent even after her assignment at McLeod ended.

It was clear that Respondent felt it necessary to report to Staff Care and not McLeod. For example, she called Staff Care to report a minor fender bender involving the rental car Staff Care provided because she thought someone at Staff Care (and not McLeod) "should know" about the accident. (R. p. 148, lines 13-21; p. 257, line 20 - p. 258, line 2) She did not purchase additional insurance on the rental vehicle because Staff Care, and not McLeod, already had coverage and specifically instructed her not to. (R. p. 148, line 22 - p. 149, line 5; p. 165, lines 18-21; p. 395-397) Staff Care's insurance company contacted Respondent after the accident, and she did not receive any car repair bills. (R. p. 149, lines 6-10) Additionally, Staff Care personnel called Respondent "once[,] perhaps twice just to ask how the job was going." (R. p. 183, lines 14-19)

Regarding her daily work activities, Respondent selected which shifts she would work, and Staff Care (not McLeod) guaranteed her salary based upon forty work hours per week. (R. p. 160, line 21 - p. 161, line 1) Staff Care, and not McLeod, required Respondent to submit verification of the number of hours she worked and required that

one of McLeod's C.R.N.A.s verify the invoices prior to their submission to Staff Care by Respondent. (R. p. 182, line 17 - p. 183, line 7) If she got her invoice to Staff Care after 5 p.m. on Friday, her paycheck from Staff Care would be delayed. (R. p. 192, line 22 - p. 193, line 3; p. 300, 398-401)

Like claimant in *Wilkinson*, it is immaterial that Respondent reported to McLeod personnel for assignments. She retained the right to refuse any assignment and exercised near complete control over the provision of anesthesia to McLeod patients. 382 S.C. 301-02, 676 S.E.2d at 703. Respondent reported to McLeod's Chief C.R.N.A. Keith Tergersen on her first day of work because he was in the operating room that day, and that was where she was to report for duty. (R. p. 142, lines 14-22) He gave her an abbreviated orientation as to "the layout of the O.R. and supply room." (R. p. 143, lines 2-5) In accordance with her preference, Respondent's typical day began at 9:00 a.m., when she would get her assignment either from the C.R.N.A. in charge that day or from a board posted near the operating room. (R. p. 143, lines 6-19) The head C.R.N.A. on duty or whoever made out the assignment board would tell Respondent where to report for duty. Other than that, the only person she would answer to would be the anesthesiologist directing the case. (R. p. 152, lines 6-7, p. 153, lines 4-7; p. 166, lines 1-7) Additionally, Respondent readily concedes that South Carolina law, and not McLeod policy, requires that an anesthesiologist be in the room while drugs are administered. (R. p. 154, line 1 - p. 155, line 15) *See also S.C. Code Ann. § 40-33-34.* Respondent also agreed that her job required the exercise of her independent judgment. (R. p. 166, lines 8-23) At the end of the day, it was up to Respondent to follow the rules and guidelines

so that she would not jeopardize her nursing or C.R.N.A. credentials. (R. p. 193, lines 15-25)

Further distinguishing Respondent from McLeod's employees, she was never "on call" for work. (R. p. 212, lines 1-4) Unlike McLeod's staff C.R.N.A.s, Respondent was only permitted to work in the operating room. (R. p. 213, lines 5-7) Given safety concerns and the complexity of the number of treatments available at McLeod, Respondent was not entitled to the level of access afforded regular, full-time McLeod employees, and she was not permitted to work in the emergency room, the cath lab, or to administer life support. (R. p. 212, line 5 - p. 213, line 4) Respondent was required to participate in an abbreviated orientation program not because she was considered a McLeod employee, but because the Joint Commission on Hospital Accreditation ("J.C.H.A.") accreditation guidelines mandated that she receive an orientation to McLeod's mission and fire safety.¹ (R. p. 213, line 14 - p. 214, line 1)

¹ "The Joint Commission accredits approximately 4,250 general, children's, long term acute, psychiatric, rehabilitation and surgical specialty hospitals. . . . Approximately 88 percent of the nation's hospitals are currently accredited by The Joint Commission." See www.jointcommission.org/AccreditationPrograms/Hospitals/hospital_facts.htm. The J.C.H.A. also publishes hospital accreditation requirements, which mandate, among other things, that facilities orient staff members and document such orientation; that a qualified doctor of medicine oversee the provision of anesthesia services; and that organizations collect information regarding each practitioner's current license status, training, experience, competence, and ability to perform the requested privilege. See, e.g., The Joint Commission Revised 2009 Accreditation Requirements as of March 26, 2009, available at http://www.jointcommission.org/NR/rdonlyres/C9298DD0-6726-4105-A007-FE2C65F77075/0/CMS_New_Revised_HAP_FINAL_withScoring.pdf. See also S.C. Code Reg. § 61-16(C) ("All new personnel shall be oriented to acquaint them with the organization and environment of the facility, the employees' specific duties and responsibilities, and patients' needs. . . . (and) 'shall be familiar with the facilities' emergency/disaster plans.).

While McLeod provided her with several documents, including an employee health validation form, urine drug screen, dress code, and job description, McLeod's Director of Occupational Health, Octavia Williams-Blake, clarified that any paperwork McLeod has filled out is required by law, either by the J.C.H.A. or Medicare. (R. p. 185, line 19 - p. 186, line 3; p. 195, lines 7-17; p. 195, line 22 - p. 196, line 3) This would include the physical examination and drug screening. (R. p. 196, lines 8-13) Williams-Blake also testified that in order to operate and to receive federal Medicaid funds, McLeod is required to be accredited and to meet federal requirements, which include providing a job description and doing a drug screen. (R. p. 196, line 19 - p. 197, line 4)

It is beyond argument that hospitals are one of the most regulated entities in modern society. For example, the Centers for Medicare and Medicaid Services ("C.M.S.") require, as a condition of participation, that hospitals like McLeod "must be in compliance with applicable Federal laws related the health and safety of patients . . . [and] assure that personnel are licensed or meet other applicable standards that are required by State or local laws." 42 C.F.R. § 482.11. Further, statutory provisions regarding C.M.S. specifically contemplate accreditation by the J.C.H.S. *See, e.g.*, 42 U.S.C. § 1395bb(a) (Effect of accreditation). Moreover, C.M.S. also requires that non-employee licensed nurses who are working in a hospital facility "must adhere to the policies and procedures of the hospital." 42 C.F.R. § 482.23(b)(6). Thus, McLeod's accreditation by the J.C.H.S. signifies that the facility complies with applicable rules and regulations relating to patient health and safety, thereby enabling it to participate in the C.M.S. programs.

Taken as a whole, it is clear that McLeod did not enjoy any sort of contractual relationship with Respondent and had little, if any, right to exercise control over her daily activities. Like the clients in *Kilgore*, and *Wilkinson*, *supra*, any degree of control McLeod could have exercised over Respondent derived exclusively from McLeod's contract with Staff Care or from regulatory controls imposed by state and federal law. In comparison, Staff Care retained abundant control over several key aspects of her employment, including scheduling and payment, insurance, assumption of legal defense in the case of malpractice proceedings, and the right to bar her employment with Staff Care's clients for a period of up to two years. Thus, the right of control factor of the *Wilkinson* analysis militates in favor of a finding in McLeod's favor.

2. Provision of Equipment.

Turning to the second factor, provision of equipment, it is at best neutral and in fact tips the scale against a finding that Respondent was a McLeod employee. This is particularly true given the fact that Respondent treated her income from Staff Care as business income and specifically claimed income tax deductions for, among other things, her uniforms. (R. p. 305, 368-369) Of the equipment McLeod did provide, the equipment either was so large as to make it impossible for Respondent to own and transport, required by federal law or hospital accreditation standards, or had not been biomedically checked and therefore rendered potentially unsafe for patient use.²

² In addition to the C.M.S. rules and regulations discussed *infra*, South Carolina law specifically provides for the cleaning and use of equipment. See, e.g., S.C. Code Reg. § 404.5 ("All equipment coming into contact with patients shall be adequately disinfected or sterilized after each use to maintain such equipment in a clean and sanitary condition . . .").

Respondent testified that while she had some of her own equipment, McLeod personnel informed her that it would not be necessary for her to bring it to the job site. (R. p. 168, lines 4-15) McLeod provided Respondent with scrub suits and made disposable paper hats and boots available if needed. (R. p. 144, line 24 - p. 145, line 2) McLeod owned the remainder of the equipment she used in the operating room. (R. p. 145, lines 17-23) McLeod also provided her with a name tag with her name, picture, department name, and the hospital's name on it. (R. p. 145, lines 6-12) McLeod required everyone entering one of its sterile environments, including Respondent, to wear sterile scrubs. (R. p. 163, lines 7-12) She was also required to have a McLeod name tag in order to access portions of the hospital that were off limits to members of the general public. (R. p. 164, lines 2-5) She used McLeod's fax machine to submit the required payment invoices to Staff Care not because anyone at McLeod required her to, but because it was the closest and most convenient. (R. p. 164, lines 22-25)

With regard to Respondent's name tag, Occupational Health Director Williams-Blake testified that the Lewis Blackman Act dictates that a patient must be able to identify care givers by name, title, and by a photograph.³ (R. p. 197, lines 5-13) Non-employee physicians with privileges at McLeod are also required by the Lewis Blackman Act to wear ID badges in order to identify themselves to patients and to gain access to restricted areas. (R. p. 198, lines 6-16) The J.C.H.A. also sets forth specific dress

³ See the Lewis Blackman Hospital Patient Safety Act, codified at S.C. Code Ann. § 44-7-3410, *et. seq.* Section 44-7-3430, Identification Badges, provides that "(a)ll clinical staff, clinical trainees, medical students, interns, and resident physicians of a hospital shall wear badges clearly stating their names, using at a minimum either first or last names with appropriate initials, their departments, and their job or trainee titles. All clinical trainees, medical students, interns, and resident physicians must be explicitly identified as such on their badges. This information must be clearly visible and must be stated in terms or abbreviations reasonably understandable to the average person, as recognized by the Department of Health and Environmental Control."

requirements for sterile areas. (R. p. 201, lines 13-16) As noted by Mr. Tergersen, the operating room has its own dress code because sterile scrubs are a non-negotiable requirement. (R. p. 220, lines 1-11) Thus, operating room personnel could report to work in shorts and flip-flops if they desired, but they are required to change into sterile scrubs upon reporting to work. (*Id.*) Respondent's badge was simply similar to that required for anyone working within the hospital confines, except that hers actually read "contract staff," thereby further distinguishing Respondent as contract staff versus a hospital employee. (R. p. 211, lines 4-14)

Turning to McLeod's heavy fixed equipment, Respondent estimated that McLeod's anesthesia machines weigh approximately 500 pounds or more and cost "much more" than tens of thousands of dollars. (R. p. 166, line 24 - p. 167, lines 5, 17-18) She has never owned an anesthesia machine and acknowledged that such a machine is not the kind of equipment a C.R.N.A., even a *locum tenens* one, would take with them to a job. (R. p. 167, lines 11-16) Additionally, any medications she would have administered would have to be dispensed by a pharmacy, making it impossible for her to bring them with her to the job site. (R. p. 167, lines 19-22) As Mr. Tergersen's testimony makes clear, the anesthesia machines like the one Respondent used were quite large. (R. p. 210, lines 2-9) Moreover, even if she could, McLeod could not permit Respondent to bring her own anesthesia machine because the hospital is, by law, ultimately responsible for the anesthesia machines. (R. p. 210, lines 13-20) Similarly, Respondent would not be allowed to bring in any equipment that was not biomedically checked by McLeod. (R. p. 223, lines 20-23).

It is unreasonable to expect temporary workers to provide their own equipment when such equipment is as big as a desk, costs as much or more than a car, and is potentially unsafe for patients because it is not biomedically tested. Moreover, the smaller "equipment" provided to Respondent, chiefly sterile scrubs and a name tag, are required by accreditation guidelines and/or applicable provisions of state or federal law. In any event, "requiring a worker to comply with the law is not evidence of control by the putative employer." *Wilkinson*, 382 S.C. at 302, 676 S.E.2d at 703, quoting *Universal Am-Can, Ltd. v. Workers' Comp. Appeal Bd.*, 563 Pa.480, 762 A.2d 328, 335 (2000) ("employer efforts to ensure the workers' compliance with government regulations, even when those efforts restrict the manner and means of performance, do not weigh in favor of employee status."). Stated differently, a strong regulatory presence equates with control by the government, not the putative employer. *Id.* Moreover, the provision of equipment has been weighed in favor of a finding that temporary workers are employees of staffing agencies under South Carolina law. *Kilgore, supra.*

3. Method of Payment.

The third factor addressed by the *Wilkinson* court also weighs in McLeod's favor. Respondent clarified that she was paid by Staff Care, not McLeod. (R. p. 164, lines 9-14; p. 320-363; p. 398-401) Staff Care deposited Respondent's salary into her account via direct deposit and required her to submit timely invoices for payment directly to Staff Care. (R. p. 146, lines 17-22; p. 164, lines 15-21) Staff Care paid Respondent \$95 per hour, plus a \$25 daily allowance. (R. p. 165, lines 6-17) Her pay stubs were mailed by Staff Care. (R. p. 181, lines 1-13) Staff Care also paid Respondent's overtime wages, provided her with a rental car, and arranged for her out-of-town housing. (R. p. 146, line

25 - p. 147, lines 16, 20-21) In contrast, McLeod does not pay a per diem to its employees or provide them with transportation. (R. p. 211, lines 17-25) Staff Care also provided Respondent's medical malpractice insurance. (R. p. 153, lines 14-15; p. 391-394) In contrast, Respondent concedes that McLeod never paid any of her wages. (R. p. 164, lines 13-14)

Respondent agreed that McLeod did not provide her with group health insurance, vacation days, sick days, or access to its 401K retirement plan. (R. p. 169, lines 8-17) Further, McLeod's Director of Payroll testified that she searched for payroll records using Respondent's name and Social Security number and found no records of any payments from McLeod. (R. p. 203, lines 11-18; p. 204, lines 6-10) There is simply no indication that McLeod paid any wages or other benefits to Respondent. (R. p. 204, lines 11-15) Mr. Tergersen also testified that as a McLeod employee, he receives benefits such as vacation time, group health insurance, access to McLeod's 401K retirement savings program, payment of continuing education requirements, and medical malpractice insurance coverage. (R. p. 207, line 25 - p. 209, line 7) In contrast, Respondent did not receive any of these employee benefits from McLeod.

McLeod's payroll records clearly reflect that McLeod made payments directly to Staff Care, and not to Respondent, for the hours she worked. (R. p. 320-363) McLeod's check requests for payment to Staff Care also indicate the payments were for "contract labor." (R. p. 233, lines 17-24; p. 335) Moreover, Mr. Tergersen testified that these check requests merely reflect the contract price McLeod agreed to pay Staff Care, and that those amounts exceeded Respondent's wages. (R. p. 232, lines 13-25; p. 234, lines 6-12) Thus, any argument that McLeod's payments reflect "reimbursement" for

Respondent's wages is misleading. McLeod was paying a negotiated contract price to Staff Care for the provision of temporary labor. Respondent's hourly wage was an expense separately negotiated between Respondent and Staff Care.

Interestingly, Respondent's \$13,916 in earnings from Staff Care in 2007 were reported to the Internal Revenue Service as business income. (R. p. 174, lines 14-18; p. 305, 368) She claimed deductions for uniforms, licenses and permits, registration fees, dues and subscriptions, education, and 6,572 miles in business travel. (R. p. 175, lines 4-17; p. 369) These deductions further highlight Respondent's role as a "freelance and independent" *locum tenens* provider and seriously undercut any argument that she was McLeod's employee. (R. p. 170, line 2 - 171, line 1) Like the claimant in *Wilkinson*, Respondent filed tax returns as a sole proprietorship, and her returns included deductions for business expenses and self-employment taxes. Respondent simply cannot establish herself as a McLeod employee while simultaneously holding herself out as a business for tax purposes. Instead, this record establishes that Respondent and Staff Care paid the costs associated with Respondent's temporary staffing services, such as lodging, meals, transportation, and uniforms. Consistent with *Wilkinson*, the method of payment in this case bears "no indicia" of an employment relationship between McLeod and Respondent. 382 S.C. at 303, 676 S.E.2d at 704 (claimant's method of payment bore "no indicia of an employment relationship" where he filed tax returns as a sole proprietor and where those returns included "forms for his business expenses and self-employment taxes.").

4. Right to Fire.

The "right to fire" is the fourth prong of the analysis regarding the right or exercise of control over a putative employee. As noted by the *Wilkinson* Court, an

important consideration regarding the "right to fire" is "the recognition that a right of termination, in some form, exists in an independent contractor arrangement. The critical inquiry is the term 'fire,' for it embraces the employment relationship." 382 S.C. at 304, 676 S.E.2d at 704. Ultimately, the court concluded where termination was controlled by the terms of their agreement, and the putative employer did not retain the "right to fire," a finding of an independent contractor arrangement was warranted. *Id.* The same result necessarily follows in this case because McLeod could not "fire" Respondent. Instead, the termination of her temporary staffing services was governed entirely by the contractual arrangement between McLeod and Staff Care.

McLeod's Chief C.R.N.A. testified that McLeod's contract with Staff Care required him to contact Staff Care if he was unhappy with Respondent's job performance. (R. p. 217, line 24 - p. 218, line 19) If she had repeatedly shown up late for work, Mr. Tergersen would have called Staff Care. (R. p. 217, lines 8-16) If her job performance was "suboptimal," he would have called Staff Care. (R. p. 217, lines 20-21) In the final analysis, Mr. Tergersen elected to terminate Respondent's *locum tenens* services at McLeod, as permitted by McLeod's contract with Staff Care, because he had full-time McLeod employees joining the organization, thereby obviating the need for contract temporary labor. (R. p. 225, lines 6-10) Thus, Respondent was never terminated for performance-related issues. Rather, McLeod hired full-time employees and elected to terminate the provision of temporary staffing services as permitted by its contract with Staff Care.

This is consistent with Respondent's understanding that pursuant to McLeod's agreement with Staff Care, McLeod was free to release her if they no longer required her

services. (R. p. 252, lines 9-14; p. 429-430) In fact, she recalled Mr. Tergersen informing her and Staff Care as early as November 2007 that McLeod had hired four new C.R.N.A.s who would be starting at the beginning of calendar year 2008. (R. p. 265, lines 3-23; p. 273, line 15 - p. 274, line 2) Staff Care also advised Respondent that her contract work at McLeod would end and inquired into her availability for future temporary assignments elsewhere. (R. p. 274, lines 3-11)

While McLeod had the right to notify Staff Care that it would like to terminate Respondent's assignment early, Staff Care imposed certain limitations, including prior notice of the client's intention to end the assignment. (R. p. 429-430) Notably, however, early termination would not result in termination of the relationship between a worker and Staff Care, as exemplified by the fact that while Respondent's assignment at McLeod ended early, Staff Care continued to contact her about future staffing opportunities. (R. p. 188, lines 6-10; p. 274, lines 3-11) In fact, McLeod had no ability to alter the relationship between Respondent and Staff Care, and its contract with Staff Care expressly required 30 days notice for the termination of an assignment by either McLeod or Respondent. (R. p. 287, 429-430)

This record demonstrates the temporary employer's belief that it should go through the agency if it had a problem with the worker's performance or if it elected to end the relationship. Such a finding has been construed to weigh in favor of a finding that the temporary workers were employees of the temporary agency rather than independent contractors. *Kilgore*, 313 S.C. at 67, 437 S.E.2d at 49.

II. The Commission Erred As A Matter Of Law In Holding Respondent's Idiopathic Fall Constitutes A Compensable Injury By Accident Arising Out Of And In The Course And Scope Of Respondent's Employment.

The idiopathic nature of Respondent's fall also compels reversal of the commission's order awarding benefits. The South Carolina Workers' Compensation Law specifically excludes any injury "which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment." *Crosby v. Wal-Mart Store, Inc.*, 330 S.C. 489, 493, 499 S.E.2d 253, 255 (Ct. App. 1998) (citations omitted).

In *Crosby*, claimant argued that the commission "confused this unexplained fall case with an idiopathic fall case (and argued) that idiopathic fall cases are not generally compensable but that unexplained fall cases are compensable." *Id.* The court rejected claimant's argument, noting instead that claimant's fall occurred on a level surface and that she failed to establish a causal connection between her employment and the resulting fall. The same result follows here where Respondent cannot establish why she fell and, therefore, that the fall was the proximate cause of her alleged injuries.

On the date of her accident, Respondent was to assist in anesthetizing a patient on his hospital bed who would then be placed on an operating table. (R. p. 276, lines 6-15) She began moving from the head of the patient's bed around to the left hand side when she fell. (R. p. 276, lines 16-19) Respondent testified that she was going to retrieve some medication when "the next thing (she) knew" was that she had hit the floor. (R. p. 259, line 11 - p. 260, line 15) She does not remember anything else before she realized she was on the ground. (R. p. 276, lines 20-22) Her exact deposition testimony regarding her recollection of the fall is telling:

Q. Do you remember anything else before you realized you were on the ground?

A. No. I picked up the syringes, turned, and I remember one step. And I thought that -- I hope this is a padded floor because it's linoleum over concrete, and sometimes they have a thin pad under there, other places I've worked had. McLeod does not have any padding between the linoleum and the concrete.

Q. So you remember taking one step, and the next thing you knew, you were on the ground?

A. Thud, thud.

(R. p. 276, line 20 - p. 277, line 6)

Respondent did not hit anything between the time she started falling and when she hit the floor. (R. p. 280, lines 3-7) Her self-serving testimony that "(t)here was something on or near the head of the bed" and that her foot got "caught" is simply unsupported by any other record evidence. (R. p. 280, lines 11-16) While Respondent presented somewhat conflicting testimony at the hearing before the single commissioner, she later was forced to concede that she has "no recollection of tripping" over anything in the operating room that day. (R. p. 171, lines 16-18) According to Respondent's later version of events, she was "in motion, in a regular stepping motion, and the right foot got stuck on something. Beyond that, I can't tell you." (R. p. 173, lines 17-19)

For this reason alone, this Court should reverse the commission's conclusion that Respondent's injuries arose out of her employment

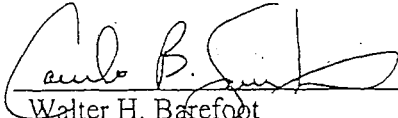
CONCLUSION

Based on the foregoing, McLeod respectfully submits that the single commissioner's order awarding benefits is contrary to South Carolina law and must

therefore be set aside.

November 20, 2009

By:



Walter H. Barefoot

Turner Padgett Graham & Laney P.A.

Post Office Box 5478

Florence, SC 29502

Phone: (843) 662-9008

Fax: (843) 667-0828

Carmelo B. Sammataro

Turner Padgett Graham & Laney P.A.

Post Office Box 1473

Columbia, SC 29202

Phone: (803) 254-2200

Fax: (803) 799-3957

ATTORNEYS FOR APPELLANT

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

G. Bryan Lyndon, Commissioner

W.C.C. File Nos.: 0724433 and 0724543

Mildred H. Shatto, Employee/Claimant Respondent,

v.

McLeod Regional Medical Center,
Employer/Carrier Appellant,

And

Staff Care, Inc., Employer
and Travelers Insurance, Carrier Respondents.

FINAL BRIEF OF RESPONDENT MILDRED SHATTO

Blake A. Hewitt
Margaret M. Bluestein
Bluestein Nichols Thompson &
Delgado, LLC
Post Office Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 facsimile

TABLE OF CONTENTS

Table of Authorities	ii
Statement of Issues on Appeal	1
Statement of the Case	1
Arguments	
(I) The Commission Correctly Determined That Mildred Shatto Was An Employee Of McLeod Regional Health Center And Not An Independent Contractor On The Date Of Her Injury	2
A. <i>Wilkinson</i> Represents A Change In The Law, But The Commission's Decision Was Not Controlled By The Law That <i>Wilkinson</i> Rejected. Furthermore, McLeod Did Not Object To The Standard Used Below	3
B. The Commission Correctly Determined That Ms. Shatto Was McLeod's Employee And Not An Independent Contractor	6
i. Right To Control	9
a. Direct Evidence Of The Right To Control	10
b. Control Required By Law	13
c. Delegation From Staff Care	14
ii. Method Of Payment	18
iii. Furnishing Of Equipment	20
iv. Right To Fire	21
(II) The Commission Correctly Determined That Mildred Shatto's Fall Was A Compensable Accident As Opposed To An Idiopathic Fall	23
Conclusion	26

TABLE OF AUTHORITIES

Cases

<i>Chavis v. Watkins</i> , 256 S.C. 30, 180 S.E.2d 648 (1971)	9
<i>Cooke v. Palmetto Health Alliance</i> , 367 S.C. 167, 624 S.E.2d 439 (Ct. App. 2005)	2, 16, 17
<i>Dawkins v. Jordan</i> , 341 S.C. 434, 534 S.E.2d 700 (2000)	3, 4
<i>Eaddy v. A.J. Metler Hauling & Rigging Company</i> , 284 S.C. 270, 325 S.E.2d 581 (Ct. App. 1985)	16
<i>I'On, LLC v. Town of Mt. Pleasant</i> , 338 S.C. 406, 526 S.E.2d 716 (2000)	5
<i>Kilgore Group, Inc. v. South Carolina Employment Security Commission</i> , 313 S.C. 65, 437 S.E.2d 48 (1993)	10, 14, 15
<i>McCreery v. Covenant Presbyterian Church</i> , 299 S.C. 218, 383 S.E.2d 264 (Ct. App. 1989)	24
<i>Nelson v. Yellow Cab Company</i> , 349 S.C. 589, 564 S.E.2d 110 (2002)	2, 3, 4
<i>Wilkinson v. Palmetto State Transportation Company</i> , Op. No. 26646 (S.C. Sup. Ct. filed May 4, 2009) (Shearouse Adv. Sheet No. 19 at 13)	3, 4, 5, 13, 22, 23, 26
<i>Wilson v. Georgetown County</i> , 316 S.C. 92, 447 S.E.2d 841 (1994)	2, 3
<i>Young v. Warr</i> , 252 S.C. 179, 165 S.E.2d 797 (1969)	8, 10, 13

Statutes

S.C. Code Ann. §§1-23-310 to -400 (2005 & Supp. 2008)	24
S.C. Code Ann. § 1-23-380(5)(e) (Supp. 2008)	3, 24
S.C. Code Ann. § 42-1-130 (Supp. 2008)	8

Other Authorities

3 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW, § 60.04[2] (2004)	17
3 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW, § 60.05[1] (2004)	17
3 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW, § 61.04 (2000)	4
3 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW, § 61.06 (2004)	19
3 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW, § 61.07[2] (2004)	20
3 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW, § 61.08[1] (2004)	21
Merriam-Webster's On-Line Dictionary, <i>at</i> http://www.merriam-webster.com/dictionary/locum%20tenens (last visited Sept. 14, 2009)	6

STATEMENT OF ISSUES ON APPEAL

- (I) Whether The Commission Correctly Determined That Mildred Shatto Was An Employee Of McLeod Regional Health Center And Not An Independent Contractor On The Date Of Her Injury.
- (II) Whether The Commission Correctly Determined That Mildred Shatto's Fall Was A Compensable Accident As Opposed To An Idiopathic Fall.

STATEMENT OF THE CASE

This is an appeal from a decision of the South Carolina Workers' Compensation Commission. The commission awarded benefits to Respondent Mildred H. Shatto for injuries she sustained when she fell while working for Appellant McLeod Regional Medical Center in Florence, South Carolina. Staff Care, Inc., the additional respondent in this case, is the staffing agency that placed Ms. Shatto with McLeod.

Ms. Shatto's fall occurred on December 21, 2007, and she commenced two actions—one against McLeod and one against Staff Care—with the South Carolina Workers' Compensation Commission on April 30, 2008. The two actions were thereafter consolidated.

In defending the action, McLeod and Staff Care asserted that Ms. Shatto's fall was spontaneous, unexplained, or caused by a medical condition of hers. Put differently, they denied that Ms. Shatto's fall was a compensable accident and argued that it was idiopathic in nature. McLeod additionally argued that Ms. Shatto was not a McLeod employee and was therefore excluded from McLeod's workers' compensation policy. According to McLeod, Ms. Shatto was either an independent contractor or, if employed by anyone, she was an employee of Staff Care. In a similar fashion, Staff Care argued that Ms. Shatto did not qualify as a Staff Care employee.

The single commissioner conducted a hearing in the case on August 21, 2008, and in an order dated December 3, 2008, the commissioner required McLeod to pay Ms. Shatto benefits. The commissioner issued alternative findings on the question of whether Ms. Shatto was an independent contractor or a McLeod employee; finding both that Ms. Shatto was a "borrowed servant" under *Cooke v. Palmetto Health Alliance*, 367 S.C. 167, 624 S.E.2d 439 (Ct. App. 2005), and that an examination of the employment factors set forth in *Nelson v. Yellow Cab Company*, 349 S.C. 589, 564 S.E.2d 110 (2002), resulted in the conclusion that Ms. Shatto was a McLeod employee. (R.p. 30).

McLeod appealed the single commissioner's decision to the commission's appellate panel December 16, 2008. The appellate panel heard the matter on March 24, 2009, and issued its order adopting and affirming the single commissioner's decision on May 19, 2009. (R.p. 1).

McLeod served and filed its notice of appeal in this court June 16, 2009, and McLeod has appealed the commission's decision on two grounds. First, McLeod argues that Ms. Shatto was an independent contractor and not a McLeod employee. Second, McLeod argues that the incident giving rise to Ms. Shatto's injuries was an idiopathic fall which is not a compensable accident.

ARGUMENT

(I) The Commission Correctly Determined That Mildred Shatto Was An Employee Of McLeod Regional Health Center And Not An Independent Contractor On The Date Of Her Injury.

Under South Carolina law, the existence of the employer-employee relationship is a jurisdictional question. *Wilson v. Georgetown County*, 316 S.C. 92, 93-94, 447 S.E.2d 841,

842 (1994). As distinguished from the more deferential standard of review for most factual determinations made by administrative agencies, see S.C. Code Ann. § 1-23-380(5)(e) (Supp. 2008), an appellate court may take its own view of the preponderance of the evidence with respect to jurisdictional facts. *Dawkins v. Jordan*, 341 S.C. 434, 438-39, 534 S.E.2d 700, 703 (2000) (overruled on other grounds by *Wilkinson v. Palmetto State Transp. Co.*, Op. No. 26646 (S.C. Sup. Ct. filed May 4, 2009) (Shearouse Adv. Sheet No. 19 at 13)). “It is South Carolina’s policy to resolve jurisdictional doubts in favor of the inclusion of employers and employees under the Workers’ Compensation Act.” *Nelson v. Yellow Cab Co.*, 349 S.C. at 594, 564 S.E.2d at 112.

McLeod advances two arguments to support its contention that the commission erred when it determined that Ms. Shatto was a McLeod employee. The first is that the commission employed an analysis which the Supreme Court of South Carolina rejected in the intervening case *Wilkinson v. Palmetto State Transportation Company*, Op. No. 26646 (S.C. Sup. Ct. filed May 4, 2009) (Shearouse Adv. Sheet No. 19 at 13). The second is that the commission’s analysis on the merits of the employment question is not supported by the preponderance of the evidence in the record. In this case, neither argument is persuasive.

A. *Wilkinson* Represents A Change In The Law, But The Commission’s Decision Was Not Controlled By The Law That *Wilkinson* Rejected. Furthermore, McLeod Did Not Object To The Standard Used Below.

McLeod’s argument that the commission used an analysis that has since been rejected should not be persuasive for two reasons. First, *Wilkinson* did not modify the four factors used to determine whether a worker qualifies as an employee, and the commission examined these factors and resolved them all in Ms. Shatto’s favor. Second, McLeod never took issue

with the test the commission applied in this case, and McLeod's argument is accordingly not preserved for review.

McLeod's general characterization of the Supreme Court's *Wilkinson v. Palmetto State Transportation Company* opinion is completely accurate. The general rubric for judging whether a worker qualifies as an employee for workers' compensation purposes has long been determined by analyzing (1) evidence of the right to control the worker; (2) whether the employer furnished the worker with equipment; (3) the method of the worker's payment; and (4) the right to fire. *Nelson*, 349 S.C. at 594, 564 S.E.2d at 113. *Wilkinson* was concerned with what the court perceived as a double-standard in the relative weights assigned to factors that indicated an employment relationship versus factors cutting the other way. Pre-*Wilkinson*, any single factor tending to show employment was virtually proof that a worker was an employee, and in the contrary direction, any factor tending to show that a worker was not an employee was "at best only mildly persuasive . . . and sometimes of [] no [] force at all." *Dawkins*, 341 S.C. at 439, 534 S.E.2d at 703 (quoting 3 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW, § 61.04 (2000)). In *Wilkinson*, the Supreme Court rejected these presumptions and instructed that the four employment factors be evaluated "with equal force in both directions." Slip Op. at 3.

The appellate panel's decision in this case cited the proposition that *Wilkinson* rejected. (R.pp. 76-80; R.pp.20-24). But importantly, the commission found that McLeod had the right to control Ms. Shatto's work, furnished her with equipment, ultimately paid her wages, and had the right to fire her. (R.pp.76-80; R.pp. 20-24). In short, the commission found that all four of the employment factors tended to show that Ms. Shatto was a McLeod

employee. The significance of the appellate panel's citation to the presumption that *Wilkinson* rejected is thus belied by the fact the commission viewed all four factors in this case as going in Ms. Shatto's favor. If the commission had resolved the question of employment based on a single factor, or, if the commission had treated a factor tending to show that Ms. Shatto was not an employee as only "mildly persuasive," McLeod's argument would have more appeal.

But placing the merits to the side, McLeod is advancing an argument on appeal that it did not advance before the commission. It is axiomatic that an argument is not preserved for review if it was not first presented to the lower court. See *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 421-22, 526 S.E.2d 716, 724 (2000) (noting "the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments"). In its appeal in this case, McLeod advances, for the first time, the argument that the commission used an inappropriate standard in examining Ms. Shatto's employment status. Ms. Shatto's position is not that McLeod should be faulted for failing to anticipate the Supreme Court's decision in *Wilkinson*; but in order to raise an appeal challenging the standard the commission used to judge Ms. Shatto's employment status, McLeod should have made that same challenge below. The argument is therefore not preserved.

As an academic matter, this particular question is only of limited importance in this appeal because the appellate court, pursuant to the standard of review for jurisdictional facts, takes its own view of the preponderance of the evidence. Thus, if the commission had

employed the wrong guideposts for its analysis, a reversal and remand would be unnecessary given that this court does not defer to the commission's findings on this question. In this case, however, the commission's decision was not controlled by a later-overruled analysis, and McLeod's suggestion to the contrary should not be persuasive.

The court should accordingly reject McLeod's suggestion that this case should be reversed on account of the method, and not the merits, of the commission's analysis.

B. The Commission Correctly Determined That Ms. Shatto Was McLeod's Employee And Not An Independent Contractor.

The court may find a bit of background helpful in analyzing the question of whether the commission erred when it determined that the preponderance of the evidence shows that Ms. Shatto was McLeod's employee and not an independent contractor at the time of her injury.

In March of 2007, Staff Care and McLeod entered into a contract in which Staff Care agreed to arrange for *locum tenens* workers to fill staffing needs at McLeod. (R.pp. 429-430). The dictionary definition of the term *locum tenens* is "one filling an office for a time or temporarily taking the place of another—used especially of a doctor or clergyman."¹ In this agreement, Staff Care agreed to arrange for providers in accordance with staffing needs that McLeod would identify. (R.pp. 429-430). After McLeod specified the rates it wished to pay the providers, Staff Care was to identify potential providers, screen and obtain references for them, arrange a complete travel and accommodation itinerary in conjunction

¹ Merriam-Webster's On Line Dictionary, at <http://www.merriam-webster.com/dictionary/locum%20tenens> (last visited Sept. 14, 2009).

with McLeod, and arrange for malpractice insurance coverage through Staff Care's carrier. *Id.* McLeod agreed to supply the providers with the usual and customary equipment and supplies, was to notify Staff Care within 48 hours if a provider who showed up to begin an assignment was not acceptable, and McLeod agreed to pay the provider, either directly or through Staff Care, the cost of housing outside McLeod's facility, local transportation, en route lodging, en route meals, and "reasonable transportation costs to and from [McLeod's] location." *Id.* The agreement contained a penalty if a provider who was presented to McLeod for a *locum tenens* assignment agreed to accept full-time employment with McLeod within two years of having been presented to McLeod as a *locum tenens* worker. *Id.* Not long after McLeod and Staff Care entered into this agreement, the director of anesthesia at McLeod sent Staff Care an order requesting that Staff Care fill a *locum tenens* need for a Certified Registered Nurse Anesthetist (C.R.N.A.). (R.p. 495). This order set the hourly rate McLeod would pay for the position and guaranteed to pay for a minimum of forty hours of work per week. *Id.*

Like McLeod, Ms. Shatto entered into a contract with Staff Care. (R.pp. 282-286). This contract, which Staff Care and Ms. Shatto executed in October of 2007, informed Ms. Shatto that Staff Care "acts as an agent" to help its clients fill *locum tenens* staffing needs. *Id.* The agreement termed potential *locum tenens* positions as "assignments." According to the agreement, the rate of pay for an assignment would be negotiated between Ms. Shatto and the client through Staff Care, and Staff Care agreed to use its best efforts to ensure that the client provided for round trip travel to and from the assignment, as well as local transportation and reasonable and pleasant living accommodations. *Id.* The agreement

further provided that the cost of malpractice coverage would be passed through to the client and additionally instructed that "Staff Care acts as a placement agent for client and [you are] an independent contractor. [You] shall not be, for any purpose, treated as an employee or agent of Staff Care. Staff Care is not licensed to practice medicine. Staff Care shall not in any way attempt to influence or direct [your] professional medical judgment or [your] relationship with clients or patients." *Id.* At the same time Ms. Shatto and Staff Care executed this agreement, they also executed a document entitled "Independent Contractor Declaration." (R.p. 287). This document provided that Ms. Shatto independently determined the assignments she wished to accept, was not employed by Staff Care, and that to the extent Ms. Shatto received payments from Staff Care, the payments were made on behalf of the client Ms. Shatto was serving. *Id.* Later that month, Ms. Shatto accepted an assignment as a C.R.N.A. with McLeod. The term of the assignment was from November of 2007 through February of 2008, and Staff Care forwarded Ms. Shatto a packet of information detailing the logistics of the assignment and instructing her to contact the director of anesthesia prior to starting for her first day instructions. (R.pp. 297-302). Ms. Shatto was injured on December 21, 2007; just over a month after she first reported for work.

In creating a test to distinguish between an employee and an independent contractor, "[t]he courts have found difficulty in laying down any hard and fast rule." *Young v. Warr*, 252 S.C. 179, 189, 165 S.E.2d 797, 802 (1969). Determining the proper classification of a worker "in each case depends largely upon its own factual situation, subject to certain established principles." *Id.* The term "employee" is defined broadly in the Workers' Compensation Act, see S.C. Code Ann. § 42-1-130 (Supp. 2008), but the "established

principle” used to draw the distinction is that a worker qualifies as an employee when the purported employer has the right to control the worker, both in what work the worker performs and in how the work is performed. *Chavis v. Watkins*, 256 S.C. 30, 32, 180 S.E.2d 648, 649 (1971). In contrast, “[a]n 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.* (quoting *Bates v. Legette*, 239 S.C. 25, 34-35, 121 S.E.2d 289, 293 (1961)). In determining whether the purported employer has the right to control the worker, courts examine four factors: (1) direct evidence of the right to control; (2) method of payment; (3) furnishing of equipment; and (4) the right to fire. *Id.* at 32, 180 S.E.2d at 649 (citing *Sharpe v. G.E. Moore Co.*, 254 S.C. 196, 200, 174 S.E.2d 397, 399 (1970) and other cases).

i. Right To Control

The commission found that McLeod had the right to control Ms. Shatto because McLeod scheduled which patients Ms. Shatto would anesthetize, relayed those assignments to Ms. Shatto through her supervisor, and required Ms. Shatto to report to her supervisor or the supervisor on duty when she reported to work. (R.pp. 76-77). The commission also relied on the fact that Ms. Shatto’s supervisor had to sign her time sheets; that Ms. Shatto had to perform her work in accordance with the standards of care for the McLeod anesthesia department; that Ms. Shatto was required to provide instruction and education for McLeod’s student nurse anesthetists; that Ms. Shatto had a definite work schedule; that Ms. Shatto was required to sign a job description; that Ms. Shatto had to abide by McLeod’s dress code; and that Ms. Shatto was required to wear a McLeod name tag. (R.pp.77-78). McLeod argues

that the commission's decision on the question of control was incorrect because Ms. Shatto selected which shifts she would work, retained the right to refuse the assignment at McLeod, exercised control over her actions with respect to administering anesthesia, and was assessed a penalty if she accepted a permanent position with McLeod before a period of time had expired. McLeod alternatively argues that if it had control over Ms. Shatto, that control was dictated by federal law or standards of hospital accreditation, and was furthermore held only by virtue of a delegation of control over Ms. Shatto from Staff Care. The court should find none of these arguments persuasive.

a. Direct Evidence Of The Right To Control

Cases in this area often speak of a distinction between control over a worker as to the work's result and control over the manner of performance. See *Kilgore Group, Inc. v. South Carolina Employment Security Commission*, 313 S.C. 65, 69, 437 S.E.2d 48, 50 (1993); see also *Young*, 252 S.C. at 189-90, 165 S.E.2d at 802 (discussing an employer as one who reserves an interest in both the performance of the work and in the finished product). Control over the manner of a worker's performance is the hallmark of an employer-employee relationship, and McLeod's primary argument is accordingly that Ms. Shatto exercised a great deal of control over her actions with respect to the way she administered anesthesia to patients. But this argument misses the relevant point. The question is not whether Ms. Shatto generally got to use her judgment in her work, but whether McLeod possessed the supervisory authority to control the manner in which Ms. Shatto performed her job.

In this case, the evidence suggests that McLeod could have and indeed did control the manner that Ms. Shatto went about her duties. As the commission found, Ms. Shatto

took her assignments each day from the supervising nurse anesthetist or off of a white board where her schedule was posted. (R.pp. 143, 151-152). McLeod required Ms. Shatto to provide instruction and education for its student nurse anesthetists, and McLeod required Ms. Shatto to attend at least fifty percent of its department staff meetings. (R.pp. 471-473). Ms. Shatto had a definite work schedule, (R.p. 143, 257, 302); Ms. Shatto's supervisor signed her timesheets "as [he does] for all employees," (R.p. 224); and Ms. Shatto was required to comply with the standards adopted by McLeod's anesthesia department "as deemed appropriate by [McLeod's] anesthesia/surgeon team." (R.pp. 450, 455, 469, 472). McLeod not only instructed Ms. Shatto to wear proper medical attire to perform her duties; it required Ms. Shatto to follow a dress code. (R.p. 452). Ms. Shatto's job description also listed her as reporting to the nurse director of McLeod's anesthesia department. (R.p. 450).

The argument that Ms. Shatto determined the method and manner of administering anesthesia is belied by the fact that she was required by law to be supervised by a medical doctor. (R.pp. 153, 155). Ms. Shatto accordingly could not independently decide when, for how long, or even how to anesthetize patients.

McLeod's protest based on the fact that Ms. Shatto picked the assignments she wanted to work is similarly unpersuasive. Along with specifying what hours she would like to work, Ms. Shatto's decision to accept an assignment took place at the front end—which is to say that it took place as Ms. Shatto went through the process of accepting the assignment at McLeod. These aspects of the relationship have little bearing on whether McLeod could control the details of how Ms. Shatto performed her job once she accepted the assignment. For this same reason, the court should discount McLeod's argument based on the fact that

it did not screen or select Ms. Shatto.

McLeod's argument based on the penalty to which both it and Ms. Shatto were subject if Ms. Shatto accepted a full time position at McLeod should also be dismissed as unpersuasive. In broad terms, the argument goes that although McLeod might have treated Ms. Shatto like an employee in some respects, she clearly was not a full employee because a contract prohibited her from becoming one. Coupled with this argument is the assertion that McLeod treated Ms. Shatto differently from its staff nurses who were employees. Those nurses received days off, vacation, 401(k) and other benefits, and were "on call."

Again, the question the court must answer is whether McLeod could control the manner in which Ms. Shatto performed her work. For this reason, the fact that Ms. Shatto was not treated like a full-fledged employee for all purposes is not terribly instructive. In this case, McLeod determined Ms. Shatto's work assignments and had staff that supervised Ms. Shatto on a daily basis. Furthermore, McLeod's argument based on Ms. Shatto not having days off rings particularly hollow in light of the evidence in the record that her supervisor gave her two days off following her fall. (R.p. 137).

As the commission found, aspects of Ms. Shatto's job like having a McLeod supervisor, taking the supervisor's direction on a daily basis, and being subject to McLeod's dress code are strong evidence that McLeod had the ability to control the manner in which Ms. Shatto performed her work. The court should accordingly reject McLeod's argument that the evidence in this case demonstrates that McLeod did not have the right to control Ms. Shatto's work.

b. Control Required By Law

The notion that a putative employer cannot be faulted for exercising a degree of control that it is required by law to exert over a worker is not a new development in the law. McLeod is right to rely on *Wilkinson* for this proposition, see Slip Op. at 4 (“requiring a worker to comply with the law is not evidence of control by the putative employer”), but the proposition is nothing new. See *Young*, 252 S.C. at 195, 165 S.E.2d at 805 (noting that the fact that an alleged employer reserved the right to refuse to give work to a truck driver who disobeyed traffic rules “had no substantial evidentiary value in determining whether the employer-employee relationship existed”).

The reason the commission’s decision in this case was the correct one is that McLeod went beyond the requirements imposed on it by law and dictated what Ms. Shatto wore to work and how she spent her time on the job. McLeod’s assertions that it is required to give workers a job summary, required to perform a drug screen, required to give workers an orientation, and required to provide all staff with nametags are all well-taken. But these arguments are not effective counters in light of the evidence in the record that McLeod exercised a great deal of authority over the manner in which Ms. Shatto performed nearly every aspect of her job. An independent contractor would not be presented with a dress code; she would simply be told to wear scrubs and other appropriate clothing. An independent contractor would not take daily assignments from, report to, and have a timecard signed by a staff supervisor. And an independent contractor would not be asked to supervise student nurses. That Ms. Shatto was required to perform these tasks indicates that she was not a worker hired to do a specific piece of work by her own methods. She was instead hired

to be an employee, albeit for a term, and the law should accordingly treat her as an employee.

The court should therefore hold that although the law impacted the degree to which McLeod exercised control over Ms. Shatto, the evidence in the record reflects that McLeod's authority over Ms. Shatto extended beyond ensuring that she complied with law and into directing the manner in which Ms. Shatto performed her work.

c. Delegation From Staff Care

McLeod's argument that any control it exercised over Ms. Shatto was delegated by Staff Care is similarly unpersuasive. Furthermore, if the argument were true, it would support the commission's finding that Ms. Shatto was a borrowed servant and that McLeod is nonetheless liable to provide Ms. Shatto with benefits.

McLeod draws support for this argument from *Kilgore Group, Inc. v. South Carolina Employment Security Commission*, 313 S.C. 65, 437 S.E.2d 48 (1993). Like the instant case, *Kilgore* involved a staffing agency that had contracted with a business to provide temporary workers. *Id.* at 67-68, 437 S.E.2d at 48-49. The question asked in *Kilgore* was whether the temporary workers qualified as employees of the staffing agency. *Id.* To defend the charge, the staffing agency pointed to language in its agreements with the temporary workers specifying that the workers were independent contractors. *Id.* The agency further argued that the temporary workers worked along-side employees of the agency's client and that the client exercised unfettered control over the temporary workers' daily activities. *Id.* In rejecting the argument that the temporary workers were not employees of the staffing agency, the court held that the client's abilities to exercise control over the temporary workers derived solely from the client's contracts with the staffing agency and from the staffing agency's contracts

with the workers. *Id.* at 69, 437 S.E.2d at 50. The court accordingly held that the staffing agency controlled the temporary workers and was therefore their employer. *Id.*

Kilgore may well be instructive in this case, but Ms. Shatto's position is that it is not instructive for the proposition McLeod offers. The case properly stands for the proposition that the court should examine and give weight to a contract in which the parties have sought to define the character of their relationship, and it furthermore correctly guarantees that a contractual characterization of a relationship as that of independent contractor and employer is not dispositive. *Id.* at 68-69, 437 S.E.2d at 49-50. Despite this, the parallel between *Kilgore* and the instant case is flawed because Ms. Shatto's contract with Staff Care expressly gives Staff Care no control over Ms. Shatto's day-to-day performance of her job. (R.pp. 282-287). The agreement acknowledges that Staff Care does not practice medicine and that Staff Care has no control over Ms. Shatto's activities, and Staff Care's actions back these assertions up. Staff Care took several steps on Ms. Shatto's and McLeod's behalf in arranging Ms. Shatto's placement at McLeod, but as the commission found, these steps amounted to (1) matching what Ms. Shatto wanted in a job with what McLeod wanted in a worker and (2) setting up the logistics for Ms. Shatto's job. (R.pp. 19, 75-76). If Ms. Shatto encountered a problem performing her duties, she would almost certainly have gone to one of her supervisors at McLeod and not Staff Care.

For this same reason, the court should discount the fact that Staff Care provided Ms. Shatto with emergency phone numbers and that Ms. Shatto called Staff Care after an accident in her rental car. These were logistical matters properly related to Staff Care and ensured only that Ms. Shatto would be able to get to her assignment at McLeod. Furthermore, the

fact that Staff Care provided Ms. Shatto with information related to legal counsel does not cut in the other direction. The evidence is that Staff Care provided Ms. Shatto's malpractice insurance and that Staff Care passed that cost on to McLeod. (R.pp. 231-232).

If *Kilgore* applied to this case—which is to say, if Ms. Shatto should be deemed an employee of Staff Care—Ms. Shatto would take the position that this supports the commission's determination that Ms. Shatto was an employee borrowed by McLeod from Staff Care. Under the "borrowed servant" doctrine, a special employer is liable for workers' compensation benefits where a general employer lends a worker to the special employer and (1) there is a contract of hire between the worker and the special employer; (2) the work being done is essentially that of the special employer; and (3) the special employer has the right to control the details of the work. *Cooke*, 367 S.C. at 175, 624 S.E.2d at 442. As McLeod reads the case, *Kilgore* provides that Ms. Shatto was an employee of Staff Care. McLeod would nevertheless remain liable for Ms. Shatto's workers' compensation benefits because it (1) has a contract of hire with Ms. Shatto, see *Eaddy v. A.J. Mettler Hauling & Rigging Company*, 284 S.C. 270, 325 S.E.2d 581 (Ct. App. 1985) (a contract with the special employer can be inferred by the worker's assent to the special employer's control); (2) Ms. Shatto was performing work which was essentially the same work McLeod employees performed; and (3) McLeod controlled the details—according to them, by virtue of a contractual delegation from Staff Care. If McLeod is right about the application of *Kilgore*, the case bolsters the commission's decision.

The court might also find it instructive that in her work as a nurse anesthetist, Ms. Shatto was working along side a staff of workers who were admittedly McLeod employees.

The court should view this fact as significant because in other scenarios, such as in the case of a contractor's employee performing work at a job site, the court views it as important if the contractor's employee is performing "an activity that is part of the [owner's] trade, business, or occupation." *Cooke*, 367 S.C. at 174, 624 S.E.2d at 442 (internal quotation marks omitted). Using a trucker as an example, Larson's puts the point this way:

If I regularly, year in and year out, engage an individual trucker to transport logs from my woods to my lumber mill; which is an integral part of my lumbering operation, paying him or her by the load, and reserving no right of control over the details of his work, it is quite possible that this person is as appropriate a subject for compensation protection as any worker that could be found. The driver is taking a regular and continuous part in the manufacture of my product; the work is hazardous; the rate of pay is such that the driver cannot be expected to bear the cost of industrial accident; and his or her place in the process is not such that the risk of injury could otherwise be distributed."

3 ARTHUR LARSON & LEX K. LARSON, *LARSON'S WORKERS' COMPENSATION LAW*, §60.04[2] (2004). In this case, McLeod chose to get its regular work accomplished through the use of Ms. Shatto. Because Ms. Shatto's services form a regular and continuing part of the cost of that work, her work was "not such an independent business that it forms in itself a separate route through which [] her own costs of industrial accident can be channeled." *Id.* at § 60.05[1] (discussing that "[t]he theory of compensation legislation is that the cost of all industrial accidents should be borne by the customer as part of the cost of the product"). This policy finds support in the maxim that doubts about a worker's employment status are to be construed in favor of coverage, and the court would be justified in taking stock of these concerns in its decision.

To sum, the commission's decision that McLeod had the right to control the details

of Ms. Shatto's work is fully supported by the evidence. Ms. Shatto had a great deal of contact with Staff Care, but the only conclusion supported in the record is that this contact related to the logistics of Ms. Shatto's traveling to and from her assignment at McLeod. Federal law and accreditation standards required McLeod to supervise Ms. Shatto to some degree, but the record supports the commission's decision that McLeod supervised Ms. Shatto to a greater extent than these authorities required. McLeod's argument based on delegated authority is belied by Ms. Shatto's contract with Staff Care, but if the argument was accurate, McLeod would nonetheless be liable for Ms. Shatto's benefits under the borrowed servant doctrine. The court should therefore reject McLeod's arguments with respect to the right to control Ms. Shatto's work.

ii. Method Of Payment

The commission found that as a practical matter, McLeod paid Ms. Shatto. McLeod argues that an analysis of the method of payment supports the conclusion that Ms. Shatto was an independent contractor because (1) McLeod did not pay her directly; (2) McLeod does not pay its regular employees per diem or for lodging; (3) Ms. Shatto filed a form 1099 and claimed her income as business income (as opposed to a W-2 claiming income from wages); and (4) Ms. Shatto claimed tax deductions for equipment like work shoes. The court should find that none of these arguments are persuasive.

Beginning with McLeod's assertion that it did not pay Ms. Shatto, the facts simply do not support the argument. It is true that every paycheck Ms. Shatto received came from Staff Care, but it is also true that McLeod bore the entire expense of Ms. Shatto's work. McLeod paid for Ms. Shatto's lodging, income, per diem, and rental car. (R.pp. 230-232;

337, 339, 348, 351). The commission's conclusion that McLeod ultimately paid Ms. Shatto's wages is the only conclusion the evidence supports.

The reason courts examine the method of payment is that "[p]ayment on a time basis is a strong indication of the status of employment. . . . [and] [p]ayment on a completed project basis is indicative of independent contractor status." *LARSON & LARSON, supra* page 17, at § 61.06. The rationale for this distinction lies in the fact 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 worker's time, the employer will if possible direct the use of time at some other point." *Id.*

Applying that maxim to this case, it is telling that McLeod contracted through Staff Care to pay Ms. Shatto by the hour. McLeod contracted to receive at least forty hours of quality work from a certified registered nurse anesthetist, and through scripting Ms. Shatto's assignments and verifying her time, McLeod implemented a system to ensure that it received what it paid for. For this reason, the court should reject McLeod's protest that it is inconsistent for Ms. Shatto to be an employee when McLeod did not pay Ms. Shatto directly and when Ms. Shatto filed taxes like an independent business. Ms. Shatto was admittedly not on McLeod's payroll. But through Staff Care, Ms. Shatto billed McLeod for all of her expenses and for her hourly work.

The court should accordingly hold that the method of payment in this case tilts in favor of a finding that Ms. Shatto was a McLeod employee.

iii. Furnishing Of Equipment

The commission found that McLeod furnished Ms. Shatto with equipment, and McLeod argues that it is unreasonable to expect a temporary nurse anesthetist like Ms. Shatto to provide her own equipment. Though part of McLeod's argument is persuasive, Ms. Shatto's position is that this factor is either neutral or tilts slightly in favor of employment.

The rationale of analyzing the furnishing of equipment is that an owner of equipment has invested resources in procuring the equipment and is "naturally going to dictate details . . . to protect his or her investment." *Id.* at § 61.07[2]. McLeod's protest that it would be impractical, if not all-together impossible, for Ms. Shatto to be expected to provide an anesthesia machine and sterile medical supplies should be taken at face value. It is also likely that it would be impractical for McLeod to structure a relationship with a provider like a nurse which required the nurse to pay rent for the use of equipment like an anesthesia machine or to reimburse McLeod for the cost of medical supplies used in treating patients. In all likelihood, these costs are already built into the charges McLeod assesses patients for medical services. This should not mean that this factor tilts in favor of Ms. Shatto being an independent contractor. If anything, it demonstrates that McLeod treated Ms. Shatto like other employees. In light of the fact that Ms. Shatto was forced to use McLeod's equipment and supplies, it remains likely that if she had misused these resources, McLeod would have instructed Ms. Shatto to perform her tasks differently. This aspect of the parties' relationship is substantially more like that of employer-employee than employer-contractor.

The court should accordingly reject McLeod's argument that the provision of equipment factor tilts in favor of a finding that Ms. Shatto was an independent contractor.

iv. Right To Fire

The commission found that McLeod had the right to fire Ms. Shatto. McLeod argues that this finding is incorrect because Ms. Shatto's supervisor at McLeod did not believe that he had the unilateral right to terminate Ms. Shatto and that had he experienced repeated problems with Ms. Shatto, he would have contacted Staff Care.

"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 contracted for and to treat any attempt to prevent completion as a breach of contract." *Id.* at § 61.08[1].

McLeod's contract with Staff Care gave it the unilateral right to terminate Ms. Shatto's job at McLeod. (R.pp. 429-430). This right was qualified only by the requirement that McLeod give thirty days written notice of its intention to do so. *Id.* The agreement also gave McLeod the ability to determine, in its sole discretion, whether Ms. Shatto was not meeting McLeod's expectations. *Id.* If the supervising nurse anesthetist would have contacted Staff Care had he experienced problems with Ms. Shatto, Ms. Shatto submits that it would only have been to inform Staff Care that he needed a new nurse anesthetist. This is, in fact, what Staff Care and McLeod's contract contemplates, *id.*, and it is instructive to note that Ms. Shatto's job at McLeod ended when her McLeod supervisor fired her. (R.pp. 137-138, 225-226). Buttreassing this conclusion is the fact that if Ms. Shatto had problems performing the medical aspects of her job, she almost assuredly would have gone to her McLeod supervisor and not her "logistics coordinator" at Staff Care. See (R.p. 302).

As a housekeeping matter on this point, the Supreme Court's recent decision in *Wilkinson* discusses the right to fire in illustrative terms. There the court analyzed the fact that the parties' contract provided that either party could terminate the relationship with thirty days written notice. Slip Op. at 6. The court said "[the putative employer] did not have a 'right to fire' [the worker]. The termination of the parties' relationship was controlled by their agreement." *Id.*

This particular analysis is not applicable in the instant case. What the court looked at in *Wilkinson* was a relationship between a truck driver and a trucking company that began as one of employer-employee and changed character when the parties entered into a contractual relationship after arms-length negotiations. The parties negotiated an increased rate of pay per mile, the truck driver owned his equipment, the truck driver expressly assumed responsibility for the methods of the performance of his work, and the truck driver agreed in writing to carry workers' compensation coverage. Slip Op. at 2. In holding that the truck driver was not the trucking company's employee, the court essentially held that the trucker got what he paid for.

The record in the instant case is substantially more equivocal. It is undisputed that Ms. Shatto believed that she was not an employee of Staff Care. Ms. Shatto never met anyone from Staff Care—a corporation located in Texas—and Ms. Shatto's directions from Staff Care were merely logistical. But unlike in *Wilkinson*, the evidence does not suggest that Ms. Shatto thought she was free and independent from McLeod's control with respect to how she performed her job. Ms. Shatto sought *locum tenens* work because it "pays better," she was looking to work less hours, and she did not want to be "on call." (R.pp. 156-

157, 171). Indeed, Ms. Shatto acknowledged that as a *locum tenens* worker “you are not an employee under their rules.” (R.p. 171). But what is less clear in this case than it was in *Wilkinson* is whether Ms. Shatto was truly contracting to do work on her own and according to her own methods or whether she was accepting what amounted to a job as a short-term McLeod employee; irrespective of her understanding of the legal significance of the term “employee.” The fairest and most accurate characterization of the record is that Ms. Shatto accepted a job as a temporary McLeod employee, subject to McLeod’s supervision and direction, and subject to McLeod’s rules. Ms. Shatto answered to a McLeod supervisor, she was paid by the hour, and if McLeod wanted to terminate her for any reason, it could do so on thirty days notice. The commission examined the nuances and idiosyncracies of this relationship and determined that Ms. Shatto was a McLeod employee because she was subject to McLeod’s control. The court should affirm that decision.

(II) The Commission Correctly Determined That Mildred Shatto’s Fall Was A Compensable Accident As Opposed To An Idiopathic Fall.

McLeod’s second argument for why the commission’s decision should be reversed is that Ms. Shatto’s fall was idiopathic and was therefore not a compensable accident. The court should view this argument as unpersuasive because it overlooks the applicable standard of review, takes an inappropriately narrow view of Ms. Shatto’s testimony with respect to the fall, and discounts the nature of the situation in which the fall occurred.

As a starting point, Ms. Shatto’s position is that McLeod is mistaken in characterizing this issue as one of law. In this case, the commission did not determine that Ms. Shatto was due benefits for injuries she sustained as the result of an idiopathic fall. The commission

instead made the factual determination that Ms. Shatto's fall was not idiopathic in nature. (R.p. 19, 75). McLeod's quibble with the commission is thus a factual one; not a legal one.

Unlike the appellate court's review of a worker's status as an employee, the question of whether an employee suffered an injury by accident is not a jurisdictional fact. *McCreery v. Covenant Presbyterian Church*, 299 S.C. 218, 383 S.E.2d 264 (Ct. App. 1989) (reversed on other grounds 303 S.C. 271, 400 S.E.2d 130 (1990)). An appellate court therefore reviews the commission's findings of fact with respect to a claimant's injury using the standard set forth in the Administrative Procedures Act. See S.C. Code Ann. §§ 1-23-310 to -400 (2005 & Supp. 2008). According to that standard, the commission's factual finding that Ms. Shatto's fall was not idiopathic must be affirmed unless it is clearly erroneous in view of the reliable, probative, and substantial evidence in the record. S.C. Code Ann. § 1-23-380(5)(e).

The commission's decision is not clearly erroneous in light of the substantial evidence in the record. The circumstances of Ms. Shatto's fall are largely undisputed. On the date of the fall, Ms. Shatto was assisting in anesthetizing a patient who was to be anesthetized on a bed and then moved to an operating table. (R.pp. 132-133, 260). As Ms. Shatto began moving from the head of the patient's bed around to the side, she fell. (R.pp. 132-133, 260). Ms. Shatto recounted that as she moved around the patient's bed, she recalled taking one step and then recalled nothing beyond thinking "I hope this is a padded floor" as she fell. (R.pp. 276-277). Ms. Shatto also opined that her right foot must have caught on something as she stepped around the bed because after the fall her right shoe was across the room. (R.pp. 132, 170, 280). McLeod has taken the position that Ms. Shatto's

testimony is inconsistent; focusing on the fact that Ms. Shatto on the one hand professes to remember nothing about the fall and on the other hand, to remember that her right foot was not moving with her as she stepped around the patient's bed. See (R.pp. 171-172).

Ms. Shatto's testimony is not inconsistent. Ms. Shatto's testimony is fairly presented in the transcript of the hearing before the single commissioner and in the transcript of her deposition, and that testimony demonstrates that Ms. Shatto recalls stepping around the patient's bed, recalling that her right foot was not coming with her, and recalling thinking "I hope this floor is padded" as she fell to the floor. The uncontradicted evidence in the record is also that medical equipment and cords were located in the area around the corner of the bed, see (R.pp. 132-133), and Ms. Shatto's approach with respect to the fall has always been that the circumstantial evidence suggests that she tripped on this equipment while moving around the bed. The commission supported its finding that Ms. Shatto's fall was not idiopathic by citing to these portions of the record in its decision. See (R.pp. 19, 75).

Under these circumstances, McLeod's argument that the fall was unexplainable, spontaneous, or caused by a medical condition of Ms. Shatto's is not persuasive. Looking past the appropriate standard of review for this question, there is a dearth of evidence in the record supporting McLeod's contention that the fall was idiopathic. Absent from the record in this case are traditional indicia of idiopathic falls like evidence that Ms. Shatto has experienced unexplained falls or spells in her past. Second, McLeod ignores the evidence, circumstantial though it may be, that Ms. Shatto tripped while moving around the bed. Third, McLeod's argument has the effect of faulting Ms. Shatto because the bulk of the evidence presented with respect to the fall consists of her recollections of the events.

According to this approach, Ms. Shatto's testimony should be assigned a lesser weight because she does not remember more about the incident and has not offered testimony from others in the room about the cause of her fall. The court should reject this suggestion.

Viewed with this perspective, the record ably supports the commission's factual finding that Ms. Shatto's fall was not idiopathic in nature. McLeod must carry a heavy burden to overcome the commission's finding that Ms. Shatto's fall was not idiopathic, and McLeod has not carried that burden here. Accordingly, the court should reject the argument that the commission erred in holding that Mildred Shatto's fall was a compensable accident.

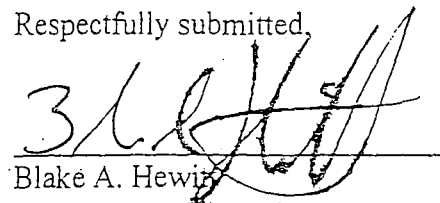
CONCLUSION

The preponderance of the evidence in this case leads to the conclusion that the Workers' Compensation Commission properly determined that Mildred Shatto was an employee of McLeod Regional Medical Center and not an independent contractor at the time of her injury. The Supreme Court of South Carolina's intervening decision in *Wilkinson* does not dictate a contrary conclusion because the evidence suggests that McLeod had the right to control Ms. Shatto—both in terms of the ultimate result of her work and in the details of her performance. The commission's conclusion that Ms. Shatto's fall was a compensable accident and not an idiopathic fall is also not clearly erroneous in light of the substantial evidence in the record. Accordingly, this court should affirm the commission's decision.

/Signature page attached

November 20, 2009

Respectfully submitted,



Blake A. Hewitt
Margaret M. Bluestein
Bluestein, Nichols, Thompson &
Delgado, LLC
Post Office Box 7965
Columbia, South Carolina 29202
(803) 779-7599
(803) 779-8995 (facsimile)
bhewitt@bntdlaw.com
mmbluestein@bntdlaw.com

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

G. Bryan Lyndon, Commissioner

W.C.C. File Nos.: 0724433 and 0724543

Mildred H. Shatto, Employee/Claimant.....Respondent,

v.

McLeod Regional Medical Center and Key
And Key Risk Management Services, Inc.,
Employer/Carrier.....Appellants,

and

Staff Care, Inc., and Travelers Insurance,
Employer/Carrier.....Respondents,

AMENDED FINAL BRIEF OF RESPONDENT STAFF CARE

Candace G. Hindersman, Esquire
Richard B. Kale, Esquire
Michael W. Burkett, Esquire
Willson Jones Carter & Baxley, P.A.
4500 Fort Jackson Boulevard
Columbia, SC 29209
Attorney for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
STATEMENT OF ISSUES ON APPEAL.....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF THE FACTS.....	4
ARGUMENT.....	7
I. The Commission Correctly Determined That Respondent Claimant Was An Employee Of Appellant McLeod Under The Borrowed Servant Doctrine And Under The Code Of Laws Of South Carolina Section 42-1-400.....	6
A. Claimant Was An Employee Of McLeod.....	6
i. McLeod Had A Contract Of Hire With Claimant.....	6
ii. Respondent Claimant's Work Was That Of Appellant McLeod.....	9
iii. Appellant McLeod Possessed The Right To Control The Details Of Respondent Claimant's Work.....	10
1. Right or Exercise Of Control.....	11
2. Method Of Payment.....	12
3. Furnishing Of Equipment.....	14
4. Right To Fire.....	15
B. Appellants' Reliance on the <i>Kilgore</i> Decision is Misplaced.....	16
C. Assuming arguendo that Respondent Claimant was not an employee of Appellant McLeod, the Court must remand the case to the Commission in order for the Commission to make findings of facts regarding Claimant's relationship with Respondent Staff Care.....	19

CONCLUSION.....	20
-----------------	----

TABLE OF AUTHORITIES

State Cases

<i>Alewine v. Tobin Quarries, Inc.</i> , 206 S.C. 103, 33 S.E.2d 81 (1945).....	7, 8
<i>Cooke v. Palmetto Health Alliance</i> , 367 S.C. 167, 624 S.E.2d 439 (Ct. App. 2005).....	6, 10, 17, 18
<i>Eaddy v. A.J. Metler Hauling & Rigging Co.</i> , 284 S.C. 270, 325 S.E.2d 581.....	8, 9
<i>Kilgore Group, Inc. v. South Carolina Employment Security Commission</i> , 313 S.C. 65, 437 S.E.2d 48 (1993).....	16, 18
<i>McDowell v. Stilley Plywood Co.</i> , 210 S.C. 173, 41 S.E.2d 744.....	19
<i>Nelson v. Yellow Cab</i> , 349 S.C. 589, 564 S.E.2d 110 (2002).....	10
<i>Porter v. Labor Depot</i> , 372 S.C. 560, 643 S.E.2d 96 (Ct. App. 2007).....	19
<i>S.C. Workers' Comp. Comm. v. Ray Covington Realtor's, Inc.</i> , 318 S.C. 546, 459 S.E.2d 302 (1995).....	19
<i>Wilkerson v. Palmetto State Transportation Company</i> , 382 S.C. 295, 676 S.E.2d 700 (2009), reh'g denied (May 29, 2009).....	10

Other Authorities

<i>Larson's Workers' Compensation Law</i> , § 67.06, at 67-17 (2003).....	13
<i>S.C. Code Ann.</i> § 42-1-130.....	2, 6, 7

STATEMENT OF ISSUES ON APPEAL

- I. DID THE COMMISSION ERR IN DETERMINING THAT RESPONDENT CLAIMANT WAS AN EMPLOYEE OF APPELLANT McLEOD UNDER THE BORROWED SERVANT DOCTRINE?

STATEMENT OF THE CASE

On April 30, 2008, Respondent Mildred Shatto ("Claimant") filed a Form 50 against Appellants McLeod Health ("McLeod") and Key Risk Management Services, Inc. ("Key Risk") (collectively "Appellants"). On that same date, Claimant filed a separate Form 50 against Respondents Staff Care, Inc. ("Staff Care") and Travelers Insurance ("Travelers") (collectively "Respondents"). In each Form 50, Claimant alleged that she sustained multiple injuries as a result of a fall arising out of and in the course of her employment on December 21, 2007. Specifically, Claimant contended she sustained injuries to her "face, right eye, nose, right hand, right arm, right shoulder, neck, back, right hip, right knee, numbness in face [and] numbness in right hand." Appellants and Respondents timely filed Form 51's denying that Claimant sustained an injury arising out of and in the course of her employment and denying an employee/employer relationship. Claimant's requests for a hearing were consolidated, and a hearing was held on August 21, 2008 in Florence, South Carolina.

At the Hearing, Claimant continued to allege she sustained multiple injuries as a result of an accident arising out of and in the course of her employment. Claimant contended she was an employee of either Appellant McLeod or Respondent Staff Care and that she was not an independent contractor. Claimant sought temporary total disability benefits from January 1, 2008 and continuing. Claimant also alleged that she was not at maximum medical improvement.

Appellants contended Claimant was never an employee of Appellant McLeod, and as a result, Appellants asserted jurisdiction was improper based on S.C. Code Ann. § 42-1-130. Appellants specifically asserted Claimant was an independent contractor.

Furthermore, Appellants maintained Claimant's alleged incident did not arise to the level of an "accident" as defined in the South Carolina Workers' Compensation Act ("Act"), and Claimant's alleged incident was idiopathic in nature.

Respondents asserted Claimant was an independent contractor of Respondent Staff Care and not an employee of Respondent Staff Care. Respondents also contended that regardless of Claimant's employment status, the December 21, 2007 incident did not rise to the level of "accident" as defined in the Act.

On December 3, 2008, Commissioner Lyndon issued a Decision and Order finding the Claimant sustained compensable injuries as a result of a fall on December 21, 2007. Commissioner Lyndon further ordered Appellants to pay Claimant's causally related medical expenses and temporary total disability benefits because she was found to be an employee of Appellant McLeod under the borrowed servant doctrine. On December 16, 2008, Appellants filed a Form 30 Request for Commission Review.

A Full Commission Review hearing was held on March 24, 2009. Following the hearing, the appellate panel fully affirmed the single commissioner's December 3, 2008 Decision and Order. On June 16, 2009, Appellants filed a Notice of Appeal with the South Carolina Court of Appeals.

STATEMENT OF THE FACTS

Respondent Claimant is a sixty-six year old female. (R. p. 236, lines 15-16). Claimant is a graduate of the Pennsylvania Hospital School of Nursing and the Carlyle Hospital School of Anesthesia in Pennsylvania. (R. p. 237, line 7-p. 238, line 6). Claimant is a certified nurse anesthetist. (R. p. 238, lines 7-12). Claimant has worked in the nursing profession her entire working career. (R. p. 239, lines 2-4). Claimant spent twenty-one years at the Carlyle Hospital in Pennsylvania. (R. p. 239, lines 2-23). In 2001, Claimant moved to South Carolina to help care for her ailing sister. (R. p. 242, lines 11-14). Claimant continued to work short-term nursing jobs after moving to South Carolina. (R. p. 242, line 20-p. 243, line 8).

In 2007, Claimant contacted Respondent Staff Care about finding employment in the nursing field. (R. p. 245, lines 18-20). Staff Care is a locum tenens staffing firm that matches physicians and CRNA's on a temporary basis with hospitals and other medical clinics. (R. p. 306). Staff Care's "role is to match qualified independent contractor physicians with healthcare organizations." (R. p. 318). Staff Care is not engaged in the practice of medicine. (R. p. 430).

In March 2007, Staff Care and Appellant McLeod entered into an agreement in which Staff Care would search and identify possible locum tenens for McLeod. (R. pp. 429-434). The agreement provided that Staff Care would deposit Claimant's earnings directly into Claimant's account and that McLeod would reimburse Staff Care for all payments made to Claimant. (R. p. 429). In addition to earnings, McLeod would also reimburse Staff Care for Claimant's transportation costs, malpractice insurance, overtime pay, and Claimant's out-of-town lodgings. (R. p. 429).

On October 29, 2007, Claimant and Staff Care entered into an agreement in which Claimant would provide locum tenens coverage for McLeod as a Certified Registered Nurse Anesthetist from November 5, 2007 through February 1, 2008. (R. pp. 297-302). In the agreement, Claimant acknowledged that she was an independent contractor; that Staff Care did not have the right to control the manner in which she practiced; that she could terminate her relationship with Staff Care, but Staff Care could not terminate any assignment Claimant accepts; and that Claimant is not entitled to any unemployment benefits or workers' compensation benefits from Staff Care. (R. p. 298). Claimant began working for McLeod in November 2007. (R. p. 273, lines 4-8).

Prior to starting work for McLeod, Claimant was required to attend McLeod's employee orientation, sign numerous "employee" forms, sign a dress code policy, and enter into a confidentiality agreement with McLeod. (R. pp. 447-488). McLeod provided Claimant with scrub suits, a McLeod name tag, and equipment to anesthetize patients. (R. p. 144, line 22-p. 146, line 4). McLeod did not require Claimant to bring any of her own equipment. (R. p. 144, line 22-p. 146, line 4). Claimant was required to arrive to work at McLeod by 9:00 a.m. each morning. (R. p. 146, lines 5-7). At the beginning of each morning, Claimant was obligated to report to McLeod's head C.R.N.A. to receive her duties. (R. p. 143, lines 6-19).

On December 21, 2007, Claimant was preparing to anesthetize a patient. (R. p. 276, lines 6-15). The Claimant fell as she was walking around the patient's bed. (R. p. 276, lines 16-22). Claimant does not recall anything else until she found herself on the floor of the operating room. (R. p. 276, lines 16-22). Immediately after the accident, Claimant received treatment in the McLeod emergency room. (R. p. 259, lines 11-p. 260,

line 15-p. 266, lines 17-18; R. pp. 303-304). Claimant was diagnosed with a contusion to the right orbit and discharged home. (R. p. 259, lines 11-p. 260, line 15-p. 266, lines 17-18; R. pp. 303-304).

Claimant returned to work the following Wednesday. Two days later, McLeod terminated the Claimant. (R. p. 264, line 11-p. 265, line 20).

ARGUMENT

I. The Commission correctly determined that Respondent Claimant was an employee of Appellant McLeod under the borrowed servant doctrine.

A. Claimant was an employee of McLeod

Under the borrowed servant doctrine, when a general employer lends an employee to a special employer, the special employer becomes liable for workers' compensation if (1) there is a contract of hire between the employee and the special employer; (2) the work being done by the employee is essentially that of the special employer; and (3) the special employer has the right to control the details of the employee's work. *Cooke v. Palmetto Health Alliance*, 367 S.C. 167, 624 S.E.2d 439 (Ct. App. 2005). In the present case, Staff Care, lent Claimant to McLeod, the special employer. Furthermore, the preponderance of the evidence supports the Hearing Commissioner's finding that McLeod and Claimant entered into a contract of hire; that Claimant's work was that of McLeod; and that McLeod had the right to control the details of Claimant's work. Therefore, based on the Court's ruling in *Cooke*, McLeod, the special employer, is responsible for Claimant's workers' compensation benefits.

i. McLeod had a contract of hire with Claimant.

The preponderance of the evidence supports the Commission's finding that there was a contract of hire between Claimant and McLeod. Pursuant to S.C. Code Ann. § 42-1-130, a contract for hire can be expressed or implied. A contract will arise even where the employer does not intend to enter into one, if his conduct is such as to lead claimant, acting as a reasonable man, or in good faith, to believe he is being employed. *Alewine v. Tobin Quarries, Inc.*, 206 S.C. 103, 33 S.E.2d 81 (1945).

In the present case, an implied contract of hire existed between Claimant and McLeod based on the fact that Claimant attended an employee orientation, signed numerous "employee" forms, and consented to the control of McLeod. Claimant testified that before she started working at McLeod, she took part in an orientation to get accustomed to the large operating room and surrounding areas. (R. p. 142, line 23-p. 143, line 5). Claimant testified that her supervisor Keith Tergersen led the orientation. *Id.* Claimant testified she was required to take part in an orientation prior to working for McLeod which is supported by the "Temporary Employee Orientation Checklist" McLeod representatives completed on November 19, 2007 and November 26, 2007. (R. pp. 447-488).

Claimant also testified that McLeod representatives presented a variety of documents to her that she had to sign before she started working at McLeod. (R. p. 185, line 13-p. 186, line 3). These documents included an "Employee Health Validation Form," a job description form, a dress code policy, and a confidentiality agreement. (R. pp. 447-488). Furthermore, Claimant had to submit to a "New Hire Post-Offer Employee Health Assessment," a background check, and a drug test. (R. pp. 447-488). McLeod's Director of Occupational Health, Octavia Williams-Blake, indicated "employee" does not

have to be written across the top of all the documents to comply with the Joint Commission on Hospital Accreditation Guidelines. (R. p. 199, lines 12-16).

By requiring Claimant to participate in an orientation, sign numerous "employee" documents, and submit to a variety of tests, McLeod's conduct was such that Claimant could believe she was being employed by McLeod. Therefore, pursuant to the ruling in *Alewine*, the Commission correctly determined that an implied contract of hire existed between Claimant and McLeod.

However, even if Claimant did not believe she was being employed by McLeod, the fact that Claimant submitted to McLeod's control is enough to infer a contract of hire. A contract of hire can be inferred under the borrowed servant doctrine when the lent employee consents to the control of the special employer. *Eaddy v. A.J. Metler Hauling & Rigging Co.*, 284 S.C. 270, 325 S.E.2d 581.

The preponderance of the evidence establishes that Claimant consented to McLeod's control. As stated above, Claimant signed a variety of forms which required her to follow McLeod's company policies. (R. p. 185, line 13-p. 186, line 3). These policies included complying with McLeod's dress code (including wearing McLeod scrub suits), wearing a McLeod name tag, and obeying McLeod's confidentiality agreement. (R. p. 251, line 18-p. 252, line 5; R. pp. 447-488). Claimant also testified regarding McLeod's expectations of her on a normal day. (R. p. 143, lines 6-19). Claimant testified that she was required to be at the hospital at 9 A.M. every morning. (R. p. 143; lines 6-19). Claimant did not have control over which patients she would anesthetize. (R. p. 144, lines 19-21). Claimant testified that when she arrived to McLeod she would either get her assignment from the C.R.N.A that was in charge that day or

from the white board near the operating room. (R. p. 143, lines 6-19). Additionally, Claimant was required to administer anesthesia “within the standards of anesthesia care for the [McLeod Regional Medical Center Anesthesia] department” and manage a patient’s care after the surgical procedure “as deemed appropriate by the [McLeod] anesthesia/surgeon team.” (R. pp. 447-488). Claimant testified she was told by Keith Tergersen, Appellant McLeod’s representative, to call the anesthesiologist before starting an induction. (R. p. 189, lines 8-12). Claimant asserted she was having a problem with a patient she would have called her supervisor or the anesthesiologist. (R. p. 189, lines 20-23).

Claimant was never written up for violating McLeod’s company policies or standards of anesthesia care. Claimant testified she followed the policies set forth by McLeod. (R. p. 189, lines 15-16). It is evident that Claimant consented to the control of McLeod. As Claimant could not control how she performed her job and obeyed McLeod’s company policies and anesthesia standards, she consented to the control of McLeod. Therefore, based on the Court’s ruling in *Eaddy* that a contract of hire can be inferred under the borrowed servant doctrine when the lent employee consents to the control of the special employer, the Commission correctly determined that a contract of hire was present between Claimant and McLeod because the preponderance of the evidence establishes that Claimant consented to McLeod’s control.

ii. Respondent Claimant’s work was that of Appellant McLeod.

The preponderance of the evidence establishes that Claimant’s work was that of McLeod. McLeod is in the business of providing general healthcare. McLeod has numerous departments within its facilities, including a cancer center, a radiology

department, an urgent care center, and a surgery center. In order for McLeod to function properly and provide general healthcare to the public, McLeod employs several anesthesiologists and nurse anesthetists.

Claimant was one of many nurse anesthetists that McLeod employed. Claimant's work as a nurse anesthetist was essential in order for McLeod to provide general healthcare to the public. Therefore, Claimant's work is without a doubt that of McLeod, the special employer.

iii. Appellant McLeod possessed the right to control the details of Respondent Claimant's work.

When determining whether a special employer has the right to control the details of an employee's work, the following four factors are considered: (1) direct evidence of the right to, or exercise of, control; (2) method of payment; (3) furnishing of equipment; and (4) the right to fire. *Cooke v. Palmetto Health Alliance*, 367 S.C. 167, 624 S.E.2d 439 (Ct. App. 2005).

The Commission's decision was based on the framework in *Nelson v. Yellow Cab*, 349 S.C. 589, 564 S.E.2d 110 (2002). In *Nelson*, the Supreme Court held that when examining the four factors of control, "for the most part, any single factor is not merely indicative of, but, in practice, virtually proof of, the employment relation; while in the opposite direction, contrary evidence is, as to any one factor, at best only mildly persuasive evidence of contractorship, and sometimes is of almost no such force at all." *Id.*

The Supreme Court recently reversed itself in *Wilkerson v. Palmetto State Transportation Company*, 382 S.C. 295, 676 S.E.2d 700 (2009), reh'g denied (May 29, 2009) and determined that courts should "return to our jurisprudence that evaluates the

four factors with equal force in both directions.” The Court determined that the analysis of the relevant factors shall be guided by the conduct of the parties. *Id.* at 300, 676 S.E.2d at 702. *Wilkerson* signals a more even-handed, balanced approach to the control analysis.

While the Court may have changed the framework behind the analysis of the four factors of control, the result in the present case should remain the same. The conduct of Appellant McLeod and Respondent Claimant establish that McLeod exercised the right of control over Claimant, and Claimant consented to the control of McLeod. Therefore, the relationship between Claimant and McLeod was an employer-employee relationship, not an independent contractor relationship.

1. Right or Exercise of Control

Appellant McLeod contends it lacked control over Respondent Claimant; however, based on the implied contract of hire with Claimant, McLeod had the right to control the details of Claimant’s work.

First, Claimant had a definite work schedule and was required to be at work and start her employment with McLeod by 9:00 A.M. each day that she was scheduled to work. When Claimant reported to work, Claimant was required to report to McLeod’s head C.R.N.A. on duty. (R. p. 143, lines 6-19). Claimant received her orders from the head C.R.N.A. on duty. (R. p. 143, lines 6-19). Mr. Tergeson testified the Claimant would call him her supervisor because the organization looks for him to provide leadership and support for any of the C.R.N.A.’s within the organization. (R. p. 215, lines 9-15). As a result, Claimant did not have control over which patients she would anesthetize or in which order she anesthetized patients.

Additionally, as stated above, Claimant was obligated to submit to a variety of McLeod company policies. Claimant was further required to administer anesthesia "within the standards of anesthesia care for the [McLeod Regional Medical Center Anesthesia] department" and manage a patient's care after the surgical procedure "as deemed appropriate by the [McLeod] anesthesia/surgeon team." (R. pp. 447-488). Claimant was also required to provide instruction and education for McLeod's student nurse anesthetists and supervise the students' interaction with patients. (R. pp. 447-488). Furthermore, Claimant was required to "attend at least 50% of [McLeod's] departmental staff and information meetings." (R. pp. 447-488). In addition, Claimant was required to comply with McLeod's dress code policy, confidentiality policy, parking policy, and McLeod's "Corporate Integrity Program." Mr. Tergersen testified Claimant would not be permitted to administer drugs in her scrubs and flip flops. (R. p. 223, lines 11-13).

There is direct evidence that McLeod controlled the details of Claimant's work as the Claimant was required to report to work by a certain time, had no control over the patients she anesthetized, and was required to submit to McLeod's company's policies.

2. Method of Payment

In the present case, the evidence supports a finding that Appellant McLeod had the right to control the details of Respondent Claimant's work. Claimant was paid by the hour. Claimant testified that she was guaranteed forty hours a week, and she occasionally worked overtime. (R. p. 149, lines 11-20). Claimant also testified she was paid directly by Respondent Staff Care and that she was never paid directly by McLeod. (R. p. 164, lines 9-14). Nevertheless, in lent-employee cases, the element of who pays employee shrinks into comparative insignificance because the net result is almost invariably that the

special employer ultimately pays for the services received and the employee ultimately gets paid. *Larson's Workers' Compensation Law*, § 67.06, at 67-17 (2003).

In the present case, Claimant received a check from Staff Care, the general employer, for services performed while working for McLeod, the specific employer. However, the fact that the check Claimant received was from Staff Care is of little significance because McLeod was ultimately responsible for paying Claimant. Claimant's earnings and malpractice coverage was passed to McLeod based on the agreement McLeod had with Staff Care. In the present case the Claimant submitted an invoice to Staff Care after it was signed by her supervisor at McLeod. After Staff Care processed the payment, they submitted a bill to McLeod for reimbursement. (R. p. 339). Consequently, Keith Tergersen, Appellant McLeod's representative, received the bill, released a check request, and issued a check made payable to Staff Care. (R. pp. 342, 346; R. p. 226, line 15-p. 228, line 25). Mr. Tergersen indicated he verified the hours the Claimant worked since the Claimant was submitting the hours for McLeod to be billed. (R. p. 224, lines 2-10). He asserted he verifies the hours of all "employees." (R. p. 224, lines 2-10).

With regard to other miscellaneous expenses, McLeod was responsible for payment per the terms of the Agreement for Locum Tenens Coverage. The Agreement states "[McLeod] shall provide or directly reimburse [Claimant] through [Staff Care] for cost of housing outside [McLeod's] facility, local transportation, en route lodging, en route meals, and reasonable transportation costs to and from [McLeod's] location." (R. pp. 429-434). Based on the Agreement, McLeod could either provide Claimant with

housing and transportation or reimburse Staff Care for these items. Either way, McLeod was ultimately responsible for paying Claimant.

Additionally, McLeod received the benefit of Claimant's services. The Agreement states "[McLeod] shall bill for, collect and retain all professional fees generated by services rendered by [Claimant]." McLeod also paid for nearly all of the expenses related to Claimant working as a registered nurse anesthetist. As McLeod paid Claimant based on the number of hours she worked and McLeod ultimately paid for nearly all of Claimant's expenses, finding that McLeod had the right to control the details of Claimant's work through the method of payment is supported.

3. Furnishing of Equipment

The third factor also supports a finding that Appellant McLeod had the right to control the details of Respondent Claimant's work as McLeod furnished the Claimant equipment. Claimant did not provide any of the equipment needed to anesthetize patients. Instead, McLeod agreed to provide and maintain the usual and customary equipment needed by Claimant. (R. pp. 429-430). Mr. Tergersen specifically testified the Claimant would not be permitted to use her own monitoring devices that were not biomedically checked through their organization. (R. p. 223, lines 20-23).

Claimant testified any type of machine or equipment she needed was provided by McLeod. (R. p. 145, line 24-p. 146, line 4). Specifically, Claimant testified McLeod provided her with the anesthesia machine, the monitoring equipment, blood-pressure cuffs, pulse oximeters, thermometers, and scrub suits. (R. p. 144, line 22-p.146, line 4). Claimant further testified she was expressly informed by McLeod representatives she did not need to bring her own stethoscope, drape clamps, laryngoscopes and blades. (R. p.

167, line 23-p. 168, line 15). Additionally, there is no evidence Claimant was required to bring her own anesthetics, needles, syringes, tourniquets, inhalation anesthetic mask, inhalation anesthetic containers, tubing, rubber gloves, or other instruments required to perform her duties as a nurse anesthetist as all of these materials were supplied by McLeod. (R. pp. 429-430).

Based on Claimant's testimony and the exhibits presented at hearing, it can be determined that McLeod provided Claimant with all of the equipment and materials she needed to perform her job as a nurse anesthetist. Therefore, the furnishing of equipment element supports a finding that McLeod had the right to control the details of Claimant's work.

4. Right to Fire

In the present case, the factor related to the right to fire weighs in favor of a finding that Appellant McLeod had the right to control the details of Respondent Claimant's work. First, it was within McLeod's discretion whether to accept Claimant as an employee or not. According to the Agreement for Locum Tenens Coverage, McLeod had 48 hours after Claimant reported to McLeod in which to notify Respondent Staff Care of its intention to accept Claimant's services. Additionally, McLeod had the right to fire Claimant if it did not find her services to be appropriate. (R. pp. 429-430). Mr. Tergersen, McLeod's representative, testified he would have contacted Staff Care if he found cause to terminate Claimant. (R. p. 218, lines 13-25). Mr. Tergersen may have terminated the Claimant on his own volition as the Agreement does not require that McLeod gain approval from Staff Care before terminating a lent employee. Finally, McLeod's right to fire Claimant was exercised as McLeod terminated Claimant on

December 28, 2007, a week after her work accident. (R. p. 224, lines 19-20). McLeod contends it terminated Claimant because McLeod was no longer in need of Claimant's services; however, McLeod still possessed the right to fire Claimant regardless of the reason for termination. Additionally, Mr. Tergersen testified the Claimant could not handle the complex cases, so it was an opportunity to hire someone to replace her. (R. p. 224, line 21-p. 225, line 5). Therefore, this element of the control test supports the Hearing Commissioner's finding that McLeod had the right to control the details of Claimant's work.

Substantial evidence supports the Commission's determination that Appellant McLeod possessed the right to exercise control of the details of Respondent Claimant's work. Not only is there direct evidence of McLeod's right to control Claimant's work, but McLeod also ultimately paid Claimant like an employee, provided Claimant with all of the equipment and materials she needed to perform her job as a nurse anesthetist, and possessed and exercised the right to terminate Claimant. Accordingly, Respondents Staff Care and Travelers respectfully request that the decision of the Commission be affirmed.

B. Appellants' reliance on the *Kilgore* decision is misplaced.

The Court's decision in *Kilgore Group, Inc. v. South Carolina Employment Security Commission*, 313 S.C. 65, 437 S.E.2d 48 (1993) is not pertinent to the current case. In *Kilgore*, the Court found the defendant liable for employment taxes because the temporary workers were determined to be employees of the provider and not independent contractors. The distinguishing factor between *Kilgore* and the present case is that *Kilgore* was an appeal from an Employment Security Commission ruling and not a workers' compensation case. Further, the premise of the lent employee doctrine is that

Claimant is an employee, but that there is a general employer and a special employer. The *Cooke* case concludes the special employer is liable for workers' compensation when particular conditions are met. Thus, the issue before the court in *Kilgore* is not the same since the court was determining if the individual was an employee of the staffing company. There was no argument presented as to whether there was a special employer. Rather, the issue in *Kilgore* was whether the individual was an independent contractor or an employee of the staffing company because there was no special employer. In the present case, the Respondent Claimant was an employee of Appellant McLeod, and Appellants are liable for workers' compensation benefits.

Under South Carolina Workers' Compensation Law, when a general employer lends an employee to a special employer, the special employer becomes liable for workers' compensation if (1) there is a contract of hire between the employee and the special employer; (2) the work being done by the employee is essentially that of the special employer; and (3) the special employer has the right to control the details of the employee's work. *Cooke v. Palmetto Health Alliance*, 367 S.C. 167, 624 S.E.2d 439 (Ct. App. 2005) (emphasis added). *Cooke* does not extend to the question regarding the special employer's responsibility to pay employment taxes because it is a workers' compensation case. In fact, the *Kilgore* Court did not bother to consider the issue of whether or not the special employer could be responsible for employment taxes. Further, it would be illogical for a court to require the special employer to pay employment taxes because, like the employee's wages, the special employer pays employment taxes when it pays the fee to the general employer.

Furthermore, even assuming arguendo that *Kilgore* should apply to the present case, the Court specifically noted in *Kilgore* that the general employer maintained control over the employees because there was no contract of hire between the employees and the special employer. As a result, the facts of *Kilgore* fail to satisfy the three-part borrowed employee test set forth in *Cooke*. In *Kilgore*, there is no evidence that there is an implied contract of hire. Specifically, there is no evidence that employees were required to take part in an employee orientation, to sign numerous "employee" documents, to wear uniforms, to wear a name tag, or to comply with a confidentiality agreement. Since there is no evidence of a contract of hire between employees and the special employer, the court determined that the general employer maintained control over the employees.

However, as discussed above, there is an implied contract of hire between Respondent Claimant and Appellant McLeod. Consequently, McLeod, not Respondent Staff Care, possessed control over Claimant. Unlike the employees in *Kilgore*, Claimant was required to take part in an employee orientation, sign numerous "employee" documents, obey McLeod's dress code, wear McLeod scrubs, wear a McLeod name tag, and comply with McLeod's confidentiality agreement. An implied contract of hire between Claimant and McLeod can be inferred based on all of McLeod's pre-employment requirements and Claimant's compliance with these requirements.

The decision in *Kilgore* is not significant to the present case. *Kilgore* is an Employment Security Commission appeal and not a workers' compensation case. Furthermore, while there is no contract of hire in *Kilgore*, there is a contract of hire in the present case. As a result, the Commission correctly determined the three-part borrowed servant test is satisfied in the present case and that Appellant McLeod maintained control

over Respondent Claimant and is responsible for Claimant's workers' compensation benefits.

C. Assuming *arguendo* that Respondent Claimant was not an employee of Appellant McLeod, the Court must remand the case to the Commission in order for the Commission to make findings of facts regarding Claimant's relationship with Respondent Staff Care.

The determination of whether a claimant is an employee or independent contractor for workers' compensation purposes is a jurisdictional question; thus the Court can take its own view of the preponderance of the evidence. *Porter v. Labor Depot*, 372 S.C. 560, 643 S.E.2d 96 (Ct. App. 2007); *S.C. Workers' Comp. Comm. v. Ray Covington Realtor's, Inc.*, 318 S.C. 546, 459 S.E.2d 302 (1995). Additionally, the jurisdictional relationship created by a contract is a question of law, and the conclusion of the Commission is reviewable. *McDowell v. Stilley Plywood Co.*, 210 S.C. 173, 41 S.E.2d 744.

In the present case, if the Court determines the Respondent Claimant was not an employee of Appellant McLeod under the borrowed servant doctrine, the Court must remand the case to the Commission in order for the Commission to make findings of fact regarding Claimant's relationship with Respondent Staff Care.

While the Commission made a determination of Claimant's relationship with McLeod, the Commission never made a finding of fact determining the relationship between Claimant and Staff Care. The Supreme Court stated in *McDowell* that "the jurisdictional relationship created by a contract is a question of law, and the conclusion of the Commission is reviewable." *Id.* (emphasis added). There is no finding in the record of whether Claimant was an employee or independent contractor of Staff Care

beyond the contract of borrowed servant doctrine. Therefore, Respondents contend that because the Commission never reached a conclusion in the relationship between Claimant and Staff Care, the Court must remand the case to the Commission for a determination by the Commission of whether Claimant was an employee or independent contractor of Staff Care. Any determination regarding the Claimant's relationship with Staff Care would exceed the Court's scope of review because the Commission made no finding regarding Claimant's relationship with Staff Care.

As such, Respondents request that if the Court finds Claimant was not an employee of Appellant McLeod under the borrowed servant doctrine, then the Court should remand the case to the Commission for a determination of the relationship between Claimant and Staff Care.

CONCLUSION

Respondents Staff Care and Travelers respectfully request that the Commission's decision that Appellants are responsible for Claimant's workers' compensation benefits based on the lent employee doctrine be affirmed. Assuming arguendo that the Court finds that Claimant was an independent contractor of Appellants, Respondents Staff Care and Travelers request that the matter be remanded to the Commission for a determination of the relationship between Respondent Staff Care and Claimant.

Respectfully submitted,

WILLSON JONES CARTER & BAXLEY, P.A.

December 3, 2009

BY:

C. G. Hundersman

Candace G. Hundersman, Esquire

Richard B. Kale, Esquire

Michael W. Burkett, Esquire

4500 Fort Jackson Blvd

Columbia, SC 29209

Attorneys for Respondents

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

G. Bryan Lyndon, Commissioner

W.C.C. File Nos.: 0724433 and 0724543

Mildred H. Shatto, Employee/Claimant,.....Respondent,

v.

McLeod Regional Medical Center, Employer/Carrier,.....Appellant,

and

Staff Care, Inc., Employer and Travelers Insurance, Carrier, ... Respondents.

FINAL REPLY BRIEF OF APPELLANT

Walter H. Barefoot
Turner Padget Graham & Laney P.A.
Post Office Box 5478
Florence, SC 29502
Phone: (843) 662-9008
Fax: (843) 667-0828

Carmelo B. Sammataro
Turner Padget Graham & Laney P.A.
Post Office Box 1473
Columbia, SC 29202
Phone: (803) 254-2200
Fax: (803) 799-3957

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. RESPONDENTS CANNOT ESTABLISH THAT CLAIMANT WAS APPELLANT'S BORROWED SERVANT	1
A. Contract of Hire	2
B. The Work Being Done	4
C. Right of Control	5
II. PURSUANT TO <i>KILGORE</i> AND <i>WILKINSON</i> , IT IS CLEAR THAT RESPONDENT SHATTO WAS EMPLOYED, IF AT ALL, BY RESPONDENT STAFF CARE	6
CONCLUSION	8

TABLE OF AUTHORITIES

State Cases

<i>Alewine v. Tobin Quarries, Inc.</i> , 206 S.C. 103, 33 S.E.2d 81 (1945)	2, 3
<i>Cooke v. Palmetto Health Alliance</i> , 367 S.C. 167, 624 S.E.2d 439 (Ct. App. 2005).....	1, 2, 5
<i>Eaddy v. A.J. Mettler Hauling & Rigging Co.</i> , 284 S.C. 270, 325 S.E.2d 581 (Ct. App. 1985).....	2
<i>Kilgore Group, Inc. v. South Carolina Employment Security Commission</i> , 313 S.C. 65, 437 S.E.2d 48 (1993)	6-8
<i>Nelson v. Yellow Cab Co.</i> , 349 S.C. 589, 564 S.E.2d 110 (2002)	7
<i>Tharpe v. G.E. Moore</i> , 254 S.C. 196, 174 S.E.2d 397 (1970)	7
<i>Wilkinson v. Palmetto State Transportation Company</i> , 382 S.C. 295, 676 S.E.2d 700 (2009)	6-8

Federal Cases

<i>Williams v. Grimes Aerospace Company</i> , 988 F. Supp. 925 (D.S.C. 1997).....	7
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ARGUMENT

I. RESPONDENTS CANNOT ESTABLISH THAT CLAIMANT WAS APPELLANT'S BORROWED SERVANT.

Respondents rely on the decision in *Cooke v. Palmetto Health Alliance*, 367 S.C. 167, 624 S.E.2d 439 (Ct. App. 2005), *reh'g denied* (Jan. 19, 2006), to support their claim that Respondent Mildred Shatto ("Shatto") was the borrowed servant of Appellant McLeod Health ("McLeod"). (In. Br. of Resp.'t Shatto p. 2, 16-17; In. Br. of Resp.'t Staff Care p. 6, 10) A closer reading of *Cooke*, however, actually supports Appellant's contention that Shatto was never McLeod's employee, borrowed or otherwise. In *Cooke*, claimant was employed as a pilot for a helicopter transport company that, much like Respondent Staff Care ("Staff Care"), "contracted with the Hospital" to provide workers who performed a very small task in relation to the hospital's overall business – transporting injured patients to the emergency room via helicopter. *Id.* at 170-171, 624 S.E.2d at 440. Claimant was injured when he tripped over a metal rod on the hospital's premises. *Id.* In addition to a workers' compensation action against his employer, claimant and his spouse also filed tort claims against the hospital. Thus, the issue raised on appeal was whether claimant was either a statutory employee or borrowed servant of the hospital and therefore bound by the exclusive remedy provision of the Workers' Compensation Act. *Id.* at 172-173, 624 S.E.2d at 441.

Turning to the question of whether the claimant in *Cooke* was the hospital's borrowed servant, the court reiterated the applicable test:

Under the borrowed servant doctrine, when a general employer lends an employee to a special employer, that special employer is liable for workers' compensation if: (1) there is a contract of hire between the employee and the special employer; (2) the work being done by the employee is essentially that of the special employer; and (3) the special

employer has the right to control the details of the employee's work.

Id. at 175, 624 S.E.2d at 443, citing *Eaddy v. A.J. Metter Hauling & Rigging Co.*, 284 S.C. 270, 272, 325 S.E.2d 581, 582-83 (Ct. App. 1985). Addressing the control prong of the test,¹ the court cited the well-known factors used to gauge the employer's right to control the details of an employee's work: "(1) direct evidence of the right to, or exercise of, control; (2) method of payment; (3) furnishings [sic] of equipment; and (4) right to fire." *Cooke* at 443, 624 S.E.2d at 175. Noting that "[a]lthough the hospital provided [claimant] with a helicopter," claimant was paid by the helicopter transport service. Thus, provision of equipment, specifically a very large, expensive piece of equipment like a helicopter, was not conclusive of claimant's employment status. Additionally, the helicopter transport service (and not the hospital) was, just like Staff Care in the present case, "charged with hiring (and presumably firing)" its employees. *Id.* Finally, and perhaps most importantly, "'the methods and details' of each flight were not left up to the Hospital." *Id.* at 176, 624 S.E.2d at 443 (internal quotation omitted).

Respondents simply cannot establish all of the required elements necessary for Shatto to attain borrowed employee status, and her compensation claim must be denied as a matter of law.

A. Contract of Hire.

Staff Care incorrectly asserts that Shatto had a contract of hire with McLeod. (In Br. of Resp.'t. Staff Care p. 6) Staff Care's reliance on *Alewine v. Tobin Quarries, Inc.*,

¹ It is important to note the procedural posture in which the borrowed servant analysis was framed in *Cooke*. Specifically, the lower court determined that while claimant met the first two prongs of the borrowed servant test, he could not satisfy the third prong of the test inasmuch as the hospital did not control the details of his work. *Cooke*, 367 S.C. at 175, 624 S.E.2d at 443. Thus, in order to qualify as McLeod's borrowed servant, it is clear that Shatto must satisfy all three elements of this test.

206 S.C. 103, 33 S.E.2d 81 (1945), in support of this contention is likewise misplaced. In *Alewine*, the parties did not contest the claimant's status as an employee. Rather, the key issue on appeal was whether the employment relationship commenced before claimant received an ultimately fatal vaccination. Addressing the employer-employee relationship, the touchstone of compensability under the Act, the court opined as follows:

No award under the Act is authorized unless the employer-employee relationship existed at the time of the alleged injury for which claim is made. This relation is contractual in character and to constitute one an employee [sic] it is essential that there shall be a contract of service. However, no formality is required. The contract may be oral or written. It may be accomplished with a few words. It is sufficient if the circumstances show unequivocally that the parties recognize each other as employer and employee. 'A contract will arise even where the employer does not intend to enter into one, if his conduct is such as to lead claimant, acting as a reasonable man, or in good faith, to believe that he is being employed.

Id. at ___, 33 S.E.2d at 83 (emphasis added). Of critical importance in *Alewine* was the court's analysis of "[w]hen did the minds of the parties meet and the contract become complete?" *Id.* The ultimately controlling facts on this question were that the injured worker was in the employer's office prior to the vaccination and that there were no further negotiations between employee and employer thereafter.

Unlike the claimant in *Alewine*, there are no facts at play in this case that evince a "meeting of the minds" between Shatto and McLeod. The only documentary evidence of a contract between Shatto and any other party is the written contract that she signed with Staff Care on October 11, 2007. (R. p. 282-286) Shatto initiated contact with Staff Care after finding them on the internet, Staff Care saw to all of the details of her initial engagement, and McLeod was never identified to Shatto at the time she accepted the assignment from her *in locum tenens* staffing agency employer, Staff Care.

In addition to the dearth of direct evidence establishing a contractual relationship between Shatto and McLeod, Shatto cannot point to any circumstantial evidence supporting a meeting of the minds. To the contrary, Shatto readily concedes that she was not a hospital employee and that she was not paid by McLeod. According to Shatto, "Staff Care advertised the job, and I called for information about it." (R. p. 178, lines 15-18) Once Shatto secured a position with Staff Care, Staff Care paid her salary and provided additional perks such as a rental car, malpractice insurance, and a daily stipend. Shatto treated her income from Staff Care as small business income and deducted expenses for travel and equipment. Most tellingly, Shatto testified that she prefers *locum tenans* work because it pays "a lot better" and provides "a little bit of autonomy [because] [y]ou're not the hospital employee under their rules." (R. p. 272, lines 10-15) At the same time, she cannot establish that McLeod exercised sufficient control over her such that she was prevented from exercising independent professional judgment.

Shatto is a well-educated, intelligent professional who clearly understood (and testified) that she had no contractual relationship with McLeod as of the date of her alleged injuries. On this record, it is clear that Shatto was not McLeod's employee or borrowed servant and, therefore, she cannot recover workers' compensation benefits from Appellant.

B. The Work Being Done.

The second prong of the borrowed employee analysis focuses on the nature of the work being done by the putative employee and whether that work is typical of the work performed by the putative employer's other employees. While it is true that McLeod

contracted with Staff Care to provide a temporary nurse anesthetist and that it had other nurse anesthetists on staff, the contract work Shatto performed was different in several critical respects. First, and most importantly, Shatto, unlike C.R.N.A.s employed by McLeod, only was permitted to work in the operating room. (R. p. 212, lines 1-4) Shatto was not entitled to the same level of access to hospital facilities provided to McLeod employees. In fact, she was not permitted to work in the hospital's emergency room, cath lab, or to administer life support. (R. p. 212, line 5 - p. 213, line 4) Moreover, the only individuals who supervised Shatto's work were contract anesthesiologists who, like Shatto herself, were not employed by McLeod. (R. p. 192, lines 17-21; p. 209, lines 8-12) Thus, the record establishes that Shatto, like the claimant in *Cooke*, was performing only a very small degree of services compared to the overall volume of health-related services offered by McLeod and its employees. Thus, Shatto's performance was not typical of the work performed by McLeod's employees, and she cannot qualify as McLeod's borrowed servant under this prong of the relevant analysis.

C. Right of Control.

McLeod's right to control Shatto, or the lack thereof, is exhaustively analyzed in Appellant's Final Brief and need not be repeated herein. Suffice it say that when considered in its entirety, the record in this case firmly establishes that Shatto was an independent contractor or, at most, an employee of Staff Care. Accordingly, the challenged orders awarding benefits to Shatto are in error and should be reversed.

II. PURSUANT TO *KILGORE AND WILKINSON*, IT IS CLEAR THAT RESPONDENT SHATTO WAS EMPLOYED, IF AT ALL, BY RESPONDENT STAFF CARE.

The critical issue to be decided on appeal is the issue of control. The arguments that Shatto's contract with Staff Care gave Staff Care no control, or that Shatto was McLeod's borrowed servant because McLeod exercised control over her day-to-day job duties, are simply incorrect. It was Staff Care, and not McLeod, that made all logistical arrangements for Shatto's temporary assignment, direct deposited her salary into her account, required a record of the hours she worked, and retained the right to penalize her if she took a job with one of Staff Care's clients. Further, it is telling that Shatto went to Staff Care, and not McLeod, when she encountered problems with her rental vehicle. (In. Br. of Resp.'t. Shatto p. 16) Further, any control McLeod may have exercised was minimal and was derived by virtue of its contract with Staff Care. For these reasons, and in light of controlling authority on these issues, this Court should reverse the prior orders of the single commissioner and the Appellate Panel of the Full Commission.

Respondents urge the Court to disregard the clear holdings of *Kilgore Group, Inc. v. South Carolina Employment Security Commission*, 313 S.C. 65, 437 S.E.2d 48 (1993), and *Wilkinson v. Palmetto State Transportation Company*, 382 S.C. 295, 676 S.E.2d 700 (2009), *reh'g denied* (May 29, 2009). Shatto attempts to distinguish these cases on the basis of control by arguing that the contract between Staff Care and Shatto gave Staff Care no control over her day-to-day job performance.² (In. Br. of Resp.'t. Shatto p. 15)

² This argument stands in marked contrast with the position Shatto presented to the Workers' Compensation Commission. In fact, in her Memorandum of Fact and Law, Shatto argued that "Staff Care did issue significant control over who Claimant could work for and when she could work under the guise of an alleged 'independent contractor' agreement." (Shatto's September 22, 2008, Memorandum of Fact and Law p. 8)

Painting more broadly, Staff Care takes the position that *Kilgore* is inapplicable because it is not a workers' compensation case. (In. Br. of Resp.'t. Staff Care p. 16-18) To accept Respondents' arguments would make all leasing services employees the employees of the leasing service's clients – a proposition clearly and emphatically rejected by *Kilgore*.

Respondents' efforts to circumvent the clear holdings in these cases fail, however, because "[u]nder South Carolina law, it is clear that workers for a temporary service agency [like Staff Care] are considered its employees." *Williams v. Grimes Aerospace Company*, 988 F. Supp. 925 (D.S.C. 1997), citing *Kilgore, supra*, 437 S.E.2d at 49-50. "But more importantly, (the analysis is) guided by the parties' conduct. . . ." *Wilkinson*, 382 S.C. at 300, 676 S.E.2d at 702, citing *Kilgore*, 313 S.C. at 68-69, 437 S.E.2d at 50 (noting that "in determining the nature of (the parties') relationship," the contract has "considerable weight" but recognizing that "language in the contract merely declaring the relationship is that of an employer/independent contractor is not dispositive.").

The critical (and only) issue at play in *Kilgore* was whether or not the workers were Kilgore's employees versus independent contractors. In order to answer that question, the court applied the same analysis applicable here; to wit, a consideration of "[t]he principle factors indicating the right of control" *Kilgore*, 313 S.C. at 68, 437 S.E.2d at 49-50, citing *Tharpe v. G.E. Moore*, 254 S.C. 196, 174 S.E.2d 397 (1970); see also *Nelson v. Yellow Cab Co.*, 349 S.C. 589, 564 S.E.2d 110 (2002). The case does not address the availability of workers' compensation benefits, either on a voluntary or

involuntary basis,³ or whether the temporary staffing agency's clients qualified as special employers as Staff Care attempts to argue here. Rather, the lesson to be learned from *Kilgore* is that a temporary staffing agency like Staff Care may not absolve itself of the responsibility of paying workers' compensation benefits merely because it labels its workers as "independent contractors." Instead, temporary workers will be deemed employees of the temporary staffing agency where, as here, "it can be inferred [the agency] possessed the right to control the workers' performance and the manner in which it was done and delegated that authority to its clients." *Kilgore*, 313 S.C. at 69, 437 S.E.2d at 50.

Analyzing the facts of this case in light of the even-handed analysis required by *Wilkinson*, it is clear that if Shatto qualifies as anyone's employee, she is Staff Care's employee, and McLeod's right of control, if any, derived solely from Shatto's employment relationship with Staff Care.

CONCLUSION

For all of the foregoing reasons, as well as for those reasons set forth in Appellant's Final Brief, Appellant respectfully submits that the single commissioner's order awarding benefits, as well as the decision and order of the Appellate Panel, are contrary to South Carolina law and must therefore be set aside.

(Signature page to follow.)

³ Indeed, this argument has never been raised in these proceedings. Staff Care and its carrier have made general appearances in this case and defended the action by asserting that Claimant was either an independent contractor or, in the alternative, McLeod's employee. To the extent Claimant is deemed an employee of Staff Care, she is entitled to workers' compensation benefits from Staff Care's policy or policies applicable to workers who sustain work-related injuries in this State.

TURNER, PADGET, GRAHAM & LANEY, P.A.

November 23, 2009

By:



Walter H. Barefoot

Turner Padget Graham & Laney P.A.

Post Office Box 5478

Florence, SC 29502

Phone: (843) 662-9008

Fax: (843) 667-0828

Carmelo B. Sammataro

Turner Padget Graham & Laney P.A.

Post Office Box 1473

Columbia, SC 29202

Phone: (803) 254-2200

Fax: (803) 799-3957

ATTORNEYS FOR APPELLANT