

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM HORRY COUNTY S.C. Supreme Court
Court Of Common Pleas

J. Michael Baxley, Circuit Court Judge

Unpublished Opinion No. 2012-UP-569 (S.C. Ct. App. Filed October 24, 2012)

Vennie Taylor Hudson,.....Respondent,

v.

Caregivers of South Carolina, LLC, and South Carolina
Workers' Compensation Uninsured Employers' Fund,

of Whom,

Caregivers of South Carolina, LLC, is.....Petitioner.

APPENDIX – VOLUME II

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court Of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No: 08-CP-26-3032

Vennie Taylor Hudson, ... Respondent,

v.

Caregivers of South Carolina, LLC, Employer, and
South Carolina Workers' Compensation Uninsured Employers' Fund, ... Appellants.

BRIEF OF APPELLANT
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STATEMENT OF ISSUES ON APPEAL

- I. DID THE CIRCUIT COURT ERR IN FAILING TO GIVE PRECLUSIVE EFFECT TO THE UNAPPEALED FEBRUARY 18, 2005 ORDER FINDING THAT HUDSON IS AN INDEPENDENT CONTRACTOR AND THAT CAREGIVERS IS NOT SUBJECT TO THE ACT?
- II. IS THE CIRCUIT COURT ORDER FINDING HUDSON WAS AN EMPLOYEE OF CAREGIVERS ERRONEOUS AND AGAINST THE GREATER WEIGHT OF THE EVIDENCE DEMONSTRATING HER STATUS AS AN INDEPENDENT CONTRACTOR?
- III. DID THE CIRCUIT COURT ERR IN CONCLUDING THAT HUDSON'S ALLEGED INJURIES AROSE OUT OF AND IN THE COURSE AND SCOPE OF HER EMPLOYMENT?

STATEMENT OF THE CASE

Respondent Vennie Taylor Hudson (hereinafter "Hudson") sought compensation benefits for allegedly work-related injuries she sustained February 5, 2004. Following oral argument of a rule to show cause notice directing Hudson's putative employer, Appellant Caregivers of South Carolina, LLC, (hereinafter "Caregivers"), to explain "why it should not be found in violation of the provisions of the . . . Act by its failure to maintain workers' compensation insurance coverage for its employees. . . .," the single commissioner concluded Caregivers "does not have employees. . . . [Rather, it] employs independent contractors." (R. p. 47) The single commissioner ruled that Caregivers is exempt from the Act and "is not required to have workers' compensation coverage." (*Id.*)

Hudson was present, testified and was represented by counsel at the hearing on the rule to show cause. (R. p. 185, line 12 – p. 190, line 9). The Commission served a copy of the single commissioner's order on the rule to show cause upon Hudson's counsel, as well as upon counsel for Appellant the Uninsured Employers' Fund (hereinafter "the Fund"). (R. p. 49) No interested party appealed the single commissioner's ruling that Hudson is an individual contractor and that Caregivers is exempt from the coverage requirement provisions of the Act. In fact, the Commission's attorney stated "[w]e don't sir. We do not appeal." (R. p. 197, lines 22-23)

Following entry of the order on the rule to show cause, Hudson filed a Form 50, Request for Hearing, identifying Caregivers as her uninsured employer and alleging it was responsible for payment of compensation benefits. (R. p. 62) Proceeding *pro se*,

Caregivers filed its Form 51, Employer's Answer, dated March 15, 2005, in which it denied the claim on the basis that Hudson was not its employee, but rather an independent contractor who was not entitled to benefits. (R. p. 60-61) Thereafter, on April 4, 2005, the Fund filed its Form 51, Answer to Request for Hearing, in which it specifically denied the existence of an employer/employee relationship between Caregivers and Hudson. (R. p. 57-59) Hudson withdrew her Form 50 prior to the merits hearing scheduled for September 2005.

Hudson filed a second Form 50 dated September 6, 2006. (R. p. 54-56) In her second Form 50, Hudson added a claim for brain injury with psychological overlay and again named Caregivers as her employer, as well as the Fund as Caregivers' insurance carrier. Caregivers and the Fund again objected on the bases that one commissioner cannot overrule or disregard an earlier order of a co-equal commissioner and that the doctrines of *res judicata* and collateral estoppel barred re-litigation of the issues decided in the unappealed February 18, 2005 Order. (R. p. 69, lines 3-7; p. 72, line 7 – p. 73, line 23) Over the objection of Caregivers, a hearing on the merits of Hudson's Form 50 occurred before a different single commissioner on December 13, 2006. In his September 11, 2007 Decision and Order, the single commissioner acknowledged the earlier, unchallenged ruling exempting Caregivers from the Act, Caregivers' objection to the hearing going forward on that basis, and Caregivers' assertion of applicable defenses,

including *res judicata* and collateral estoppel.¹ Nevertheless, the single commissioner effectively overruled the holdings of the earlier order - that Hudson was an independent contractor and that Caregivers was not subject to the Act - and proceeded to a determination of the merits. Pertinent to this appeal, the single commissioner found Caregivers subject to the Act and that Hudson was its employee. He denied benefits, however, concluding Hudson's fall was idiopathic in nature and, therefore, not compensable. (R. p. 32-44)

All parties appealed the September 11, 2007 Decision and Order to the Appellate Panel of the Full Commission, which affirmed in part and reversed in part in its Decision and Order dated March 18, 2008. (R. p. 23-31) Specifically, the Full Commission rejected the *res judicata* and collateral estoppel arguments on the basis that Hudson was not a party to the compliance proceedings. The Full Commission also determined Hudson was an independent contractor and not an employee of Caregivers at the time in question and, therefore, reversed the single commissioner's order to the contrary. (R. p. 29) The Full Commission affirmed the single commissioner's finding that Hudson sustained a non-compensable, idiopathic fall. (*Id.*, p. 30)

Hudson appealed to the court of common pleas, seeking review of two key holdings by the Full Commission: (1) that she was an independent contractor rather than Caregivers' employee; and (2) that she sustained a non-compensable, idiopathic fall. The Fund and Caregivers, this time proceeding with counsel, again objected on the bases that

¹ Caregivers proceeded *pro se* through its principal David Teeple (hereinafter "Mr. Teeple") at the December 13, 2006 hearing before the single commissioner. At that hearing, Mr. Teeple indicated he wasn't "sure exactly what *res judicata* means," but understood he was being tried twice and appropriately objected and moved to dismiss the hearing on that basis. (R. p. 69, lines 3-7) The single commissioner denied the motion. (*Id.*, p. 69, lines 8-14)

one commissioner cannot overturn or disregard the earlier order of a co-equal commissioner and that the doctrines of *res judicata* and collateral estoppel barred re-litigation of the unappealed February 18, 2005 Order. Following oral argument on August 30, 2010, the circuit court entered its "Order Reversing Decision of Workers' Compensation Commission, Remanding Case to Commission for Determination of Benefits, and Relieving Employer's Counsel as to Appeal." In that order, the circuit court reversed and remanded to the Commission for a determination of benefits in light of its findings, as a matter of law, that Hudson was Caregivers' employee and that she sustained a compensable injury. (R. p. 3) It further directed that the Commission "*shall* make findings of fact and conclusions of law consistent with [the order]; and *shall* enter an Order providing for medical treatment" (*Id.*, p. 20) (emphasis added). The circuit court noted the *res judicata* and collateral estoppel arguments raised by Caregivers, but did not address these arguments in its order other than to note that Hudson was not a party to the enforcement proceedings. (R. p. 4)

Both the Fund and Caregivers challenged the circuit court order via timely notices of appeal in this Court. Thereafter, in a telephone conference on March 22, 2011, the Court directed the parties to consider and brief the issue of whether the circuit court order is subject to immediate appeal. That oral order was memorialized in a written Order filed March 23, 2011. Following briefing by the parties on that issue, this Court issued its May 13, 2011 Order permitting the appeal to proceed and setting briefing deadlines.

STATEMENT OF THE FACTS

Caregivers is a referral service that matches elderly and disabled individuals who may need or require assistance in their homes with individuals who provide the type of assistance Caregivers advertises to potential clients. (R. p. 77, lines 19-24; p. 180, lines 4-15;) Caregivers operates throughout Horry County, as well as in Georgetown, Marion, and Florence. (R. p. 77, line 25 – p. 78, line 3) In order to secure clients who need in-home services, Caregivers advertises, maintains a website, publishes brochures, and solicits referrals from doctors' offices and hospitals. (R. p. 180, lines 16-25) In its advertisements, Caregivers makes clear that qualified applicants "will be referred by Caregivers of South Carolina, L.L.C. to the client, who will hire you and pay you an hourly rate of nine dollars per hour." (R. p. 81, line 11 – p. 82, line 17) Clients using Caregivers' services pay \$9.00 per hour directly to the caregiver and \$2.50 per hour directly to Caregivers. (R. p. 79, lines 19-23)

Caregivers also uses the Yellow Pages, newspaper advertisements, its website, and a job service to attract individuals who are interested in working as care providers. (R. p. 80, lines 9-16; p. 181, lines 1-4) Caregivers then makes a referral of a caregiver to its clientele based upon the number of hours and types of services the client needs. (R. p. 181, lines 8-19) Caregivers interviews candidates, conducts a background check, and checks references but does not provide training or require any specific credentials for individuals whom it refers to its clients. (R. p. 80, line 22 – p. 181, line 1; p. 181, line 20 – p. 182, line 13) Caregivers is not licensed to serve clients who require medical assistance. Instead, Caregivers is serving clients who need unskilled assistance with bathing, dressing, cleaning house, and preparing meals. (R. p. 182, lines 15-23)

Individuals selected for referral are paid an hourly rate by Caregivers clients, who also write a separate check to Caregivers as a referral fee. (R. p. 182, line 24 – p. 183, line 6) The client retains exclusive authority to hire and fire the care provider, supervise job performance, and set the work schedule. (R. p. 184, lines 18-25) The client retains the choice as to whether or not to use someone referred by Caregivers. (R. p. 100, lines 5-10) Clients pay a referral fee to Caregivers “for the services of the caregiver. . . .” (R. p. 78, lines 13-15) Specifically, clients pay \$9.00 per hour to the care provider, plus an additional \$2.50 per hour to Caregivers. (R. p. 79, lines 19-23) Clients issue separate checks to caregivers for their work and to Caregivers for the referral fee. (R. p. 100, lines 19-25)

Hudson’s initial contact with Caregivers occurred in September 2003, after she moved to the Myrtle Beach area. (R. p. 111, lines 20-24; p. 186, lines 2-7) Hudson went to the Unemployment Office in Horry County, filled out an application, and was interviewed by Mr. Teeple. (R. p. 111, line 25 – p. 112, line 7) She did not receive on-the-job training and sometimes was not aware what her duties would be until she arrived at a client’s home. (R. p. 186, line 20 – p. 187, line 1) Hudson acknowledged she was responsible for her own taxes and was not provided insurance coverage. (R. p. 112, line 18 – p. 113, line 11) She does not dispute that she was not provided with workers’ compensation coverage. (*Id.*) Caregivers instructed her as to where to report for work and what her hours would be²; however, Caregivers did not supervise her work or require her to complete oral or written reports on her work. (R. p. 187, lines 2-16) Hudson

² Specifically, Hudson testified that the hours of service were arranged between Caregivers and the client and then communicated to her by Caregivers. (R. p. 187, lines 10-13)

testified she received payment from the client. (R. p. 187, lines 17-19)

On February 4, 2004, Hudson was working for an elderly client of Caregivers, Mrs. Bunch, who asked Hudson to check the mail just as she did every day at the end of Hudson's shift. (R. p. 118, lines 13-25) While performing her task, Hudson "fell face-down on the concrete" and was rendered unconscious. (R. p. 119, lines 1-4) At the time of her accident, Hudson was not aware of what caused her to fall. (R. p. 119, lines 8-11) Hudson alleges that she was a Caregivers employee when she sustained a work-related injury to her head, brain, cheekbone, both knees, back and left wrist as a result of her February 4, 2004 fall. (R. p. 125, line 24 – p. 126, line 21)

STANDARD OF REVIEW

South Carolina Code Ann. § 1-23-380 establishes the "substantial evidence" rule as the standard of review for decisions of the Workers' Compensation Commission. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981). Pursuant to that rule, the circuit court reviewing an award or denial of benefits may only reverse or modify the agency's decision if the findings, rulings, and conclusions of the administrative agency are "clearly erroneous in view of the reliable and substantive evidence of the whole record." *Id.*, 276 S.C. at 135, 276 S.E.2d at 306. Substantial evidence is defined as:

Such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It must be enough to justify, if the trial went to a jury, refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. This is something less than the weight of the evidence and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.

Id., 276 S.C. at 135-136, 276 S.E.2d at 307.

Appellate courts are not at liberty to substitute their view of the evidence for that rendered by the Commission. Rather, "[t]he Circuit Court's role is appellate only, and is limited to deciding whether the Commission's decision is not supported by substantial evidence or is controlled by some error of law." *Rogers v. Kunja Knitting Mills Co.*, 312 S.C. 377, 440 S.E.2d 401 (Ct. App. 1994). When reviewing an appeal from the Workers' Compensation Commission, the appellate court may not weigh the evidence or substitute its judgment for that of the Full Commission as to the weight of the evidence and questions of fact. *Farrell v. Jerry's, Inc.*, 370 S.C. 22, 26, 633 S.E.2d 893, 894-895 (2006).

Moreover, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n*, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984). In workers' compensation cases, the Appellate Panel is the ultimate finder of fact. *Shealy v. Aiken County*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). When the evidence is conflicting over a factual issue, the findings of the Appellate Panel are conclusive. *Hargrove v. Titan Textile Co.*, 360 S.C. 276, 290, 599 S.E.2d 604, 611 (Ct. App. 2004). The final determination of witness credibility and the weight to be accorded evidence is reserved for the Appellate Panel. *Bass v. Kenco Group*, 366 S.C. 450, 458, 622 S.E.2d 577, 581 (Ct. App. 2005).

In contrast to questions of fact, 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*.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN FAILING TO GIVE PRECLUSIVE EFFECT TO THE UNAPPEALED FEBRUARY 18, 2005 ORDER FINDING THAT HUDSON IS AN INDEPENDENT CONTRACTOR AND THAT CAREGIVERS IS NOT SUBJECT TO THE ACT.

In her Order dated February 18, 2005, the single commissioner considered whether Caregivers should be found in violation of the South Carolina Workers' Compensation Act by its failure to maintain compensation coverage.³ The central issue necessary to a determination of that question is identical to the second issue presented in this appeal; to wit, whether Hudson and others Caregivers referred to its clients were its employees or, in the alternative, independent contractors. On this issue, the single commissioner unequivocally found Caregivers exempt because it "does not have employees. [Caregivers] employs independent contractors." (R. p. 47) This unappealed ruling is entitled to preclusive effect as the law of the case, as well as pursuant to the

³ Notably, the caption of the February 18, 2005 Order reads as follows: "South Carolina Workers' Compensation Commission, Plaintiff, vs. Caregivers of South Carolina, LLC, Defendant/Employer. *In re: Vennie Taylor Hudson v. Caregivers of South Carolina, LLC*".

doctrines of *res judicata* and collateral estoppel. The subsequent orders⁴ to the contrary are in error and must be reversed.

A. The Unappealed Rulings That Hudson Is An Independent Contractor And That Caregivers Is Exempt From The Act Establish The Law Of The Case.

With the filing of her Form 51, Request for Hearing, Hudson improperly seeks to re-litigate the issues decided in the unappealed order of the single commissioner. In failing to seek re-consideration of that order by the Appellate Panel, Hudson and the Commission waived further review, and it was improper for the second single commissioner essentially to reverse a fellow commissioner's unappealed ruling and to allow Hudson a second bite at the apple. Because the interested parties failed to seek timely review, the show cause rulings became the law of the case, and it was error for the Commission and the circuit court to proceed further. For this reason, the circuit court order not exempting Caregivers from the Act must be reversed and the February 18, 2005 Order reinstated.

At the conclusion of the October 4, 2004 hearing before the single commissioner, she advised that "[w]hen I actually sign an order, that's when you'll have 14 days from the date of my instructions to go ahead and -- the actual order to go ahead and appeal to the full commission." (R. p. 197, lines 11-18) In response to a question from Mr. Teeple, counsel for the Commission advised "[w]e don't sir. We do not appeal." (*Id.*, lines 19-23) Notwithstanding the Commission's position with regard to appeals and

⁴ While the circuit court order does not expressly rule on the issues of collateral estoppel and *res judicata*, it implicitly does so by noting "[t]he [February 18, 2005] Order does not list Claimant as a party, nor is there any indication Claimant or her counsel participated in the hearing as a party." (R. p. 5) As explained herein, these statements are factually and legally incorrect, unsupported by applicable authority, and should be reversed.

Hudson's stated intention merely "to observe", the single commissioner correctly noted that the proper remedy from an adverse ruling on the employment question would have been a timely Form 30, Request for Commission Review, filed within fourteen days as required by S.C. Code Ann. § 42-17-50. See *Goodman v. City of Columbia*, 318 S.C. 488, 490, 458 S.E.2d 531, 532 (1995) ("§ 42-17-50 confers jurisdiction upon the Commission and provides for fourteen days to apply for review."). A Form 50 in lieu of a timely appeal was no substitute and did not provide a proper vehicle for review of the single commissioner's February 18, 2005 Order. *Brunson v. American Koyo Bearings*, 367 S.C. 161, 164-165, 623 S.E.2d 870, 872 (Ct. App. 2005) (absent timely appeal, "the findings of fact and law by the hearing commissioner become and are the law of the case. . ."), quoting *Green v. City of Columbia*, 311 S.C. 78, 80, 427 S.E.2d 685, 687 (Ct. App. 1993).

Numerous opinions from this Court recognize the jurisdictional nature of Section 42-17-50. See, e.g., *Brunson v. American Koyo Bearings*, *supra*, 367 S.C. at 166, 623 S.E.2d at 872 ("Only issues within the application for review under S.C. Code Ann. § 42-17-50 (1976) are preserved for appeal to the commission.") (internal quotation omitted); *Lloyd v. AT & T Nassau Metals Corp.*, 299 S.C. 207, 383 S.E.2d 257 (Ct. App. 1989) ("the proper remedy is a timely appeal to the full Commission and then to the courts."), citing S.C. Code Ann. §§ 42-17-50 and -60. As a jurisdictional limitation imposed by enactment of the General Assembly, the fourteen day requirement can neither be waived by the parties nor expanded, modified, or selectively enforced by the Commission. *South Carolina Coastal Conservation League v. South Carolina Department of Health and Environmental Control*, 380 S.C. 349, 376-377, 669 S.C. 899, 913-914 (Ct. App. 2008),

reh'g denied (Dec. 19, 2008).

Inasmuch as no party affected by the single commissioner's order finding Hudson is an independent contractor and that Caregivers is exempt from the Act filed a timely application for review, those findings became the unappealed law of the case. All subsequent efforts to re-litigate those findings were improper. As a result, all subsequent orders in this case result from error and should be reversed, and the February 18, 2005 Order should be affirmed.

B. The Doctrines Of *Res Judicata* And Collateral Estoppel Preclude Further Review.

In addition to becoming the law of the case, further review of the February 18, 2005 Order of the single commissioner is barred by the doctrines of *res judicata* and collateral estoppel. The single commissioner and the Appellate Panel improperly refused to apply *res judicata* and collateral estoppel on the basis that Hudson was not in privity with any party to the hearing to show cause. (R. p. 29-30, 43) Similarly, the circuit court erroneously refused to give preclusive effect to the single commissioner's unappealed order based on the premise that there was no "indication that [Hudson] or her counsel participated in the hearing as a party." (R. p. 5) The privity issue is a red herring, however, as Hudson was present, represented by counsel, and participated in the rule to show cause hearing. Moreover, the Coverage and Compliance Division of the Commission effectively stepped into Hudson's shoes to protect not only her interests, but also the interests of all putative employees of uninsured employers. *See, e.g.*, S.C. Code Ann. § 42-3-90 (creation of the Division of Coverage and Compliance); § 42-7-200 (Uninsured Employers' Fund established to "ensure payment of workers' compensation benefits to injured employees whose employers have failed to acquire necessary coverage

for employees in accordance with provisions of this act.”); *Bass v. Isochem*, 365 S.C. 454, 617 S.E.2d 369 (Ct. App. 2005) (“the whole purpose of the South Carolina Worker’s Compensation Act . . . is to protect injured workers.”).

The South Carolina Supreme Court “has repeatedly held that, under the doctrines of *res judicata* and collateral estoppel, the decision of an administrative tribunal precludes the relitigation of the issues addressed by that tribunal in a collateral action.” *Bennett v. South Carolina Department of Corrections*, 305 S.C. 310, 312, 408 S.E.2d 230, 231 (1991) The doctrine of *res judicata* “bars a subsequent suit by the same parties on the same issues. . . . [and] . . . is shown if (1) the identities of the parties is the same as a prior litigation; (2) the subject matter is the same as the prior litigation; and (3) there was a prior adjudication of the issue by a court of competent jurisdiction.” *Garris v. The Governing Board of the South Carolina Reinsurance Facility*, 333 S.C. 432, 511 S.E.2d 48 (1998) *reh’g denied* (March 5, 1999) (citations omitted). Similarly, “[c]ollateral estoppel prevents a party from relitigating in a subsequent suit an issue actually and necessarily litigated and determined in a prior action.” *Jinks v. Richland County*, 355 S.C. 341, 585 S.E.2d 281 (2003).

In this case, the first commissioner to consider the issue of whether Caregivers qualifies as an employer for purposes of the Worker’s Compensation Act made a specific finding to the contrary: “the caregivers are independent contractors, not employees of [Caregivers].” (R. p. 46) The single commissioner further found that Caregivers did not regularly employ four or more workers on or before Hudson’s alleged incident and, therefore, was not subject to the provisions of the Act. (*Id.*, p. 47) She based her decision, in part, on “the testimony given.” (*Id.*) Hudson was present for and testified at

the October 4, 2004 hearing, at which she was represented by counsel. (R. p. 177) Going further, as the single commissioner pointed out, Hudson and her counsel wished “to observe the proceeding”, and Hudson’s counsel was served with a copy of the February 18, 2005 Order. (R. p. 49; p. 178, lines 14-19) Given that Hudson, represented by counsel, was present for and testified at the rule to show cause hearing but declined the opportunity to cross-examine witnesses or present her own evidence, she should be precluded from re-litigating that issue. It was error for the Appellate Panel of the Full Commission and the circuit court to find *res judicata* and collateral estoppel inapplicable to her claims.

Regardless of her intention to move “forward with the Form 50 hearing” in the event of an adverse ruling by the single commissioner on the coverage issue, Hudson nevertheless is bound by the single commissioner’s findings that she was an independent contractor and that Caregivers was exempt from the Act at the time of her accident. (R. p. 198, lines 1-6) In furtherance of the Act’s primary purpose, “to protect injured workers,” the Commission essentially stepped into Hudson’s shoes and initiated compliance proceedings. *Bass v. Isochem*, 365 S.C. 454, 617 S.E.2d 369 (Ct. App. 2005). Going further, both Hudson and her attorney were present for and afforded an opportunity to participate in the show cause hearing. On this basis, her argument that collateral estoppel and *res judicata* should not bar her claims because she was not a party to the rule to show cause hearing is unavailing. To the contrary, she had a “fair and full opportunity to litigate the issue in the first proceeding” and circumstances do not “justify providing the party an opportunity to relitigate the issues.” *Wade v. Berkeley County*, 330 S.C. 311, 317, 498 S.E.2d 684, 687 (Ct. App. 1998). While *res judicata* and

collateral estoppel are "two different concepts," both work to estop Hudson's claim that she was Caregivers' employee at the time of her allegedly compensable accident. *Liberty Mutual Insurance Company v. Employers Insurance of Wausau*, 284 S.C. 234, 237, 325 S.E.2d 566, 568 (Ct. App. 1985) (finding claimant estopped from arguing one-year statute of limitations did not apply to intestate's claim where that issue was decided in a prior proceeding) (internal quotations omitted).

As noted by this Court in *Liberty Mutual* "[a] final judgment on the merits in a prior action will conclude the parties and their privies under the doctrine of *res judicata* in a second action based on the same claim as to issues actually litigated in the first action." *Id.*, 284 S.C. at 237, 325 S.E.2d at 568. In this case, both the compliance proceedings and the hearing on Hudson's Form 50 hinged on the determination of the same issues: (1) whether Hudson is an employee versus and independent contractor, and the related question of (2) whether Caregivers is subject to the coverage provisions of the Act. Further, because the Coverage and Compliance Division was effectively proceeding on Hudson's behalf (and because Hudson and her counsel actively participated in the show cause hearing and Hudson's name appears in the caption of the February 2005 Order), the privity requirement is met. Because of the identity of issues presented, the doctrine of collateral estoppel likewise controls. *Id.* ("[u]nder the doctrine of collateral estoppel . . . the judgment in the first action precludes relitigation of only those issues 'actually and necessarily litigated and determined in the former suit.'" (quoting Stewart, *Res Judicata and Collateral Estoppel in South Carolina*, 29 S.C.L.REV. 451, 452 (1977) (additional citation omitted))). For these reasons, it was error for the Commission and the circuit court to fail to give preclusive effect to the February 2005 Order. As such, these

orders should be reversed.

II. THE CIRCUIT COURT ORDER FINDING HUDSON WAS AN EMPLOYEE OF CAREGIVERS IS ERRONEOUS AND AGAINST THE GREATER WEIGHT OF THE EVIDENCE DEMONSTRATING HER STATUS AS AN INDEPENDENT CONTRACTOR.

Even in the event this Court concludes the February 2005 Order lacks preclusive effect, it should reverse the order of the circuit court finding that Hudson was an employee of Caregivers as that finding is inconsistent with the record evidence in the case.

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*. This broader scope of review, however, does not require the Court "to ignore the findings of the Commission, which was in a better position to evaluate witness credibility." *Paschal v. Price*, 392 S.C. 128, 133, 708 S.E.2d 771, 773 (2011), rehearing denied (May 26, 2011) (citing *Shealy v. Aiken County*, 341 S.C. 448, 535 S.E.2d 438 (2000)).

As reiterated in *Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 676 S.E.2d 700 (2009), rehearing denied (May 28, 2009), cert. denied, 130

S.Ct. 741 (2009), 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; however, the circuit court erroneously placed this case on all fours with the facts presented in *Kilgore Group, Inc. v. S.C. Employment Sec. Com'm.*, 313 S.C. 65, 437 S.E.2d 48 (1993). In that case, Kilgore 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.*

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*, it becomes abundantly clear that Hudson was an independent contractor and not a Caregivers employee on the date of her accident. In contrast to the workers in *Kilgore*, Hudson was not provided insurance coverage by Caregivers, nor did Caregivers furnish her with equipment or pay her wages. She was not permitted to receive payment in advance, received no on-the-job training or supervision, and the client retained exclusive authority to hire and fire her. Thus, while *Kilgore* sets forth the applicable test, it is highly distinguishable by the facts of this case. Turning to an even-handed application of the factors used to assess the nature of her employment, it becomes clear that ample evidence supports the Commission’s determination that Hudson was an independent contractor.

A. Direct Evidence Of The Right To Or Exercise Of Control.

The circuit court based its decision, in part, on restrictions on the types of services caregivers could provide (R. p. 10), as well as on the incorrect statement that Caregivers set the hours of service. (*Id.*) In fact, the restrictions imposed are merely evidence of government control, and the circuit court clearly overlooked or chose to disregard testimony that work hours were set by the client and only communicated through

Caregivers.⁵

Consistent with the Mr. Teeple's testimony, while Caregivers checked references, screened and interviewed applicants, it retained no control over the method and manner in which Hudson performed her duties as a caregiver. (R. p. 181, lines 20-25) Indeed, from the initial interview, potential caregivers are instructed that they will be considered independent contractors and not employees. (R. p. 45) As noted by the single commissioner in her February 18, 2005 Order, the client hires and fires a caregiver, retains authority to exercise control over the caregiver's job performance, and the Caregivers agreement provides that caregivers are independent contractors with no workers' compensation benefits. (*Id.*) Caregivers merely owns and operates a referral service whereby it matches and then refers care providers to its clients. (R. p. 45; p. 180, lines 7-15; p. 181, lines 9-19; p. 184, lines 4-9) The decision regarding whether to hire or reject a caregiver is vested solely with the client, and clients determine the level of service to be provided and the hours each care provider will work. (R. p. 181, lines 8-19) Clients pay their care providers directly, provide them with tax documents, and are free to negotiate a higher rate of pay with the care provider. (R. p. 100, lines 19-22; p. 138, lines 18-22) Each of these facts militates strongly in favor of a finding that its clients, and not Caregivers, retain authority to control.

With regard to Hudson, there is no evidence that supports a finding that Caregivers directed Hudson in the performance of her job duties. To the contrary,

⁵ As an alternative, "[a]lthough not necessary for the decision," the circuit court held that Hudson provided a "necessary, essential and integral part" of Caregiver's business. (R. p. 13, n. 2) This alternative ruling is erroneous, however, because the argument that Hudson was a statutory employee was never raised or ruled upon by the single commissioner of the Full Commission and should be deemed abandoned.

Hudson achieved her certified nursing assistant designation prior to applying with Caregivers and testified that she was not instructed, trained, or directed in the performance of her duties in any way by Caregivers. (R. p. 115, lines 5-8; p. 182, lines 2-3, 7-13; p. 186, line 25 – p. 187, lines 1, 8-9) These decisions were left to the discretion of the client and Hudson.

Hudson's suggestion that Caregivers exercised direct control over her job performance by disallowing her to perform nursing duties also is misleading. Caregivers lacks a license to provide nursing services; therefore, Caregivers cannot refer individuals to provide nursing services as doing so would constitute a violation of the law. (R. p. 85, lines 3-14) As Mr. Teeple explained, "we're not licensed to perform nursing duties and . . . we're very careful to make sure that some of the caregivers that . . . want to be referred by us, might be a C.N.A. or L.P.N. or something to that effect and could perform functions that we're not licensed to [] perform." (*Id.*)

Hudson also acknowledged that the restriction on her job duties was solely a by-product of licensing requirements and not an attempt by Caregivers to exercise control. (R. p. 85, lines 15-18) Thus, this restriction is evidence of government control and does not evince evidence of direct control by Caregivers. See *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.*

B. Furnishing Of Equipment.

The order challenged on appeal relies on the provision of one piece of equipment – a time sheet – and an inapplicable 1963 decision. (R. p. 11) (quoting *South Carolina Industrial Commission v. Progressive Life Ins. Co.*, 242 S.C. 547, 550, 131 S.E.2d 694, 695 (1963) (insurance agents who “were furnished supplies, which included all forms” were employees)). Here, there is no legitimate dispute that the only equipment Caregivers provided to Hudson was a form⁶ used to keep track of her time. (R. p. 91, lines 4-16) Tellingly, Caregivers filed these completed forms under the names of its clients and not the names of independent contractors providing services to its clients. (R. p. 97, line 13 – p. 98, line 7) Hudson readily admits she was not required to provide Caregivers with any other type of oral or written reports for the services she provided. (R. p. 187, lines 14-19) Thus, the provision of equipment factor, standing alone, is woefully insufficient to establish an employer/employee relationship. *See, e.g., Ray Covington Realtors*, 318 S.C. at 548, 459 S.E.2d at 303 (holding realtor was an independent contractor even though the putative employer supplied business forms and office space).

Here, there is no evidence that Caregivers supplied Hudson with a car, cleaning supplies, groceries, assistive devices such as wheelchairs or lifts, or any of the other basic equipment that would be required to provide in-home assistance to the elderly. As a result, this factor supports the conclusion reached by the Full Commission that Hudson was an independent contractor and not an employee of Caregivers.

⁶ Hudson used the triplicate form supplied by Caregivers to keep track of her hours, providing one copy to Caregivers, one to the client, and keeping one for her own records. (R. p. 91, line 8 – p. 92, line 1; p. 277-294)

C. Method Of Payment.

With regard to method of payment, the record evidence overwhelmingly supports the conclusion that Hudson was an independent contractor and not an employee. As previously noted, clients, and not Caregivers, paid Hudson directly. (R. p. 182, line 24 – p. 183, line 2) Clients issued a separate check to Caregivers to pay its referral fee. (R. p. 183, lines 3-6) While clients were required to pay Hudson a minimum wage of \$9.00 per hour, Hudson remained free to negotiate directly with clients of Caregivers for a higher rate, a fact the circuit court overlooks in its analysis. (R. p. 12-13; p. 92, lines 9-16) In the event Hudson used her own car (as Caregivers certainly did not provide her with transportation), clients (and not Caregivers) would have been obligated to pay her 35 cents per mile. (R. p. 277-294)

Caregivers did not provide Hudson with medical or health insurance, workers' compensation insurance, or other benefits, and she received form 1099s for tax purposes⁷ directly from clients and not Caregivers. (R. p. 138, lines 18-22) No payments or reimbursements ever were made from Caregivers to Hudson. For all of these reasons, the method of payment factor weighs quite strongly in favor of a finding that Hudson was an independent contractor.

D. Right To Fire.

The fourth and final factor – right to fire – is the most difficult to apply inasmuch as the right to terminate, in some form, exists in both the independent contractor and employee contexts. *See Wilkinson*, 382 S.C. at 304, 676 S.E.2d at 704. Under the

⁷ Unlike the claimant in *Pikaart v. A&A Taxi, Inc.*, Op. No. 27003 (*See index*) (Shearhouse Adv. Sh. No. 22 at 88), Hudson never filed a tax return listing Caregivers as her employer. (R. p. 139, lines 16-19)

express terms of the agreement between Caregivers and Hudson, however, Caregivers could only remove Hudson from its referral list but did not have the right to fire her. (R. p. 296) Instead, the express terms of the agreement provide that only the client retained the right to fire, while Hudson also retained the right to terminate the relationship. (*Id.*) Here, the application Hudson signed on September 11, 2003, specifically advised:

I understand that Caregivers of SC is a referral service and not my employer. Should Caregivers of SC refer me to their clients, I acknowledge and understand that I am an independent contractor regarding my relationship with Caregivers of SC as well as any clients of Caregivers of SC refers me to. As an independent contractor, I understand that I will not be covered by worker's compensation/insurance as well as unemployment compensation.

(R. p. 295) The message that Hudson was an independent contractor is repeated on her payroll records/time sheets. (R. p. 277-294) This is consistent with Mr. Teeple's testimony that Caregivers only made referrals, with the decision to accept or reject a care provider vested solely in the client. (R. p. 82, lines 10-17; p. 193, lines 9-19)

III. THE CIRCUIT COURT ERRED IN CONCLUDING THAT HUDSON'S ALLEGED INJURIES AROSE OUT OF AND IN THE COURSE AND SCOPE OF HER EMPLOYMENT.

The idiopathic nature of Hudson's fall is evinced by the substantial record evidence and compels reversal of the circuit court 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 Hudson cannot establish why she fell and, therefore, that the fall was the proximate cause of her alleged injuries.

The testimony from Hudson herself overwhelmingly establishes that she failed to establish the requisite causal connection between her injuries and the performance of her work. At various points in her testimony before the single commissioner, Hudson testified that she did not know what caused her to fall (R. p. 119, lines 7-11), that her fall was a “freak accident” (*Id.*, p. 122, line 18) and that she “couldn’t figure out what happened.” (*Id.*, p. 121, lines 13-14) It was only well after-the-fact, when she observed photographs of the purported accident location taken by family members that Hudson “assumed” her foot got caught on a crack or uneven spot in the concrete near her employer’s mailbox. (*Id.*, p. 119, line 9 – p. 124, line 2)

The Commission’s conclusion that Hudson’s fall was idiopathic in nature also is supported by the medical evidence. For example, the February 5, 2004 emergency room note generated by Grand Strand Regional Medical Center ER contains the following information: “[o]f note, the patient has been in the emergency room once a month for the past five months for various falls and pain-related complaints.” (R. p. 200) The same record also notes that Hudson “allegedly fell” while going to the mailbox. (*Id.*) An April 15, 2004 record from Strand Regional Specialty Associates indicates her “right foot slipped. She fell rapidly and the next thing she knew she was down.” (R. p. 234) Despite the circuit court’s best efforts to harmonize the medical records with Hudson’s

version of events, the first mention of uneven pavement as the cause of Hudson's fall appears nearly nine months post-accident in a November 18, 2004 record. (R. p. 13-18; p. 254)

Assumption and speculation cannot satisfy Hudson's burden of establishing "an injury by accident arising out of and the course of the employment." S.C. Code Ann. § 42-1-160. Further, the burden was on Hudson "to prove such facts as will render an injury compensable, and such award must not be based on surmise, conjecture, or speculation." *Crosby, supra*, 330 S.C. at 494; 499 S.E.2d at 257. Even if the evidence regarding the nature of Hudson's fall was conflicting, which it isn't, this Court must affirm because "where there are conflicts in the evidence over a factual issue, the findings of the Commission are conclusive." *Crisp v. SouthCo., Inc.*, 390 S.C. 340, 701 S.E.2d 762 (Ct. App. 2010), *reh'g denied* (Nov. 22, 2010) (quoting *Pack v. State Dep't. of Transp.*, 381 SC 526, 536, 673 S.E.2d 461, 466 (Ct. App. 2009)).

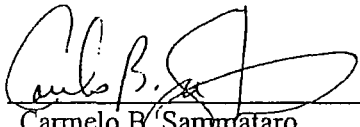
Moreover, the circuit court's reliance on *Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 689 S.E.2d 615 (2010), is misplaced as that case did not involve an idiopathic or unexplained fall or stem from claimant's reliance on speculation and conjecture to explain why he fell. Instead, the injury sustained by the claimant in *Pierre* "occurred as a result of a hazard that existed on the employer's premises, i.e., [he] slipped and fell on a wet sidewalk just outside the employer's housing facility." *Id.*, 386 S.C. at 549, 689 S.E.2d at 623. Given the grossly speculative nature of Hudson's version of events, it was error for the circuit court to reverse the Full Commission's finding that her fall was idiopathic in nature and not compensable.

CONCLUSION

For the foregoing reasons, Appellant Caregivers of South Carolina, LLC, respectfully submits that the January 4, 2011 Order of the circuit court is erroneous and must be reversed and that the unappealed February 18, 2005 Order of the single commissioner should be reinstated in its entirety as the law of this case.

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In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No: 08-CP-26-3032

Vennie Taylor Hudson.....Respondent,

v.

Caregivers of South Carolina, LLC, Employer, and
South Carolina Workers' Compensation Uninsured Employers' Fund,.....Appellants.

BRIEF OF APPELLANT
SOUTH CAROLINA WORKERS' COMPENSATION
UNINSURED EMPLOYERS' FUND

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STATEMENT OF ISSUES ON APPEAL

- I. THE CIRCUIT COURT ERRED IN FINDING THAT THE CLAIMANT WAS AN EMPLOYEE OF CAREGIVERS OF SOUTH CAROLINA, LLC, FINDING THE EXISTENCE OF AN EMPLOYEE/EMPLOYER RELATIONSHIP, AND FINDING THE WORKERS' COMPENSATION COMMISSION TO HAVE JURISDICTION OVER THIS MATTER.
- II. THE CIRCUIT COURT ERRED IN ITS CAPACITY AS AN APPELLATE COURT IN REVERSING THE WORKERS' COMPENSATION COMMISSION'S FINDINGS OF FACT THAT THE CLAIMANT DID NOT SUFFER A COMPENSABLE INJURY ARISING OUT OF THE COURSE AND SCOPE OF HER EMPLOYMENT AS IT RESULTED FROM AN "IDIOPATHIC LEVEL FLOOR FALL," AS THE COMMISSION'S FINDING IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

STATEMENT OF THE CASE

This matter arises out of an alleged injury by accident allegedly occurring on February 5, 2004, in Horry County, South Carolina. Shortly after the alleged accident, the Claimant, by and through her attorney, filed a Form 50 alleging that she was an employee of Caregivers of South Carolina, LLC on and before February 5, 2004, on which date she sustained a compensable injury by accident and was, thus, entitled to benefits. Following the filing of the Form 50, it was discovered that Caregivers of South Carolina, LLC was not insured under the South Carolina Workers' Compensation Act. Thus, the matter was referred to the Coverage and Compliance Division of the South Carolina Workers' Compensation Commission.

During the Spring of 2004, an investigation was conducted by the Coverage and Compliance Division of the South Carolina Workers' Compensation Commission pursuant to Regulation 67-1402. It was the opinion of the Coverage and Compliance Division that the Alleged Employer, Caregivers of South Carolina, LLC was subject to the South Carolina Workers' Compensation Act on and before February 5, 2004, but operating without insurance. The Employer, Caregivers of South Carolina, LLC, disputed the findings of the Coverage and Compliance Division.

During the Summer of 2004, a Rule to show Cause hearing was set before the South Carolina Workers' Compensation Commission. Pursuant to a subpoena issued by the Commission, Caregivers of South Carolina, LLC was required to provide numerous documents to the Commission. In September of 2004, the Commission issued a hearing notice setting the Rule to Show Cause hearing for October 4, 2004. Notice of the hearing was given to the Claimant, the Claimant's attorney, as well as to the Employer.

A hearing was held before Commissioner J. Michele Childs on October 4, 2004. Present at the

hearing, in addition to persons representing the Commission and the Coverage and Compliance Division of the Commission, were the Claimant and her attorney, Stephen Samuels. The Claimant, David Teeple of Caregivers of South Carolina, LLC, and Garry Smith, investigator for the Coverage and Compliance division, testified at the hearing. In addition, numerous documents provided by Caregivers of South Carolina, LLC were introduced into evidence. Following the hearing, Commissioner Childs issued an Order on February 18, 2005, finding that the Claimant and other persons working through Caregivers of South Carolina, LLC were not employees but, instead, independent contractors. Commissioner Childs found that the Alleged Employer, Caregivers of South Carolina, LLC did not regularly employ four (4) or more persons on or the date of the Claimant's accident, and thus was not subject to the South Carolina Workers' Compensation Act. The above Order was served upon the attorney for the Claimant, Stephen Samuels, on February 23, 2005. In addition, the Order was sent to the South Carolina Workers' Compensation Uninsured Employers' Fund, as well as to David Teeple, Director of Caregivers of South Carolina, LLC. No appeals were taken from that Order.

On March 3, 2005, the Claimant, by and through her attorney, again filed a Form 50 alleging an injury on February 5, 2004, in Horry County, South Carolina, while working for Caregivers of South Carolina, LLC. The Alleged Employer, filed a Form 51 on March 15, 2005, denying again that the Claimant was an employee but, instead, an independent contractor. The matter was set for a hearing in September of 2005 in Myrtle Beach, South Carolina. At that time, the Claimant chose to withdraw her Form 50. A Form 50 was re-filed on behalf of the Claimant on September 6, 2006. Following that time, the matter was set before Commissioner J. Alan Bass and heard on December 13, 2006, in Surfside Beach, South Carolina. On September 11, 2007, Commissioner Bass issued an Order finding that the Appellant, Caregivers of South Carolina was subject to the South Carolina Workers' Compensation Act and held that

the Claimant was an employee rather than an independent contractor. However, Commissioner Bass denied the Claimant's claim as being compensable as it arose as a result of an "idiopathic level floor fall." Timely appeals were filed by all parties. The Employer and the Uninsured Fund filed appeals of the jurisdictional issues. The Claimant appealed the denial of her claim.

On March 8, 2008, the Appellate Panel of the Workers' Compensation Commission issued an unanimous Order reversing the single Commissioner's finding regarding jurisdiction but affirming the denial of the compensability of the claim. The Claimant timely file an appeal to the Circuit Court of Horry County.

The matter was finally heard by Judge Michael Baxley on August 20, 2010. On January 4, 2011, Judge Baxley filed an Order with the Circuit Court in Horry County reversing the Workers' Commission finding jurisdiction and finding the Claimant's claim compensable. This appeal follows.

STANDARD OF REVIEW

The Administrative Procedures Act establishes the standard of review for decisions by the South Carolina Workers' Compensation Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E. 2d 304, 306 (1981). The Commission is the ultimate fact finder and is not bound by the single commissioner's findings of fact. Etheredge v. Monsanto Co., 349 S.C. 451, 454, 562 S.E. 2d. 679, 681 (Ct. App. 2002). The findings of the Commission are presumed correct and will be set aside only if unsupported by substantial evidence. Lark, 276 S.C. at 135, 276 S.E. 2d. at 306. Substantial evidence is not a mere scintilla of evidence, nor evidence viewed blindly from one side of the case, but is evidence that, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action. Taylor v. S.C. Dept of Motor Vehicles, 368 S.C. 33, 36, 627 S.E. 2d. 751, 752 (Ct. App. 2006).

The Administrative Procedures Act mandates that the Commission take the evidence, judge the credibility and weight of that evidence and, from that judgment, determine the facts of the case. An Appellate Court's role is appellate only, and is limited to deciding whether the Commission's decision is unsupported by substantial evidence or is controlled by some error of law. The Court must look at the record as a whole and determine whether a reasonable mind might reach the same conclusion as reached by the Commission. It is not within the Court's power to decide that the weight of the evidence supports contrary findings from those of the Commission when the findings are supported by substantial evidence. Rogers vs. Kunja Knitting Mills, Inc., 312 S.C. 377, 440 S.E. 2d 401 (Ct. App. 1994).

As mentioned above, appeals from the South Carolina Workers' Compensation Commission are generally governed by the Administrative Procedures Act, which establishes the "substantial evidence rule" as the standard for judicial reviews of factual findings of the South Carolina Workers' Compensation Commission.

The Jurisdictional issues in the present case are not governed by the substantial evidence standard of review. The issue as to whether an Employee/Employer relationship existed is jurisdictional. Therefore, the Commissions findings of fact as to the Employer/Employee relationship are not conclusive on Appeal and Appellate Courts have the power and duty to review the record and decide those issues in accordance with the preponderance of the credible evidence. Kirksey v. Assurance Tire Company, 314 S. C. 43, 443 S.E.2d 803 (1994). Thus, an Appellate Court must review the record in accordance with its own view of the preponderance of the credible evidence. However, while the Appellate Court may take its own view of the preponderance of the evidence on the existence of an Employer/Employee relationship, the final determination of witness credibility is usually reserved to the Appellate Panel of the South Carolina Workers' Compensation Commission. Porter v. Labor Depot, 643 S.C. 2d 96, 103

FACTS OF THE CASE

Mr. David Teeple, principle of Appellant Caregivers of South Carolina, LLC, testified at the December 13, 2006, hearing held before Commissioner Bass and also testified at the prior compliance hearing held before Commissioner Childs, (Record on Appeal, page 77). At the time of the hearing, Appellant Caregivers had been in business in South Carolina for approximately five and one-half years. Mr. Teeple testified that he runs the business out of his home and, at that time, he and his wife were the only employees of the business (Record on Appeal, page 101).

Mr. Teeple testified that his business provides home health care through individuals that he designates as "caregivers." He admitted that the only revenue generated by his business was from the work done by those "caregivers." Mr. Teeple interviews and screens "caregivers" and matches them with potential clients. The client pays the "caregiver" directly at a rate of \$9.00 per hour. And additional \$2.50 per hour referral fee is paid to his business. Mr. Teeple designates the "caregivers" as being independent contractors. Numerous documents were introduced into evidence during Mr. Teeple's testimony. Many of those documents designate the "caregivers" as being independent contractors. Mr. Teeple explains to all "caregivers" that they are responsible for their own taxes and that he provides no health or worker's compensation insurance.

The Respondent also testified before Commissioner Bass. She testified that she met with Mr. Teeple at the Employment Security Commission office and he interviewed her at that time to be a "caregiver." She admitted signing various forms during the interview, but did not remember what forms she signed until she saw them on the day of the hearing. She admitted that she remembered signing forms showing that she was responsible for her own taxes and had no health insurance coverage. Shortly after

the interview, the Respondent received her first assignment as a "caregiver."

According to the Respondent, the accident in question occurred on February 5, 2004. She stated that the client she worked for asked her to go get the mail, as she did everyday near the end of the day. She stated that, on her way to get the mail, she fell face down on concrete. The Claimant was unconscious for a short period of time but is unsure how long she was unconscious.

In her testimony, the Claimant admitted that she does not know what caused her to fall. She first described the fall as a "freak accident." She testified that she "couldn't figure out what happened." (Record on Appeal, page 119). After seeing pictures taken by her niece and nephew sometime after the accident, she assumes her shoe got caught in a crack in the concrete. (Record on Appeal, page 121).

It appears that the Claimant was initially seen at South Strand Ambulatory Care Center. A report dated the day of the accident shows that the Claimant fell while going to the mailbox. The report makes no mention of the mechanics of the fall (Record on Appeal, page 200). Handwritten notes from the Greenville Hospital System dated February 15, 2004, approximately ten days after the accident, show that the Claimant slipped and fell from a standing position (Record on Appeal, page 219). A report from Dr. Schexnayder from April 15, 2004, shows that the Claimant fell on February 5, 2004. According to the report, the Claimant claimed that her right foot apparently slipped (Record on Appeal, page 234). A report from Dr. Mason Ahearn from November 18, 2004, shows the Claimant slipping on uneven concrete while going to a mailbox (Record on Appeal, page 254).

ARGUMENT

I. THE CIRCUIT COURT ERRED IN FINDING THAT THE CLAIMANT WAS AN EMPLOYEE OF CAREGIVERS OF SOUTH CAROLINA, LLC, FINDING THE EXISTENCE OF AN EMPLOYEE/EMPLOYER RELATIONSHIP, AND FINDING THE WORKERS' COMPENSATION COMMISSION TO HAVE JURISDICTION OVER THIS MATTER.

The preponderance of the evidence in this matter supports the Full Commission's finding that the Respondent was an independent contractor. The determination of whether a claimant is an employee or an independent contractor focuses on the issue of control, specifically whether the purported employer had the right to control the claimant in the performance of his work. S.C. Workers' Compensation Commission v. Ray Covington Realtors Inc., 318 S.C. 546, 547, 459 S.E. 2d 302, 303 (1995). In evaluating the right of control, a court examines four (4) factors which serve as a means of analyzing the work relationship as a whole: (1) direct evidence of the right of control; (2) furnishing of equipment; (3) method of payment; (4) right to fire. Id. Because the question of whether a claimant is an employee or an independent contractor is jurisdictional, a court may take its own view of the preponderance of the evidence. Wilkinson v. Palmetto State Transportation Company, 382 S.C. 295, 676 S.E. 2d 700 (2009). In Wilkinson, the Court overruled the analytical framework of Dawkins v. Jordan as it most assuredly skews the analysis to a finding of employment. Pursuant to Wilkinson, the Court returned to prior jurisprudence that evaluates the above-mentioned four (4) factors with equal force in both directions. Wilkinson, at 703. In the present case, all four (4) factors weigh heavily in favor of the Appellant Caregivers. Both the Full Commission and Commissioner Childs, in her earlier Order, correctly determined the Respondent was an independent contractor.

The first element of the right to control is direct evidence of the right or exercise of control. Ray Covington Realtors, 318 S.C. at 548, 459 S.E. 2d at 303. The Appellant Caregivers had no control over the method and manner of the Respondent's duty as a "caregiver." The Appellant merely owns and operates a referral services which screens, matches, and then refers "caregivers" to clients. (Record on Appeal, page 82, page 46). Clients make the final decision whether to hire the "caregiver" referred by the Appellant. Clients determine when they want the "caregiver" to work, which could be anywhere from one (1) hour to around the clock as a live-in "caregiver." (Record on Appeal, page 296). Appellant Caregivers offered no training or direction on how to perform duties as a "caregiver" in any particular way. Accordingly, the record is clear that the client, and not the Appellant, determined the manner in which the "caregiver" performed her work.

The second element in evaluating control is the furnishing of equipment. Ray Covington Realtors at 303. The only item furnished to the Respondent was a time sheet. (Record on Appeal, page 91). This alone does not demonstrate an Employer/Employee relationship. In Ray Covington Realtors, the Court held the claimant was an independent contractor, even though the alleged employer supplied some business forms and office space to the claimant. Here, the mere provision of a time sheet does not even reach that level.

The third element in determining the right to control is the method of payment. Id. at 548 at 303. In evaluating this evidence, it is clear that the Claimant was an independent contractor. As noted above, clients paid the "caregiver" directly. The Claimant never received any monies from Appellant Caregivers. Documents signed by the Claimant showed that she was responsible for her own taxes and would receive Form 1099s at the end of the year directly from her clients. Thus, the method of payment, in no way, supports an employment relationship.

The fourth element to consider when determining the right to control is the right to fire. Ray Covington Realtors at 548 at 303. This factor is always the most difficult to evaluate because, in some form, a right to terminate exists in an independent contractor relationship. Wilkinson at 304 at 704.

Under the terms of the agreement, the Appellant Caregivers did not have the right to fire the Respondent or any other "caregiver." (Record on Appeal, page 296). Appellant Caregivers could merely remove Respondent from its referral list. (Id.). The agreement provided that the client had the right to fire a "caregiver." Respondent also had the right to terminate the relationship. (Id.). Clients decided, on their own, whether they wanted to hire or fire a particular "caregiver." (Record on Appeal, page 82). Thus, this element supports a finding that Respondent was an independent contractor, as well.

In its decision applying the four element test, as laid out in Ray Covington Realtors, the Full Commission correctly determined that the Respondent was not the Appellant Caregiver's employee. The Respondent failed to satisfy even one of the four factors that would be evidence of control or evidence of the right to exercise control. The Full Commission correctly determined that the Respondent was an independent contractor rather than an employee.

II. THE CIRCUIT COURT ERRED IN ITS CAPACITY AS AN APPELLATE COURT IN REVERSING THE WORKERS' COMPENSATION COMMISSION'S FINDINGS OF FACT THAT THE CLAIMANT DID NOT SUFFER A COMPENSABLE INJURY ARISING OUT OF THE COURSE AND SCOPE OF HER EMPLOYMENT AS IT RESULTED FROM AN "IDIOPATHIC LEVEL FLOOR FALL," AS THE COMMISSION'S FINDING IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

In its Order of March 18, 2008, the Full Commission affirmed the finding of single Commissioner Bass and held that the Claimant did not suffer a compensable injury by accident as it arose out of an idiopathic level floor fall. In its Finding of Fact No. 2, the Full Commission explains: "Claimant alleges

that she suffered a fall on February 5, 2004, arising out of and in the course of her employment. Claimant's accident is not compensable as the cause of her fall is unexplained. Claimant testified that she does not know why she fell. She described her fall as a 'freak accident.' She testified that she was walking and the next thing she knew, she fell face first on the concrete. It would be speculation, at best, to render a factual finding regarding the cause of Claimant's fall since even the Claimant, herself, indicated she does not know why she fell. Claimant admitted that all theories regarding the cause of her fall would be speculation, at best. The Claimant's injuries occurred as a result of her falling face forward onto concrete. Claimant's injury did not result from special danger to which she was subjected as a result of her employment. Claimant's injuries would have been sustained if she had a similar fall at home or any other hard surface area. Since the Claimant's injury is an idiopathic level ground fall, it did not arise out of her employment." (Record on Appeal, page 29). In the above numbered finding of fact, the Full Commissioner found that the Claimant did not suffer a compensable injury by accident. The Commission then detailed the reason and evidence for such a finding.

Under South Carolina law, unexplained falls at work are not automatically compensable. Crosby v. Wal-mart Store, 330 S.C. 489, 499 S.E.2d 253 (Ct. App. 1998). In other words, merely being on an employer's premises, without more, does not automatically confer compensability for an injury. To recover, a claimant must establish the requisite connection between work and the fall. As such, an unexplained fall without evidence connecting the fall to the employment is not compensable. Id.

In his Order reversing the Full Commission's findings of fact, Judge Baxley characterized the facts of the present case as being uncontroverted. He finds that "the evidence clearly shows Hudson tripped and/or slipped on uneven concrete on the sidewalk. Her foot got caught in a hole, which she was even able to identify in the picture. There is a complete and clear explanation for how she fell." (Record on Appeal,

page 16). It is clear from the above that Judge Baxley was assigning weight to certain evidence. Judge Baxley found that, based upon his factual determinations, the Respondent was entitled to Workers' Compensation benefits as a matter of law.

In the present case, Judge Baxley should have applied the substantial evidence standard to the findings of fact to the Full Commission. In the present case, the Full Commission's finding of fact finding that the Claimant did not suffer a compensable injury by accident is supported by substantial evidence. As mentioned above, the Claimant testified that she does not know what caused her to fall. (Record on Appeal, page 119). She testified that she does not know why she fell, and described the fall as a "freak accident." (Record on Appeal, page 119). She stated that she "couldn't figure out what happened." (Record on Appeal, page 119). Then, after seeing pictures her niece and nephew took, she assumed she got caught on a crack in the concrete. (Record on Appeal, page 121). The initial medical reports showed that the Claimant "slipped." Later reports show that the Claimant "slipped." The evidence certainly is conflicting.

Even though the record presents conflicting evidence on the issue of whether the Claimant suffered a compensable injury, the Circuit Court obviously erred in reversing the Commission. Where conflicts exist in the evidence over factual issues, the finding of the Commission are conclusive. The Court cannot simply reverse the Commission because, although the evidence is conflicted, the Commission's findings are supporting by substantial evidence. Rogers v. Kunja Knitting Mills, Inc. 312 S.C. 377, 440 S.E.2d 401 (Ct. App. 1994).

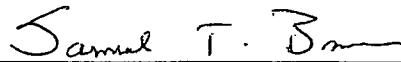
Clearly, the findings of Commissioner Bass, as affirmed by the Full Commission, detailed the evidence relied upon to categorize the Claimant's fall as "idiopathic." The evidence detailed is substantial. Thus, the Full Commission's denial of this claim should have been affirmed.

CONCLUSION

In this case, the South Carolina Workers' Compensation Commission lacks jurisdiction over the above claim, as the Employer/Employee relationship did not exist at the time of the Claimant's accident. The Full Commission correctly and unanimously found the Claimant to be an independent contractor rather than an employee. Jurisdiction must be proven by a preponderance of the evidence and, in this case, the evidence clearly supports the Commission's conclusions.

In addition, the Circuit Court erred in weighing evidence in reaching its own findings of fact regarding the compensability of the Claimant's claim. Clearly, the Commission's finding that the Claimant's accident arose out of an idiopathic level floor fall is supported by substantial evidence and must be affirmed.

RESPECTFULLY SUBMITTED,



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February 29, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

J. Michael Bailey, Circuit Court Judge

Case No. 08-CP-26-1032

Vernice Taylor Hudson

Respondent

Caregivers of South Carolina, LLC, Employer, and
South Carolina Workers' Compensation Uninsured Employers' Fund

Appellants

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STATEMENT OF ISSUES ON APPEAL

1. Whether the Circuit Court properly held that the Order in the Rule to Show Cause hearing had no preclusive effect on Hudson because she was not a party and had no full and fair opportunity to litigate the issue of her status as an employee.
2. Whether the Circuit Court correctly found that Hudson was the direct employee of Caregivers of South Carolina.
3. Whether the Circuit Court correctly found that Hudson was also the statutory employee of Caregivers of South Carolina.
4. Whether the Circuit Court correctly held Hudson's trip and fall injury arose out of her employment, thus properly reversing the Commission's improper legal conclusion that Hudson's injury of February 5, 2004 arose out of a non-compensable idiopathic level floor fall.
5. Whether Hudson is entitled to the presumption of compensability if the Court holds she suffered an unexplained fall.

STATEMENT OF THE FACTS

The Employer, Caregivers of South Carolina, LLC, is an agency that supplies in-home attendant care to elderly and disabled people. Caregivers is owned by David and Janet Teeple. The Teeples have approximately 50 "caregivers" who provide these services to their clients.

The Teeples contend the workers are independent contractors rather than employees. Caregivers recruits, interviews and screens the workers. They are then assigned to a particular client. Caregivers gives the worker the work schedule and address of the client.

According to the Teeples, the worker is then "hired" by the client. The client pays \$11.50 per hour for these services. The rate is set by Caregivers. The worker fills out a timesheet supplied by Caregivers. One copy goes to the client; one copy goes to Caregivers. The client writes one check for \$9.00 per hour directly to the worker and one check for \$2.50 per hour to Caregivers. Caregivers' sole source of revenue is the \$2.50 per hour for each hour of care provided.

The workers can provide only those services specified by Caregivers. They get their work schedule from Caregivers and are required to call in to Caregivers (not the client) if they are sick or going to be late. They are not allowed to give their own phone numbers to the client.

Hudson was employed by Caregivers in October 2003. On February 5, 2004, Caregivers sent her to the home of one of their clients to perform work as a "caregiver." On her way out to the mailbox to pick up the client's mail, Hudson tripped on a hole in the sidewalk and fell face forward onto the ground, knocking herself out and suffering multiple injuries.

STANDARD OF REVIEW

Employee/employer relationship:

The existence of an employment relationship is a factual question that determines the jurisdiction of the Workers' Compensation Commission and is reviewable under the preponderance of the evidence standard. Brayboy v. WorkForce, 383 S.C. 463, 681 S.E.2d 567 (2009). When the issue involves jurisdiction, the appellate court may take its own view of the preponderance of the evidence. It is South Carolina's policy to resolve jurisdictional doubts in favor of inclusion rather than exclusion. White v. J.T. Strahan Co., 244 S.C. 120, 135 S.E.2d 720, 723 (1964).

Idiopathic level floor fall:

The facts of the case at bar are essentially undisputed. Vennie Hudson, the Claimant, injured herself when she fell tripping or slipping on a broken concrete sidewalk. The Commission ruled as a matter of law that her injury did not arise out of her employment because these facts constituted an "idiopathic level-floor fall."

The compensability of a particular event or injury as an accident within the purview of the South Carolina Workers' Compensation Act is a question of law to be decided by the courts. Sturkie v. Ballenger Corporation, 268 S.C. 536, 539, 235 S.E.2d 120, 121 (1977). Upon admitted or established facts, the question of whether an accident is compensable is a question of law, and review thereof is not an invasion of the fact-finding field of the Commission on the part of the Court. Jordan v. Dixie Chevrolet, Inc., 218 S.C. 73, 61 S.E.2d 654 (1950). When only one reasonable inference can be deduced from the evidence, it becomes a question of law for the courts. Kinsey v. Champion American Service Center, 268 S.C. 177, 232 S.E.2d 720 (1977). A lack of a conflict in the evidence renders the question one of law for the courts. Polk v. E.I. duPont de Nemours Co., 250

S.C. 468, 158 S.E.2d 765 (1968). The issue of whether a particular event constitutes a compensable accident is for the court. Sturkie v. Ballenger Corp., 268 S.C. 536, 235 S.E.2d 120 (1977). A court may reverse or modify the Commission's decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are affected by other error of law. Broughton v. South of the Border, 336 S.C. 488, 520 S.E.2d 634, 637 (Ct. App. 1999).

"In determining if an accident arose out of and in the course of employment, each case must be decided with reference to its own attendant circumstances." Hall v. Desert Aire, Inc., 376 S.C. 338, 349, 656 S.E.2d 753, 758 (Ct. App. 2007). "The general policy in South Carolina is to construe the Workers' Compensation Act in favor of coverage, and any reasonable doubts as to construction should be resolved in favor of the claimant." Id. at 350, 656 S.E.2d at 759. "Where employer and employee are subject to the compensation act, . . . an injured employee should not be excluded from the benefits of the law upon the ground that the accident did not arise out of and in the course of his employment when there is substantial doubt (arising from the proven facts) of the propriety of such conclusion." Pelfrey v. Oconee County, 207 S.C. 433, 440, 36 S.E.2d 297, 300 (1945). "These words are construed broadly and should continue to be so construed." Id. "Common sense indicates that a compensation law passed to increase workers' rights (because their common law rights were too narrow) should not thereafter be narrowly construed." Id.

ARGUMENT

I. The Order in the Rule to Show Cause Hearing has no preclusive effect as to Hudson's right to prosecute her case on the merits.

Caregivers contends the Commission's Order in the Rule to Show Cause hearing precludes her from trying her case on the merits under three theories: (1) the law of the case doctrine; (2) res judicata; and (3) collateral estoppel. Caregivers misunderstands the very nature of the coverage and compliance hearings held by the Commission. Hudson was merely a witness – under subpoena issued by the Coverage and Compliance Division. She had no right to present a case; no right of cross-examination; and no right of appeal – nor would she have been entitled to any benefits under the Act no matter the outcome of the Rule to Show Cause hearing.

The Workers' Compensation Act requires all employers "in which four or more employees are regularly employed" to either purchase workers' compensation insurance or to file as qualified self-insureds. S.C. Code Ann. § 42-1-150; § 42-5-10 (2004). The requirement to purchase insurance is enforced by the Division of Coverage and Compliance. S.C. Code Ann. § 42-3-90 (2004). Enforcement proceedings are governed by the regulations. 25A S.C Code Ann. Reg. 67-1402 (2004).

In this case, Coverage and Compliance began investigating when it received notice that Hudson was asserting a claim against an uninsured employer. The Coverage and Compliance staff opined that Caregivers was an uninsured employer subject to the Act. Initially they asked Caregivers to sign a capitulation – a document formally known as a Form 62, Compliance Agreement. Mr. Teeple refused. Coverage and Compliance then issued an Order and Rule to Show Cause requiring Caregivers' principal to appear "before a Commissioner to show cause why it is not in violation with

the provisions of this Chapter and the Act.” Id.; 25A S.C Code Ann. Reg. 67-1404 (2004).

The Commission’s practice is to hold the Rule to Show Cause hearing before it schedules a hearing on the claimant’s Form 50 or 51. The hearing determines only the issue of compliance with the Act and any penalties for noncompliance. The merits are not reached and no award of benefits to the claimant can be made – which is why the claimant is not made a party to these hearings.

The Rule to Show Cause hearing was held before Commissioner Michele Childs. Mr. Teeple appeared *pro se* on behalf of Caregivers; Coverage and Compliance was represented by staff attorney Janet Griggs. Hudson was subpoenaed to the hearing and called as a witness by Griggs. Hudson’s counsel was present solely as an observer.

At the close of the hearing, Hudson’s attorney – as a matter of courtesy – asked Commissioner Childs to inform Mr. Teeple that Hudson retained the right to proceed with a Form 50 hearing no matter the outcome of the Rule to Show Cause hearing. [R. p. 198, lines 1-6]. Commissioner Childs advised Mr. Teeple: “That’s a whole separate hearing that Mr. Samuels will be having later with respect to the claimant’s compensability of the claim and then also probably issues with whether or not you had four or more employees and were subject to the Act.” [R. p. 198, lines 13-19]. This was a correct instruction as the regulations specifically provide that “When a final decision concerning jurisdiction is rendered the claimant may proceed with a claim for compensation by filing a Form 50 or 52 as provided in R. 67-207.” 25A S.C Code Ann. Reg. 67-1402 (2004).

Commissioner Childs issued an Order on February 18, 2005 in which she found as a fact that Vennie Hudson was an independent contractor and not an employee of Caregivers. [R. p. 45-49]. As such, no penalties for noncompliance were issued. Coverage and Compliance did not appeal.

Following the issuance of the Coverage and Compliance Order, Hudson, per regulation 67-1402 G, filed a Form 50 requesting a hearing.

Both the Commission and the Circuit Court correctly rejected Caregivers' arguments that the Rule to Show Cause order had preclusive effect against Hudson. This Court should affirm.

A. The Law of the Case doctrine does not apply because Hudson was not a party to the Rule to Show Cause hearing and had no right of appeal.

Caregivers contends Hudson is bound by the result in the Rule to Show Cause hearing because she did not appeal. This argument overlooks the central fact: Hudson was not a party; she was a witness. She had no standing in the case. She had no right of appeal. A non-party is "required, like everyone else, to formally intervene and become a named party before he can file an appeal." Condon v. State, 354 S.C. 634, 583 S.E.2d 430 (2003).

The caption shows that the Rule to Show Cause hearing was brought by Coverage and Compliance against Caregivers. It reads: "South Carolina Workers' Compensation Commission, Plaintiff, vs. Caregivers of South Carolina, LLC, Defendant/Employer." These two entities are the only parties to the hearing.

Caregivers asserts Hudson must also somehow be considered a party with the right to appeal because the caption also states: "In re: Vennie Taylor Hudson v. Caregivers of South Carolina, LLC." This is simply incorrect. Hudson is not a party and had no standing in the Rule to Show Cause hearing.

A party must be a real party in interest to the litigation to have standing. Evins v. Richland County Historic Pres. Comm'n, 341 S.C. 15, 532 S.E.2d 876 (2000). A real party in interest is a party with a real, material, or substantial interest in the outcome of the litigation. Baird v. Charleston

County, 333 S.C. 519, 511 S.E.2d 69 (1999). The purpose of the Rule to Show Cause hearing was solely to determine if Caregivers was in violation of the Act and to assess penalties for noncompliance. Hudson derived no direct benefit from the result. No matter the result, Hudson would be awarded benefits only if she prevailed on the merits at a Form 50 hearing. 25A S.C Code Ann. Reg. 67-1402 (2004).

Moreover, the mere happenstance Caregivers would have been collaterally estopped from relitigating the employment relationship issue – had it not prevailed in the Rule to Show Cause hearing – does not bestow standing on Hudson. She does not automatically become a party to the enforcement proceeding merely because it is her claim that caused Coverage and Compliance to conduct their investigation.

This Court should reject Caregivers' argument that Hudson is bound by the law of the case doctrine as to the result of the Rule to Show Cause Hearing. Hudson was not a party to that hearing. The regulations specifically provide that the claimant has a right to proceed on the merits once the Commission issues a final order on jurisdiction – regardless of how the Commission rules.

B. The claim against Caregivers is not barred by *res judicata* because Claimant was not a party to the Rule to Show Cause Hearing prosecuted by the Compliance Division.

The elements of *res judicata* are: 1) a final, valid judgment on the merits; 2) identity of parties; and 3) the second action must involve matters properly included in the first suit. Stone v. Roadway Express, 367 S.C. 575, 627 S.E.2d 695 (2006). As Hudson was not a party to the first action, she cannot have previously litigated it and cannot, as a matter of law, be barred by *res judicata*.

The purpose of *res judicata* is to prevent a party from relitigating a case it has already tried

and lost. Hudson did not try and lose the Show Cause Hearing; the Compliance Division did. In this case, Hudson no opportunity to litigate her case until the Form 50 hearing. As such, her claim is not barred by *res judicata*.

C. The claim against Caregivers is not barred by collateral estoppel because Hudson was not a party in the Rule to Show Cause Hearing nor was she in privity with the Compliance Division.

Collateral estoppel is somewhat similar to *res judicata*, except that it applies to a particular issue (issue preclusion) whereas *res judicata* applies to the entire claim (claim preclusion). "Collateral estoppel prevents a party from relitigating in a subsequent suit an issue actually and necessarily litigated and determined in a prior action." Jinks v. Richland County, 355 S.C. 341, 585 S.E.2d 281 (2003). The Appellants assert Hudson is collaterally estopped from relitigating the issue of her employment status because Commissioner Childs ruled for Caregivers and held Hudson was an independent contractor in the Rule to Show Cause hearing.

Hudson was not a party and could not, as a matter of law, have obtained review of the Show Cause hearing before the Full Commission. A party may assert nonmutual collateral estoppel to prevent relitigation of a previously litigated issue unless the party sought to be precluded did not have a fair and full opportunity to litigate the issue in the first proceeding, or unless other circumstances justify providing the party an opportunity to relitigate the issue. Slear v. Hanna, 321 S.C. 100, 467 S.E.2d 761 (Ct.App.1996). Unlike *res judicata*, collateral estoppel can apply to a person who is not a party to the prior action, but only if he is in privity with a party to the prior action against whom an adverse finding is made. Roberts v. Recovery Bureau, Inc., 316 S.C. 492, 450 S.E.2d 616 (Ct.App.1994). Only a party to a prior action or one in privity with the party can be precluded from relitigating an issue on the basis of offensive collateral estoppel. Carrigg v. Cannon,

347 S.C. 75, 552 S.E.2d 767 (Ct.App.2001).

Hudson may have desired the same outcome as the Compliance Division, but that did not put her in privity with the Compliance Division. Privity deals with a person's relationship to the subject matter of the previous litigation, not to the relationships between entities. Richburg v. Baughman, 290 S.C. 431, 351 S.E.2d 164 (1986). To be in privity, a party's legal interests must have been litigated in the prior proceeding. H.G. Hall Constr. Co. v. J.E.P. Enter., 283 S.C. 196, 321 S.E.2d 267 (Ct.App.1984). Merely having an interest in proving or disproving the same set of facts does not establish privity. Roberts, 316 S.C. at 496, 450 S.E.2d at 619. Due process prohibits estopping litigants who never had a chance to present their evidence and arguments on a claim, despite other adjudications of the same issue that stand squarely against their position.¹ Richburg, 290 S.C. at 434-35, 351 S.E.2d at 166. The reason for this is made clear by comparing the records of the two hearings. The Compliance Division entered no exhibits and elicited very little testimony to prove its case. It would be grossly unjust to bind Hudson to a result in which she had no opportunity to present evidence, and – when she did get her day in court – presented a full case.

Hudson never had a full and fair opportunity to litigate the issue of her employment status, nor could she have appealed the Show Cause Order. Hudson is not in privity with the Compliance Division, and due process precludes the use of res judicata and collateral estoppel against her. Therefore, this Court should affirm the rulings below.

¹Had Commissioner Childs ruled that Hudson was an employee rather than an independent contractor, collateral estoppel would bar Caregivers from relitigating the issue in the Form 50 hearing. The difference is because Caregivers had the opportunity to fully litigate the issue in the first hearing where Hudson did not.

II. Hudson was an employee of Caregivers.

The Circuit Court reversed the Appellate Panel's finding that Hudson was an independent contractor, ruling instead that she was employee of Caregivers. Caregivers and the Fund appealed this ruling, contending Hudson was an independent contractor.

Caregivers was set up by its owners as a deliberate scheme to evade payroll taxes and other liabilities associated with employees – including liability under the Workers' Compensation Act.² By denoting its workers as “independent contractors” and having their paychecks written by the client, Caregivers was able to offer in-home care services to its clients at a substantially lower cost than its competitors. [R. p. 79, line 8-p. 80, line 3]. Public policy strongly disfavors one business gaining an advantage over another by misclassifying its employees.

The evidence shows Hudson was an employee of Caregivers. She is either a direct employee of Caregivers or a statutory employee.

A. Hudson is the direct employee of Caregivers.

The Circuit Court held Hudson was the direct employee of Caregivers based on a showing that Caregiver had the right to exercise control over her workplace activities. The preponderance of the evidence shows Caregivers exercised near complete control over her activities, including her duties, her work schedule, her rate of pay, and her performance standards. The fact she received her paycheck from the client instead of directly from Caregivers is meaningless. The Court correctly found this method of payment was an obvious sham.

The arrangement set up by Caregivers is similar to the arrangement in Kilgore Group, Inc.

²Social Security and Medicare taxes are currently 7.65% of payroll. South Carolina employers are required to pay unemployment taxes. Employers are required to file returns and make the tax payments quarterly.

v. South Carolina Employment Sec. Comm'n, 313 S.C. 65, 437 S.E.2d 48 (1993). Although Kilgore dealt with an appeal from the Employment Security Commission, the legal test for an employee is the same as in workers' compensation cases. In Kilgore, the putative employer was an agency which supplied temporary workers to perform:

a variety of tasks, including construction work, machine operation, truck driving, cleaning, stocking, and assembly. 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. Kilgore then contracted with the individual workers to fill the positions required by the client. According to Kilgore's president, the contract could be based on an hourly wage or a fixed amount for the job. However, all workers were required to turn their hours in to Kilgore. Hourly workers were permitted to take "draws" on the amount they had worked. Kilgore's president testified that the contracts expressly provide that the relationship is one of an independent contractor. Id. at 67.

Kilgore's clients controlled the daily activities of the workers. The clients "felt free to tell Kilgore not to send a worker back if they were ever dissatisfied with his work." Id. Based on these facts, the South Carolina Supreme Court held "the workers were employees of Kilgore, and not independent contractors." Id. Kilgore should control the result in this case.

Workers' compensation awards are authorized only if an employer-employee relationship exists at the time of the injury. "The general test applied is that of control by the employer. It is not the actual control then exercised, but whether there exists the right and authority to control and direct the particular work or undertaking, as to the manner or means of its accomplishment." Young v. Warr, 252 S.C. 179, 189, 165 S.E.2d 797, 802 (1969). There are four elements which determine the right of control: 1) direct evidence of the right or exercise of control; 2) furnishing of equipment; 3) right to fire; and 4) method of payment. These factors "should be evaluated in an evenhanded manner in determining whether the questioned relationship is one of employment or independent

contractor.” Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 676 S.E.2d 700 (2009). Hudson is able to establish all four elements showing the right of control.

Caregivers recruited Hudson through a listing with the Employment Security Commission. She filled out an employment application. David Teeple interviewed her at the Employment Security Commission’s offices in Conway. Teeple filled out a *Staff Interview Form*.

Caregivers relies on the language of the application as proof that Hudson was an independent contractor and not entitled to workers’ compensation benefits. However, regardless of the language used by Caregivers in drafting the document, an employee cannot waive his rights to workers’ compensation. See S.C. Code Ann. 42-1-620 (2007)(“No agreement by an employee to waive his rights to compensation under this Title shall be valid.”); Cf. Kilgore Group, Inc. v. S.C. Employment Sec. Comm’n, 313 S.C. 65, 68-69, 437 S.E.2d 48, 50 (1993) (“language in the contract merely declaring the relationship is that of an employer/independent contractor is not dispositive”). Moreover, the document signed by Hudson is merely an application; it is not a contract.

1. Direct Evidence of the Right or Exercise of Control

Numerous documents show Caregivers had the right of control over Hudson, as does the testimony. The application itself states Hudson was required to (1) use the title “Caregiver”; (2) “not provide any service not specified/approved by Caregivers of South Carolina; (3) not divulge the names of any Caregivers’ clients to other companies; and (4) “not provide any services to ‘clients’ (individuals referred to) without the authorization of Caregivers of SC (within one year of being referred). [R. p. 295]. See Carter’s Dependents v. Palmetto State Life Insurance Co., 209 S. C. 67, 38 S.E.2d 905 (1946)(contractual agreement “to give my full time to the service of the Company to not engage in any other occupation while in the employ of the Company” was sufficient evidence

of control to make insurance agent an employee). The owners of Caregivers, David and Janet Teeple, confirmed these points in their testimony. [R. p. 84, line 4-p. 85, line 23].

Other documents specified the level of control in even more detail. An information sheet stated:

To become a *Caregiver* you must be a reliable person – someone we can trust, count on, someone the client can count on. If you agree to accept an assignment by the client, it is understood you will be there on time, you will do it. Excuses are not part of being a *Caregiver*. If there is some unforeseen circumstance that comes up, you must contact *Caregivers of South Carolina, LLC* immediately and inform us. We cannot and will not use individuals who do not take their work seriously.

Caregivers do not provide duties that are provided by a nurse. We provide non-nursing duties. These duties include: providing personal care (assisting with bathing, dressing, etc.); companionship; light housekeeping; meal preparation; running errands; taking clients to appointments, etc. [R. p. 414 (emphasis in original)].

This passage shows that Caregivers exercised control over the specific duties and tasks performed by Hudson. Moreover, the fact the document states, “We provide non-nursing duties,” proves Caregivers is much more than a referral service. They provide all these services through their employees.

A third document specified certain other details. Under Calling Out/Being Late, Caregivers required the worker to, “Always call us if you are going to be late or if your are sick. Respect works both ways. Do not call the client, call us.” [R. p. 415 (emphasis in original)]. Teeple testified, “Well – yeah, we require it. Yes, Sir.” [R. p. 88, line 2]. Hudson could hardly be considered the employee of the client if she had to call in sick to Caregivers rather than the client. She was also not allowed to give out her phone number to the client. [R. p. 28, line 17-p. 30, line 4].

Not only did Caregivers direct the work done by the employee; they also set the schedule. The hearing Commissioner asked David Teeple: “When you give out an assignment – whatever you

want to call it – to a caregiver, do you tell them what time to be at the client's house?" Teeple answered, "If that's the question, yes sir." [R. p. 90, lines 8-16]. Teeple confirmed Caregivers told them what time to be there and where to go. [R. p. 90, lines 21-24]. See Spivey v. D.G. Constr. Co., 321 S.C. 19, 467 S.E.2d 117 (Ct.App.1996)(employment relationship shown when employer instructed worker where to report and "explained to worker exactly what needed to be done").

David Teeple conceded specifically that "caregivers have to perform only the functions you specify they perform. . . . They cannot do LPN or CNA duties."³ [R. p. 85, lines 3-23]. He stated people wishing to perform nursing duties have "got to go work for a – a different kind of company." [R. p. 85, lines 22-23]. Caregivers asserts this fact actually supports their argument under the theory that "this restriction is evidence of government control and does not evince evidence of direct control by Caregivers." [Brief of Appellant Caregivers, page 23]. The opposite is true. Hudson possessed a CNA certificate. As such, *she* had the proper license to perform CNA duties. If she were *truly* an independent contractor *not* subject to control by Caregivers, she would have been free to use *her* license. The fact Caregivers prevented her from using her license in her job shows that the control was exercised by Caregivers; not the government and not the client.

2. Furnishing of Equipment.

Hudson used no equipment, tools or materials on her job. However, she did turn her hours in to Caregivers on a form provided by them. She was required to use the form to track her time. R. p. 91, line 4-p. 92, line 2]. Although not dispositive, this factor weighs towards her being an employee. See South Carolina Industrial Commission v. Progressive Life Ins. Co., 242 S. C. 547,

³In their Brief, Caregivers erroneously attribute this statement to Hudson, but in fact the reference is to testimony by Mr. Teeple. [Brief of Appellant Caregivers, page 23].

550, 131 S.E.2d 694, 695 (1963)(insurance agents who "were furnished supplies, which included all forms" were employees).

3. Right to Fire.

The employment application states, "I understand that should Caregivers of SC chose to utilize my services as an independent contractor, Caregivers of SC will refer me to said client and as an independent contractor I, as well as the client, have the right to terminate such relationship with no cause." [R. p. 295]. This statement makes it clear that Hudson is an at-will employee.

The application goes on to effectively state that Hudson had the same relationship with Caregivers:

I understand that false statements made, by providing misleading information, incorrect answers, or not disclosing requested and/or appropriate information shall result in Caregivers of SC removal of your name from being considered for referral as an independent contractor.

While the terms are carefully parsed to avoid explicitly stating Hudson was an employee, this provision indicates she was exactly that. See Kilgore Group, Inc. v. South Carolina Employment Sec. Comm'n, 313 S.C. 65, 437 S.E.2d 48 (1993) (While a contract entered into by the parties must be considered, language in the contract declaring the relationship to be that of an employer/independent contractor is not dispositive, because the parties do not control the legal effect of their contract.).

The Teeples testified that Hudson was not their employee because she was "hired" by their client. As such, they contend only the client has the right to fire Hudson. Moving beyond their self-serving testimony, it is clear that Caregivers retained the right to fire Hudson throughout her employment. The Teeples may have characterized this as "removal from the referral list," but whatever they tried to call it, it is still tantamount to the right to fire. See Simmons v. Robinson, 303

S.C. 201, 399 S.E.2d 605 (Ct. App. 1991)(fact that foster parent license may be revoked by DSS "if the foster family fails to maintain proper standards of care and services to children" shows that foster parents are employees of DSS).

4. Method of Payment.

The method of payment supports a finding that Hudson is an employee. David Teeple testified that Caregivers charged its "clients \$11.50 an hour for each hour of healthcare services." [R. p. 79, lines 14-18]. Caregivers set it up "so that the client pays \$9.00 per hour to the [worker] and \$2.50 per hour to [Caregivers]. [R. p. 79, lines 19-23]. Both Hudson's rate of pay and work schedule were set by Caregivers. [R. p. 296].

The parties disputed whether a caregiver was able to negotiate her rate of pay with the client. Hudson was asked "Did you do any kind of negotiation or have any kind of conversation with the patient about your employment, in the terms of hiring or the terms of pay or anything like that?" Hudson responded, "No sir. That was already discussed by Caregivers. We already knew that when we took the case from Caregivers." [R. p. 115, lines 14-20].

Teeple claimed a client could negotiate a higher rate of pay, but admitted "the client *cannot* pay a lower rate." [R. p. 92, lines 9-16 (emphasis added)]. However, the written documents produced by Caregivers confirm the rate of pay is \$9.00 per hour. [R. p. 82, lines 12-17; p. 296]. Even taking Teeple's testimony at face value, the fact Caregivers sets the minimum rate of pay at \$9.00 per hour is strong evidence of the right of control. Furthermore, Hudson was paid the \$9.00 per hour set by Caregivers.

Caregivers argues that Hudson must be an independent contractor because Caregivers' client wrote the paycheck directly to her. The fact Caregivers structured the payment system such that they

never wrote a check directly to Hudson proves nothing as to her employment status. It may show that Hudson is the direct employee of the client and the statutory employee of Caregivers, but it does not indicate she is an independent contractor. Hudson was *required* to turn her hours in to Caregivers on a form provided by them. See Kilgore Group, Inc. v. South Carolina Employment Sec. Comm'n, 313 S.C. 65, 437 S.E.2d 48 (1993) (fact that "all workers were required to turn their hours in to" the employing agency was evidence of the employment relationship).

Independent contractors are typically paid a set price for a job from which they deduct the cost of materials and other expenses. See Marlow v. E.L. Jones & Son, Inc., 248 S.C. 568, 151 S.E.2d 747 (1966). Hudson was paid by the hour. Hourly wages are a strong indicator that the worker is an employee. See Kilgore; South Carolina Industrial Commission v. Progressive Life Ins. Co., 242 S. C. 547, 550, 131 S.E.2d 694, 695 (1963)(insurance agents who were paid guaranteed minimum wage were employees); Spivey v. D.G. Constr. Co., 321 S.C. 19, 467 S.E.2d 117 (Ct.App.1996)(fact worker was paid \$8.00 per hour was evidence that he was an employee). Furthermore, she was paid wages every week rather than upon completion of an assignment.⁴

The circuit court properly weighed all these factors under the preponderance of the evidence standard. The court correctly held all four factors lead to a conclusion that Hudson is an employee of Caregivers; not an independent contractor. This Court should affirm.

⁴Caregivers asserts in their brief that "Unlike the claimant in Pikaart . . . , Hudson never filed a tax return listing Caregivers as her employer." [Brief of Appellant Caregivers, page 25 n. 7]. Caregivers seeks to give the misleading implication that Hudson must not have considered herself an employee of Caregivers because she did not list Caregivers as her employer on her tax returns. Hudson actually testified that she had "not yet [filed my taxes], because I have not been physically and emotionally able to. But I have them ready to be taken care of." [R. p. 139, lines 16-19]. As the tax returns had not yet been filed, it would be speculation to infer how she would have listed her employer.

B. Hudson is the statutory employee of Caregivers.

Even if Hudson was not the direct employee of Caregivers, she is unquestionably their statutory employee. The legislature created the category of "statutory employer" to prevent employers from evading workers' compensation liability by subcontracting their work to smaller employers who were not subject to the Act.

The statute provides:

When any person, in this section ... referred to as "owner," undertakes to perform or execute any work which is part of his trade, business or occupation and contracts with any other person (in this section . . . referred to as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him. S.C. Code Ann. § 42-1-400 (2004).

Our courts apply three tests, only one of which need be met: (1) is the activity an important part of the owner's business or trade; (2) is the activity a necessary, essential, and integral part of the owner's business; or (3) has the activity previously been performed by the owner's employees? Glass v. Dow Chemical Co., 325 S.C. 198, 482 S.E.2d 49 (1997). "[T]he guidepost is whether or not that which is being done is or is not a part of the general trade, business or occupation of the owner." Hopkins v. Darlington Veneer Co., 208 S.C. 307, 311, 38 S.E.2d 4, 6 (1946).

Caregivers has claimed throughout this litigation that Hudson is employed by the client. On their webpage, it states "If accepted, you will be referred by Caregivers of South Carolina, LLC, to the client, who will hire you and pay you an hourly rate of \$9.00." [R. p. 403].

If one accepts Caregivers' assertion that Hudson was employed by the client, the Court must determine if Hudson was a statutory employee. The evidence is overwhelming that Hudson meets

the first two of the three tests for a statutory employee.

Teeple admitted that the only revenue generated in his company is from work done by the caregivers, and without them, he would have no business. [R. p. 78, lines 4-15]. He specifically conceded "that the caregivers are *essential* to [his] business, that without them [he] wouldn't have a business." [R. p. 79, lines 4-7 (emphasis added)]. This testimony plainly meets the test that the work be "a necessary, essential, and integral part of the owner's business." Glass v. Dow Chemical Co., 325 S.C. 198, 482 S.E.2d 49 (1997).

1. Hudson preserved her statutory employer argument by raising it to the Commission.

Caregivers contends Hudson failed to preserve the argument that she is the *statutory employee* of Caregivers because "The argument was not raised to or ruled upon by the Full Commission." [Brief of Respondent Caregivers, page 7]. This is incorrect. Hudson explicitly raised the issue at the hearing before the Single Commissioner:

Alternatively – although, we would contend that she is the direct employee, it is also possible your Honor could find that she is the statutory employee of Caregivers, if – if she is in fact a direct employee of the disabled people who retain Caregivers to provide these in-home health care services. [R. p. 70, lines 12-18].

The Single Commissioner did not reach this issue because he ruled Hudson was the direct employee of Caregivers. Hudson did not have to appeal this issue because she was the prevailing party at the initial hearing. Nonetheless, these same issues were presented to the Appellate Panel.

The case law shows that raising the issue on the record at the initial hearing is absolutely sufficient to preserve an issue for later appeal. Issue preservation, particularly in informal proceedings before the Commission, is liberally construed so as not to create a trap for the unwary. Liberal construction of issue preservation is particularly important in workers' compensation cases

as there is no mechanism to rescue an issue raised but not ruled upon by a commissioner. See Nettles v. Spartanburg School Dist. #7, 341 S.C. 580, 588 n.4, 535 S.E.2d 146, 150 n.4 (Ct. App. 2000)(“The commission's failure to explicitly rule on an issue raised to it in a Form 30 does not create an error preservation problem although a similar omission in a civil proceeding would be fatal.”) If the appellate court can fairly infer an issue was raised, it will not dismiss an appeal on preservation grounds. Cf. Holston v. Allied Corp., 300 S.C. 174, 386 S.E.2d 793(Ct. App. 1989)(issue properly raised on appeal where the issue raised was reasonably clear from appellant’s arguments below); Palm v. General Painting Co., Inc., 296 S.C. 41, 370 S.E.2d 463 (Ct. App. 1988)(“it is inferable from the record that [claimant] raised this issue before the single commissioner”). Our appellate courts have held issues are preserved where “it is questionable whether [the appellant] raised this issue to the single commissioner, it is clear it was raised before both the full commission and the circuit court, and was addressed by the circuit court in its order.” Eaddy v. Smurfit-Stone Container Corp., 355 S.C. 154, 164 n. 1, 584 S.E.2d 390, 396 n. 1 (Ct. App. 2003). In fact, the Court of Appeals has ruled on issues even when explicitly raised for the first time to the Full Commission. See Swinton v. South Carolina Dept. of Mental Health, 314 S.C. 202, 442 S.E.2d 215 (Ct. Appl. 1994)(“On appeal to the full commission, the employer and the carrier first raised the issue of their entitlement to a credit for all temporary total benefits paid to Swinton after May 21, 1990.”).

As the record explicitly shows Hudson raised the statutory employer issue at the hearing before the Single Commissioner, this Court should reject the Caregivers’ preservation argument, and

affirm the issue on the merits.⁵

2. Hudson proved she is the statutory employee of Caregivers.

At the Circuit Court level, Caregivers contended Hudson was not the statutory employee of Caregivers as a matter of law because she is “a self-employed injured worker [who] fail[ed] to elect coverage for [herself].” This argument turns on the false assumption that Hudson, even if she is not the direct employee of Caregivers, is self-employed rather than the direct employee of the client. Caregivers has consistently insisted that Hudson was not their employee, instead maintaining that Hudson was the employee of their client. The relationship between Caregivers and the client is exactly the type of scheme the Legislature addressed by bringing employees of subcontractors within the ambit of workers’ compensation coverage. See S.C. Code Ann. § 42-1-410 (2004)(providing “When any person . . . contracts to perform or execute any work for another person which is not a part of the trade, business or occupation of such other person . . . the contractor shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if that workman had been immediately employed by him.”).

The testimony of David and Janet Teeple conclusively establishes the statutory employer relationship. David Teeple testified regarding the arrangement that, “If accepted, you will be referred by Caregivers of South Carolina, LLC *to the client, who will hire you and pay you an hourly rate of nine dollars per hour. So it – it specifies who’s going to be doing the hiring.*” [R. p. 82, lines 12-17 (emphasis added)].

Teeple was asked:

⁵Neither the Fund nor Caregivers raised a preservation issue at the Commission or Circuit Court levels.

Q. Your contention is that you do not employ the caregiver, but your client employs the caregiver.

A. Yes, sir. We're a referral service. We're the middle guy. [R. p. , line 24-page 20, line 3].

David Teeple further testified, "But the client has to hire the caregiver; the caregiver has to accept the job." [R. p. 89, lines 16-18].

And while Janet Teeple denied Caregivers itself had the right to fire – she confirmed that the client did: "... I don't have the authority to do that. I can't fire them. *They are not my employees. They're working for the client.*" [R. p. 164, lines 16-19 (emphasis added)].

The strongest testimony came from David Teeple at the Rule to Show Cause Hearing:

Q. Who has the right to hire and fire?

A. The client.

Q. Who supervises?

A. The client.

Q. Who sets the work schedule?

A. The client. [R. p. 184, lines 20-25].

This testimony plainly establishes all the elements that would make Hudson an employee, rather than an independent contractor, as to the client.

As to whether Hudson is the statutory employee of Caregivers, the evidence here is overwhelming, with the critical testimony again being supplied by Mr. Teeple. He conceded "that the caregivers are *essential* to [his] business, that without them [he] wouldn't have a business." R. p. 79, lines 4-7 (emphasis added)). This testimony plainly meets the test that the work be "a

necessary, essential, and integral part of the owner's business." Glass v. Dow Chemical Co., 325 S.C. 198, 482 S.E.2d 49 (1997). It is confirmed by the fact that Caregivers' sole source of revenue is the \$2.50 per hour they receive for each hour worked by the employee. Therefore, even if this Court does not find Hudson to be the direct employee of Caregivers, she would be a statutory employee. The Court should affirm the circuit court's ruling that Hudson was an employee (both direct and statutory) of Caregivers.

III. Hudson suffered a compensable injury by accident when she tripped on a hole or crack in the sidewalk and fell forward.

The Commission found Hudson's accident did not arise out of her employment as a matter of law, based on the "idiopathic level-floor fall" doctrine. The circuit court correctly held this was legal error. Hudson testified that she fell when her shoe "hung on something", specifically "a crack or a hole in the concrete there." [R. p. 121, ll. 19-25]. As such, her fall was not "unexplained." The Commission misapplied the law when it held this was an "idiopathic level floor fall." See Pierre v. Seaside Farms, Inc., 386 S.C. 534, 689 S.E.2d 615 (2010)(reversing commission's finding "that the risk was not associated with [claimant's] employment because the sidewalk was no different in character from other sidewalks" when the "accident occurred as a result of a hazard that existed on the employer's premises, i.e., [claimant] slipped and fell on a wet sidewalk"). Moreover, even if the fall were unexplained, such claims are presumed to be compensable. As such, Hudson is entitled to the presumption of compensability in the absence of any other explanation (such as an internal breakdown) accounting for her fall.

A. The evidence shows Hudson fell because her shoe got hung up in a crack or hole in the concrete.

The circuit court correctly held that the Commission erred when it found Hudson's accident

did not arise out of her employment as a matter of law, based on the “idiopathic level-floor fall” doctrine. The Commission’s findings are based wholly on speculation. The evidence in the record confirms that Hudson tripped and fell because her foot got caught in a crack in the sidewalk.

Both Appellants try to pigeon-hole this case as akin to Crosby v. Wal-Mart Store, Inc., 330 S.C. 489, 499 S.E.2d 253 (Ct. App.1998). Crosby is obviously distinguishable. In that case, there was testimony that the employee told her employer, “My leg just gave out.” Id. There is no such testimony in this case. Here, Hudson specifically testified about the crack in the sidewalk which caused her to fall. See Pierre v. Seaside Farms, Inc., 386 S.C. 534, 689 S.E.2d 615 (2010) (reversing commission’s finding “that the risk was not associated with [claimant’s] employment because the sidewalk was no different in character from other sidewalks” when the “accident occurred as a result of a hazard that existed on the employer’s premises, i.e., [claimant] slipped and fell on a wet sidewalk”).

Appellant Caregivers argues “At various points in her testimony before the single commissioner, Hudson testified that she did not know what caused her to fall, that her fall was a ‘freak accident’ and that she ‘couldn’t figure out what happened.’” [Brief of Appellant Caregivers, page 27]. This argument misstates the actual testimony – making the same error made by the commission when it found as fact that “Claimant testified she does not know why she fell.” [R. p. 29, finding of fact 2].

The complete statement was, “You know, sir, *at the time*, I couldn’t tell you, because I’m not a clumsy person. Later, my niece and nephew went down and took pictures, and there was —” [R. p. 119, lines 9-12 (emphasis added)]. Hudson never completed her statement due to an objection interposed by the Fund’s attorney.

Her point is clear though, “at the time” she did not know what happened; only that it was not her own clumsiness that caused her to fall. In this respect, Hudson is like everyone else who slips and falls. At first, they don’t know why they fell – had they known about the hazard, they would not have fallen in the first place. See, e.g. Felder v. K-Mart Corp., 297 S.C. 446, 447, 450, 377 S.E.2d 332 (1986)(plaintiff “did not realize there was water on the floor until he slipped. When he hit the floor, the water wet the whole side of his clothes.”). Cf. Hancock v. Mid-South Management, Inc., 381 S.C. 326, 673 S.E.2d 801 (2009)(reversing trial court’s grant of summary judgment where “Although Petitioner could not identify the exact cause of her fall, she testified that she tripped on ‘a rock or something to that effect,’ ‘something raised up,’ and ‘broken asphalt.’”).

When her testimony resumed, Hudson testified:

Okay. I couldn’t figure out what happened. And then when I saw the pictures – okay. You know how there’s sidewalks and then there’s like a concrete path leading to the city mailboxes?

Okay. And there was like a – a crack or a hole in the concrete there. And my shoe evidently – I’m – I’m assuming this is how it happened – got caught in there as – because I – I went down. *What I remember before I got – before I fell down – I was like hung on something. So that’s the only thing it could have been.* [R. p. 121, l. 13- p. 122, l.1 (emphasis added)].

Hudson went on to identify in the pictures the specific crack that caused her to fall: “There it is right, right there. I was wearing Keds. So it just barely fit – I guess so narrow, it just fit in there.” [R. p. 122, ll. 11-16].

Other evidence confirms that Hudson tripped on the crack in the concrete. The emergency room records from February 9, 2004 state, “This is a 56-year old lady who *tripped falling on concrete* three days ago.” [R. p. 211 (emphasis added)].

Subsequent reports confirm a history of falling because of the uneven concrete. Handwritten

notes from the Greenville Hospital System on February 15, 2004 note she "slipped" and "fell from" a "standing position"⁶ The report notes a loss of consciousness, but memory of the impact and coming to the hospital. [R. p. 219]. The April 15, 2004 report from her neurologist, Dr. Schexnayder, states, "She stated that she was in her normal state of health where she works as a nursing assistant and had a fall on 2/5/04. Apparently her right foot slipped. She fell rapidly and the next thing she knew she was down, somewhat stunned, and did not have a prolonged period of loss of consciousness, but was dizzy and had some dysequilibrium, and felt relatively ill for a number of minutes afterward." [R. p. 234]. The report from her orthopaedic surgeon makes the same point: "In February of 2004, she was at work when she apparently *slipped on some uneven concrete* going out to a mailbox." [R. p. 254 (emphasis added)]. Dr. Zgleszewski's report of November 19, 2006 has the same history: "She states that her *right foot got caught on an uneven pavement* which caused her to fall face down upon the pavement hitting her head, face, breaking with left wrist, injuring both knees." [R. p. 270].

These reports are uniformly consistent with Hudson's testimony. Moreover, they were made directly to the doctors at a time when neither Vennie Hudson nor any other party had any idea there was even an issue of an idiopathic level floor fall in the case. Neither the Fund nor the Employer raised the issue in their contentions on the record. The Fund listed "None" under Facts in Controversy on its Form 58. The medical histories have a strong indicia of credibility.

The Fund argues Hudson's testimony that her fall was a "freak accident" is somehow a failure to prove the causal connection between her injuries and the performance of her work. Yet,

⁶The reference to a "standing position" does not imply she was standing still. It simply means from a standing position as opposed to "from height". [R. p. 219].

there is no doubt she tripped and fell while performing a workplace duty. And an “accident” is an essential element of every workers’ compensation claim – a freak accident even more so. Compare Stillman v. Multi-States Electric, 28 Ark.App. 193, 771 S.W.2d 807 (1989)(“the evidence shows that he was able to fully perform the duties for which he had been employed for over four months, and until he injured his back in a freak accident caused by soapy water and oil on the floor.”) with Pierre v. Seaside Farms, Inc., 386 S.C. 534, 689 S.E.2d 615 (2010)(reversing commission’s finding “that the risk was not associated with [claimant’s] employment because the sidewalk was no different in character from other sidewalks” when the “accident occurred as a result of a hazard that existed on the employer’s premises, i.e., [claimant] slipped and fell on a wet sidewalk”).

The evidence shows Hudson tripped on uneven concrete on the sidewalk. Her foot got caught in a hole which she identified in the pictures. There is a complete and clear explanation for the hazard of employment which caused her to fall. As such, it was error of the Commission to apply the idiopathic level-floor fall doctrine to this case. See Pierre v. Seaside Farms, Inc., 386 S.C. 534, 689 S.E.2d 615 (2010)(reversing commission’s finding “that the risk was not associated with [claimant’s] employment because the sidewalk was no different in character from other sidewalks” when the “accident occurred as a result of a hazard that existed on the employer’s premises, i.e., [claimant] slipped and fell on a wet sidewalk”). The circuit court acted correctly in reversing the Commission. This Court should affirm.

B. The Commission erred in finding that Hudson suffered an “idiopathic level ground fall” when the only evidence in the record shows that her fall was caused by uneven concrete rather than an internal breakdown.

The Commission erroneously concluded that Hudson had suffered a non-compensable “idiopathic level ground fall.” [R. p. 29, finding of fact 2]. As noted above, Hudson’s fall was

neither unexplained nor idiopathic; she tripped or slipped when her foot got caught in a hole in the broken concrete sidewalk. Notwithstanding this clear evidence, the Commission nonetheless denied the case, holding in error that it was controlled by the idiopathic level-floor cases of Crosby v. Wal-Mart Store, Inc., 330 S.C. 489, 499 S.E.2d 253 (Ct. App.1998) and Bagwell v. Ernest Burwell, 227 S.C. 444, 88 S.E.2d 611 (1955). [R. p. 8, conclusion of law 4]

An "idiopathic level-floor fall" is defined by Larson as the situation where "an employee, solely because of a nonoccupational heart attack, epileptic fit, or fainting spell, falls and sustains a skull fracture or other injury . . ." 1 Charles Larson & Lex K. Larson, Larson's Workers' Compensation Law § 12.11 at p. 3-416 (1997). See also Bagwell v. Ernest Burwell, Inc., 277 S.C. 444, 453, 88 S.E.2d 611, 615 (1955) ("We have, therefore, before us the difficult question where an employee suffers an injury or dies as a result of striking his head against the concrete floor of his employer's premises during the course of his employment, when the cause of the fall is wholly unrelated to his employment."); Crosby v. Wal-Mart Store, Inc., 330 S.C. 489, 499 S.E.2d 253 (Ct. App.1998)(Claimant could not recover for injuries suffered when her "leg just gave out" as the injury was the result of an idiopathic fall onto level floor).

Larson goes on to explain that idiopathic level-floor falls are usually not compensable because the risk of the *fall itself* is personal to the employee. Unlike the presumption of a neutral cause that inheres in unexplained fall cases, see Hudson's third argument *infra*, idiopathic falls "begin with an origin which is admittedly personal and which therefore requires some affirmative employment contribution to offset the prima facie showing of personal origin."⁷ 1 Charles Larson

⁷The importance of this distinction goes to who should bear the risk for a workplace injury. Injuries solely related to a risk of the employment are compensable. Risks purely personal to the employee are not compensable. Purely personal risk cases run the gamut from

& Lex K. Larson, Larson's Workers' Compensation Law § 12.11 at p. 3-424 (1997). "The basic rule . . . is that the effects of such a fall are compensable if the employment places the employee in a position increasing the dangerous effects of such a fall, such as on a height, near machinery or sharp corners, or in a moving vehicle." Id. at pp. 3-419 - 420.

The law of idiopathic level-floor falls arose to address the question of whether secondary injuries sustained in such a fall are compensable. "It must be shown that the cause of the fall *or* of the resulting injury bore some special relation to the work or to the conditions under which it was performed." Bagwell v. Ernest Burwell, Inc., 277 S.C. 444, 450, 88 S.E.2d 611, 613 (1955) (emphasis added). Once it is shown that the cause of the fall was related to the work or working conditions, then the analysis stops. Such a claim is compensable because it is not an idiopathic fall.

The second part of the analysis begins with a presumption – "that the cause of the fall was unexplained, but the circumstances of the fall were witnessed, which tended to show the employment was not a contributing cause." Crosby v. Wal-Mart Store, Inc., 330 S.C. 489, 496, 499 S.E.2d 253, 257 (Ct. App. 1998) (describing the court's findings in Bagwell). It ends with an analysis of whether the injuries *sustained in the fall* have a causal connection to the employment. See Turner v. Campbell Soup Co., 252 S.C. 446, 166 S.E.2d 817 (1969) (requiring a finding of fact as to whether consequences of idiopathic fall were causally connected with the employment).

This is where the level-floor distinction comes in. If the claimant suffers injuries from an

strokes while having sexual intercourse, Nawa v. Wackenhut Corp., 288 S.C. 250, 341 S.E.2d 800 (Ct. App. 1986), being shot by a rejected suitor, Bridges v. Elite, Inc., 212 S.C. 514, 48 S.E.2d 497 (1948), and, of course, idiopathic level-floor falls. Neutral risks are considered compensable because the policy underlying workers' compensation law is to favor compensation of injured workers. See, generally, Larson at §§ 7.10-7.40.

This policy further accounts for the presumption of compensability in unwitnessed or purely unexplained fall and death cases. See, Crosby, 495-96, 499 S.E.2d at 257.

idiopathic fall onto a level-floor, the claim is not compensable. This is because there is no connection between the hazards of the workplace and the injury. A level floor could be anywhere; it has no particular relation to the workplace. On the other hand, if the employee encounters some hazard on the way down such as machinery, a table, or a vat of toxic chemicals that enhances his injury, then the enhancement is compensable. See Turner, Bagwell v. Ernest Burwell, Inc., 277 S.C. 444, 453, 88 S.E.2d 611, 615 (1955)(noting that the court's opinion did not mean that "if the fall originates in a cause unrelated to the employment, compensation must be denied even though a particular hazard inherent in the working conditions contributes to the fall and consequent injury)". Cf. Holly v. Spartan Grain & Mill Co., 210 S.C. 183, 42 S.E.2d 59 (1947) (Claimant fell from catwalk into open bin aggravating pre-existing condition).

The above discussion is instructive, but so far as this case is concerned, merely academic. Hudson proved the cause of her fall was broken concrete – which is a hazard associated with her work. See Pierre v. Seaside Farms, Inc., 386 S.C. 534, 689 S.E.2d 615 (2010)(reversing commission's finding "that the risk was not associated with [claimant's] employment because the sidewalk was no different in character from other sidewalks" when the "accident occurred as a result of a hazard that existed on the employer's premises, i.e., [claimant] slipped and fell on a wet sidewalk"). There was no evidence of an internal breakdown or "a nonoccupational heart attack, epileptic fit, or fainting. . ." 1 Charles Larson & Lex K. Larson, Larson's Workers' Compensation Law § 12.11 at p. 3-416 (1997). Because this is not an idiopathic fall, there is no need to determine whether the injuries were enhanced because of the fall. Hudson proved the cause of the fall itself were work-related.

Since both Appellants argue this case is controlled by Crosby, it is important to understand

why the case at bar is different from Crosby. In Crosby, Wal-Mart asserted the fall was an idiopathic, noncompensable fall, whereas Crosby asserted that she slipped and fell on something. The Commission originally denied the case and Crosby appealed to the Court of Appeals. The Court, finding a lack of specificity in the Commission's factual findings remanded the case back to the Commission to consider the issues raised by Wal-Mart. On remand, the Commission found:

there was no evidence Crosby slipped on any substance, debris or merchandise or that her fall was caused by any hazards of her employment. Neither was there any evidence regarding the condition of the floor as to wax. The commissioner held that to presume Crosby slipped on something would be speculation. He found Crosby admitted she did not know why she fell and there was no evidence the employment relationship or job duties of Crosby were causally related to the fall. Crosby v. Wal-Mart Store, Inc., 330 S.C. 489, 492, 499 S.E.2d 253, 255 (Ct. App.1998).

These facts are completely different from the instant case. Here, Hudson testified, "And there was like a – a crack or a hole in the concrete there. And my shoe evidently . . . got caught in there as . . . I went down. What I remember before I got – before I fell down – I was like hung on something. So that's the only thing it could have been." [R. p. 121, l. 13-p. 122, l.1]. Hudson specifically identified the hole in a photograph of the sidewalk. [R. p. 417]. This is not speculation; this is fact.

A further point in Crosby is the testimony that Crosby told her employer, "My leg just gave out." Id. at 491, 499 S.E.2d at 254. As the Court of Appeals noted, this testimony brings it into the first prong of the idiopathic level-floor fall cases where the cause of the fall is personal to the employee. This testimony was substantial evidence that Crosby's fall did not result from a workplace hazard, but from an internal breakdown. As such, the Court found itself bound by the Commission's factual finding that Crosby's injury was the result of an idiopathic fall caused by her leg giving out. See Bagwell v. Ernest Burwell, Inc., 227 S.C. 444, 88 S.E.2d 611 (1955); Miller v.

Springs Cotton Mills, 225 S.C. 326, 82 S.E.2d 458 (1954) (court determined the injury was the result of some internal breakdown of the knee). But see, Pierre v. Seaside Farms, Inc., 386 S.C. 534, 689 S.E.2d 615 (2010))(reversing commission's finding "that the risk was not associated with [claimant's] employment because the sidewalk was no different in character from other sidewalks" when the "accident occurred as a result of a hazard that existed on the employer's premises, i.e., [claimant] slipped and fell on a wet sidewalk").

This case is controlled by the Supreme Court's analysis in Pierre. In Pierre, the claimant slipped and fell on a wet sidewalk on the employer's premises. The Commission denied his claim because "the risk was not associated with [claimant's] employment because the sidewalk was no different in character from other sidewalks." Id. In so doing, the Commission made the same legal error it made in this case.

The source for the Commission's reasoning came from a passage in Bagwell:

We are not prepared to accept the contention that, in the absence of special condition or circumstance, a level floor in a place of employment is a hazard. Cement floors or other hard floors are as common outside industry as within it. The floor in the instant case did not create a hazard which would not be encountered on a sidewalk or street or in a home where a hard surface of the ground or a hard floor existed.

The Commission took this statement literally in both the instant case and Pierre, essentially holding that any fall onto a level concrete surface does not arise out of the employment. The Commission overlooked the evidence in both cases of hazards on the concrete that caused the fall. In Pierre, the hazard was water; in the instant case, the hazard was a hole where the concrete was broken. In both cases, the Commission erred as a matter of law and should be reversed.

There is no evidence Hudson suffered an internal breakdown of the sort suffered by the claimants in Crosby, Bagwell and Miller. The cause of her fall was slipping or tripping on a broken

sidewalk, a risk akin to the wet sidewalk in Pierre. Therefore, Hudson is entitled to workers' compensation benefits as a matter of law. The circuit court should be affirmed.

C. Even if Hudson failed to prove the uneven concrete caused her fall, she is still entitled to the presumption of compensability from an unexplained fall.

Hudson has shown her fall was caused by a hazard of her employment. However, even if the Commission found she had somehow failed to prove her fall was caused by catching her foot on the hole or crack in the concrete, she would still be entitled to compensation due to the presumption of compensability in unexplained falls.

Unexplained falls are of two types: (1) those in which the fall was unwitnessed, and (2) those in which the evidence implied that the fall resulted from some pre-existing physical weakness or condition. In the instant case, there is no suggestion Hudson fainted or had some sort of internal breakdown. As such, if her fall is unexplained, it is because it was unwitnessed. "Where the fall is unwitnessed or purely unexplained, as in situations where the employee dies before he has an opportunity to relate the occurrence, and there are no eyewitnesses to the occurrence itself, our courts have tended to affirm an award of compensation, deferring to the fact finding discretion of the commission." Crosby v. Wal-Mart Store, Inc., 330 S.C. 489, 495-96, 499 S.E.2d 253, 257 (Ct. App.1998).

The rationale behind the presumption of compensability in unexplained fall cases goes to who should bear the risk for a workplace injury. Injuries solely related to a risk of the employment are compensable. Risks purely personal to the employee are not compensable. Purely personal risk cases run the gamut from strokes while having sexual intercourse, Nawa v. Wackenhut Corp., 288 S.C. 250, 341 S.E.2d 800 (Ct. App. 1986), being shot by a rejected suitor, Bridges v. Elite, Inc., 212

S.C. 514, 48 S.E.2d 497 (1948), and, of course, idiopathic level-floor falls. Neutral risks are considered compensable because the policy underlying workers' compensation law is to favor compensation of injured workers. See, generally, Larson at §§ 7.10-7.40.

The presumption of compensability for unexplained falls applies not only to those falls where the claimant is killed, but also where he is rendered unconscious such that he cannot recall or explain the cause of his fall. This may be one of those cases. Therefore, even if Hudson's fall is unexplained, she is still entitled to compensation under the unexplained fall presumption.

CONCLUSION

For the foregoing reasons, the Decision and Order of the Circuit Court should be affirmed. This Court should find (1) Hudson is an employee of Caregivers; and (2) her accident arose out of her employment. The case should be remanded to the Commission with instructions to award medical benefits and temporary total disability compensation to Hudson.

Respectfully Submitted,



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February 16, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No: 08-CP-26-3032

Vennie Taylor Hudson, ... Respondent,

v.

Caregivers of South Carolina, LLC, Employer, and
South Carolina Workers' Compensation Uninsured Employers' Fund, ... Appellants.

CERTIFICATE OF COUNSEL

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



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REPLY BRIEF OF APPELLANT
CAREGIVERS OF SOUTH CAROLINA, LLC

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ARGUMENT

I. THE UNAPPEALED RULE TO SHOW CAUSE ORDER IS THE LAW OF THE CASE.

Respondent Vennie Taylor Hudson's (hereinafter "Hudson") misreading of the applicable regulation governing compliance review would render former Commissioner Childs' order a nullity and should be rejected. While Respondent correctly notes that an investigation and hearing pursuant to S.C. Code Ann. Reg. 67-1402 do not necessarily reach the merits of the underlying claim, she incorrectly argues that the unappealed ruling that Appellant Caregivers of South Carolina, LLC, (hereinafter "Caregivers") was not her employer and was not subject to the Act has no preclusive effect. Because no interested party appealed the February 18, 2005 Order finding Caregivers exempt from the Act, that Order became the law of the case and effectively deprived subsequent tribunals of jurisdiction over Caregivers in connection with Respondent's claim for benefits. *See, e.g., Charleston Lumber Co. v. Miller Housing Corp.*, 338 S.C. 171, 175, 525 S.E.2d 869, 871 (2000) (unappealed ruling, right or wrong, is the law of the case and requires affirmance); *Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 177 S.E.2d 544 (1970) (same); Rule 220(c), SCACR (appellate court may affirm for any reason appearing in the record).

Hudson relies upon S.C. Code Reg. Ann. 67-1402(G) for the proposition that she was authorized to file a successive request for benefits against Caregivers even after (and irrespective of) the unappealed ruling that Caregivers is not subject to the terms of the Act. Such a reading is improper, unsupported by any citation to authority in Hudson's brief, and would render the jurisdictional finding by Judge Childs meaningless - clearly a result not contemplated by the drafters of the regulatory provision at issue. Regulation

67-1402(G) permits a claimant to "proceed with a claim for compensation" once "a final decision concerning jurisdiction is rendered. . . ." It necessarily follows, however, that where, as here, an entity has been deemed *not* subject to the provisions of the Act, the claim for benefits must proceed only against an entity that *is* subject to the Act. Stated differently, the regulation contemplates that an action may proceed, but only against an entity over which jurisdiction exists.

Hudson's view - that a party may be subjected to repeated claims regardless of a prior, unappealed ruling that it is not subject to the Act - is nonsensical and should be rejected. *South Carolina Nat'l Bank v. Cook*, 291 S.C. 530, 532, 354 S.E.2d 562, 563 (1987) (citing *Hartford Accident and Indem. Co. v. Lindsay*, 273 S.C. 79, 85, 254 S.E.2d 301, 304 (1979) ("Full effect must be given to each section of a statute, giving words their plain meaning, and, in the absence of ambiguity, words must not be added or taken away."))).

II. HUDSON WAS AN INDEPENDENT CONTRACTOR.

A. Hudson Was Not A Direct Employee.

Applying the even-handed approach outlined by the South Carolina Supreme Court in *Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 676 S.E.2d 700 (2009), *reh'g denied* (May 28, 2009), *cert. denied* 130 S. Ct. 741 (2009), it is clear the circuit court's finding that Hudson was an employee of Caregivers is erroneous and should be reversed.

i. Direct Evidence Of The Right To Or Exercise Of Control.

While Hudson asserts that Caregivers exercised control by limiting the types of services care givers could perform, that contention is not supported by the record

evidence. Hudson herself testified she was not instructed, trained, or directed in the performance of her duties in any way by Caregivers. (R. p. 115, lines 5-8; p. 182, lines 2-3, 7-13; p. 186, line 25 - p. 187, lines 1, 8-9) In addition, Caregivers is not licensed to perform nursing services, so it would be a violation of law to do so. (R. p. 85, lines 3-14) Hudson also acknowledged that the restriction on her job duties was solely a by-product of licensing requirements rather than an attempt by Caregivers to exercise control over her job duties. (*Id.*, p. 85, lines 15-18) See *Shatto v. McLeod Reg'l Med. Ctr.*, 394 S.C. 552, 559, 716 S.E.2d 446, 450 (Ct. App. 2011), *reh'g denied* (Sept. 22, 2011).

ii. **Furnishing Of Equipment.**

Despite ample opportunity, Hudson has failed to point to any evidence that Caregivers provided her with any equipment. Instead, she asserts that one form - a time sheet - tilts this factor in favor of a finding of employment status. Hudson concedes she was not provided with other equipment and that she was not required to provide any type of oral or written report of her job performance. (R. p. 187, lines 14-19) This factor, standing alone, is insufficient to weigh in favor of employment status and, in fact, weighs in favor of a finding that Hudson was an independent contractor. Moreover, the South Carolina Supreme Court has squarely rejected Hudson's contention that provision of a form, without more, is sufficient to confer employee status. See *S.C. Workers' Comp. Comm'n v. Ray Covington Realtors*, 318 S.C. 546, 548, 459 S.E.2d 302, 303 (1995) (holding realtor was an independent contractor even though the putative employer supplied business forms and office space).

iii. Method Of Payment.

Hudson points to her rate of pay and work schedule, which she claims were set by Caregivers, as evidence of her employment status. That claim, however, is belied by the record evidence and Hudson's own testimony. Clients, and not Caregivers, paid Hudson directly. (R. p. 182, line 24 - p. 183, line 2) While clients were required to pay Hudson a minimum wage of \$9.00 per hour, Hudson remained free to negotiate with clients for a higher rate. (R. p. 92, lines 9-16). Additionally, clients, and not Caregivers, were responsible for paying mileage to a care giver if he or she used his or her own vehicle on the job. (R. p. 277-294) Caregivers did not provide Hudson with additional compensation or benefits such as medical or workers' compensation insurance, and Hudson received form 1099s directly from clients. (R. p. 138, lines 18-22) Caregivers never made any payments or reimbursements to Hudson. As such, this factor weighs heavily in favor of a finding that Hudson was an independent contractor.

iv. Right To Fire.

As noted in its initial brief, Caregivers could remove Hudson from its referral list but did not have the right to fire her. (R. p. 296) The express terms of her agreement with Caregivers provide that only the client retained the right to fire, while Hudson retained the right to terminate the relationship. (*Id.*) The message that Hudson was an independent contractor is repeated on the agreement she signed, her payroll records, and the testimony of the parties. Like the nurse anesthetist at issue in *Shatto, supra*, Hudson's status as an independent contractor was made clear by the relevant documentation, and the right to remove Hudson from the provider list was specifically set forth in the controlling document. (R. p. 295). For these reasons, the right to fire element weighs

strongly in favor of a finding that Hudson was an independent contractor.

B. Hudson Was Not A Statutory Employee And Waived Appellate Review Of This Issue.

Hudson's counter-argument, that she was a statutory employee of Caregivers, is equally unavailing and has been waived. The second single commissioner's order did not address the statutory employer issue, and Hudson did not raise that issue in her appeals to the Full Commission or to the circuit court. As such, she has waived the issue and should not be permitted to pursue it here. Assuming for the sake of argument that this issue is preserved, Hudson's assertion that she is a statutory employee of Caregivers fails for the same reasons that she cannot prove she was a direct employee of Caregivers.

This Court in *Cooke v. Palmetto Health Alliance*, 367 S.C. 167, 175, 624 S.E.2d 439, 443 (Ct. App. 2005), *reh'g denied* (Jan. 19, 2006) (citation omitted), reiterated the elements that must be proven to establish a statutory employment relationship:

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.

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.

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 Caregivers' borrowed servant, it is clear that Hudson must satisfy all three elements of this test.

Here, Hudson cannot point to a contract of hire as between herself and Caregivers. She cannot demonstrate that her work in providing care to Caregivers' clients is the same as the work of Caregivers (e.g., providing referral services to clients who need assistance). And, most importantly, she concedes that Caregivers did not retain the right to control the details of her work. For all of these reasons, Hudson's claim that she was a statutory employee of Caregivers has been waived and also fails on the merits.

III. HUDSON CANNOT ESTABLISH A CAUSAL CONNECTION BETWEEN HER IDIOPATHIC FALL AND HER ALLEGED EMPLOYMENT.

Like the claimant in *Crosby v. Wal-Mart Store, Inc.*, 330 S.C. 489, 499 S.E.2d 253 (Ct. App. 1998), Hudson simply cannot establish the required causal nexus between her idiopathic level floor fall and her alleged employment. As such, the circuit court erred in concluding that she sustained a compensable work-related injury arising out of and in the course and scope of her employment. Stated differently, Hudson is not entitled to workers' compensation benefits because she cannot establish why she fell and, therefore, that the fall was the proximate cause of her alleged work-related injuries.

The best Hudson can do is offer after-the-fact speculation as to the cause of her fall. In fact, she candidly admits that she did not know at the time what caused her to fall. (R. p. 119, lines 7-11). She also testified that her fall was a "freak accident" and that she "couldn't figure out what happened." (*Id.*, p. 121, lines 13-14; p. 122, line 18) It was not until much later, when she observed photographs of the purported accident location taken by family members, that Hudson self-servingly "assumed" her foot got caught on a crack or an uneven spot in the concrete near her employer's mailbox. (*Id.*, p. 119, line 9 - p. 124, line 2)

The Commission's conclusion also is supported by ample record evidence consisting of medical records. (R. p. 200, 234, 254) In light of the substantial evidence, it was error for the circuit court to accept Hudson's speculative explanation and to supplant the Commission's conclusive findings on this issue. *Crosby, supra*, 330 S.C. at 494, 499 S.E.2d at 257; *Crisp v. SouthCo., Inc.*, 390 S.C. 340, 701 S.E.2d 762 (Ct. App. 2010), *reh'g denied* (Nov. 22, 2010) (internal citation omitted).

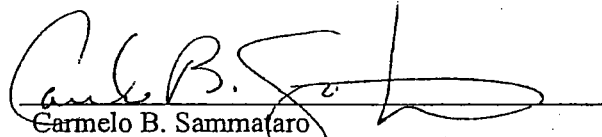
CONCLUSION

For the foregoing reasons, Appellant Caregivers of South Carolina, LLC, respectfully submits that the January 4, 2011 Order of the circuit court is erroneous and must be reversed and that the unappealed February 18, 2005 Order of the single commissioner should be reinstated in its entirety as the law of this case.

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

February 16, 2012

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CAREGIVERS OF SOUTH CAROLINA,
LLC

The South Carolina Court of Appeals

Vennie Taylor Hudson,

Appellant,

v.

Caregivers of South Carolina, LLC, and
S.C. Uninsured Employers' Fund,

Respondents.

The Honorable J. Michael Baxley
Horry County
Trial Court Case No. 2008-CP-26-03032

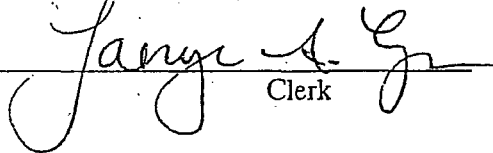
ORDER

Pursuant to a telephone conference with the parties, the briefing schedule is held in abeyance to allow the parties to submit appealability memos. Appellant's memo is due April 15, 2011, and the Respondents' memo is due on May 2, 2011.

IT IS SO ORDERED.

JOHN CANNON FEW, CHIEF JUDGE

BY


Clerk

Columbia, South Carolina

cc: Carmelo Barone Sammataro, Esquire
Samuel Thompson Brunson, Esquire
Stephen Benjamin Samuels, Esquire

FILED

3/23/11

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court Of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No: 08-CP-26-3032

Vennie Taylor Hudson Respondent,

v.

Caregivers of South Carolina, LLC, Employer, and
South Carolina Workers' Compensation Uninsured Employers' Fund,

of whom Caregivers of South Carolina, LLC is the Appellant.

MEMORANDUM OF LAW ADDRESSING
APPEALABILITY

RECEIVED
APR 15 2011
SC Court of Appeals

QUESTION PRESENTED

Pursuant to Rule 201(a), SCACR, as well as the Court's March 23, 2011 Order, Appellant Caregivers of South Carolina, LLC, ("Caregivers") submits this memorandum addressing why the trial court's order entered January 4, 2011, constitutes a final order that is subject to immediate appellate review. Specifically, Caregivers submits that the trial court's order is immediately appealable because it constitutes a final judgment for purposes of S.C. Code Ann. § 1-23-390, as well as Rule 201, SCACR, Right to Appeal.

STATEMENT OF THE CASE

Respondent Vennie Hudson ("Hudson") seeks compensation benefits for allegedly work-related injuries she sustained February 5, 2004. Following argument of a rule to show cause directing Caregivers to explain "why it should not be found in violation of the provisions of the . . . Act by its failure to maintain workers' compensation insurance coverage for its employees. . . .," former Commissioner Childs concluded that Caregivers "does not have employees. . . . [Rather, it] employs independent contractors." (February 18, 2005 Order, attached as Exhibit A, p. 1, 3) The commissioner expressly ruled that Caregivers is exempt from the Act and "is not required to have workers' compensation coverage." (*Id.*, p. 3) Hudson was present for the hearing and was served with a copy of the order. No interested party, including Hudson, appealed the single commissioner's ruling that Caregivers is exempt from the Act, and that ruling became the law of the case.

Disregarding the unappealed ruling exempting Caregivers from the Act, Hudson filed a Form 50, Request for Hearing, identifying Caregivers as her uninsured employer and alleging it was responsible for payment of compensation benefits. Proceeding *pro se*,

Caregivers filed its Form 50, Employer's Answer, dated March 15, 2005, in which it denied benefits on the basis that Respondent was not its employee, but rather an independent contractor who was not entitled to benefits. Thereafter, on April 4, 2005, Appellant South Carolina Uninsured Employers' Fund ("the Fund") filed its Form 51, Answer to Request for Hearing, in which it specifically denied the existence of an employer/employee relationship between Caregivers and Hudson. Hudson withdrew her Form 50 prior to the merits hearing scheduled for September 2005.

Once again disregarding the unchallenged ruling that Caregivers is not subject to the Act, Hudson filed a second Form 50, Request for Hearing, dated September 6, 2006. In her Form 50, Hudson added a claim for brain injury with psychological overlay and again named Caregivers as her employer, as well as the Fund as Caregivers' insurance carrier. Over the objection of Caregivers, a hearing on Hudson's Form 50 occurred before the single commissioner on December 13, 2006. In his September 11, 2007 Decision and Order, attached as Exhibit B, former Commissioner J. Alan Bass acknowledged the unappealed ruling exempting Caregivers from the Act, that Caregivers objected to the hearing going forward on that basis, and that Caregivers raised all applicable defenses, including *res judicata* and collateral estoppel. Nevertheless, the single commissioner effectively overruled the earlier order and proceeded to a determination of the merits. Pertinent to this appeal, Commissioner Bass found Caregivers subject to the Act and that Hudson was its employee. He denied benefits, however, in light of his conclusion that Hudson's fall was idiopathic and not compensable.

All parties appealed the September 11, 2009 Decision and Order to the Appellate Panel of the Full Commission, which affirmed in part and reversed in part in its Decision and Order dated March 18, 2008. The Full Commission Decision and Order is attached as Exhibit C. Specifically, the Full Commission rejected the *res judicata* and collateral estoppel arguments because Hudson was not a party to the compliance proceeding. Further, the Full Commission determined Hudson was an independent contractor and not an employee of Caregivers at the time in question and, therefore, reversed the single commissioner's order to the contrary. (March 18, 2008 Decision and Order, Ex. C, p. 7) The Full Commission affirmed the single commissioner's determination that Hudson sustained a non-compensable idiopathic fall. (*Id.* p. 8)

Hudson appealed to the court of common pleas, seeking review of two key holdings by the Full Commission: (1) that she was an independent contractor rather than Caregivers' employee; and (2) that she sustained a non-compensable, idiopathic fall. Following oral argument on August 30, 2010, the court entered its "Order Reversing Decision of Workers' Compensation Commission, Remanding Case to Commission for Determination of Benefits, and Relieving Employer's Counsel as to Appeal," attached as Exhibit D. In that order, the circuit court went well beyond reversal and remand to the Commission for further proceedings. The order finds as a matter of law that Hudson was Caregivers employee and that she sustained a compensable injury. Going further, it directs that the Commission "*shall* make findings of fact and conclusions of law consistent with [the order]; and *shall* enter an Order providing for medical treatment" (January 4, 2011 Order, Ex. D, p. 18) (emphasis added). The circuit court noted the *res judicata* and collateral estoppel arguments raised by Caregivers, but did not issue any

specific order regarding them. Implicit in the circuit court's order, however, is its erroneous conclusion that Caregivers is subject to the Act.

Both the Fund and Caregivers challenged the circuit court order via timely notices of appeal filed in this Court. Thereafter, in a telephone conference on March 22, 2011, the Court directed the parties to consider and brief the issue of whether the circuit court order is subject to immediate appeal. That oral order was memorialized in a written Order filed March 23, 2011, and is the genesis of the instant memorandum.

ARGUMENT

Dismissal of this appeal as interlocutory could only result from an erroneous and overly broad reading of the holding in *Charlotte-Mecklenburg Hospital Authority v. South Carolina Department of Health and Environmental Control*, 387 S.C. 265, 692 S.E.2d 894 (2010). Upon closer examination, that case actually supports immediate review of the circuit court's order because that order finally determines the legal rights of the parties; to wit, the legal conclusion that Respondent was an employee for purposes of the Act and that she sustained a compensable injury in the course and scope of her employment. The circuit court's order overturns the factual findings of the single commissioner and the Full Commission and holds, as a matter of law, that Hudson is entitled to benefits. Thus, the circuit court made conclusive findings as to jurisdiction and compensability, and the only remaining task for the Commission on remand is to fix the amount of benefits. Inasmuch as the challenged order constitutes a final order with regard to the legal questions presented, it is immediately appealable. Accordingly, Appellants are entitled to immediate appellate review.

I. The Circuit Court Order Is Subject To Immediate Review Because It Constitutes A Final Decision Pursuant to S.C. Code Ann. § 1-23-390.

South Carolina Code Ann. § 1-23-390 provides for appellate review of “any final judgment of the circuit court.” The circuit court order is just such a final decision. To find differently on the basis that the order remands for further proceedings by the Full Commission fails to accurately describe the effect of the circuit order and implies that further fact finding on the legal question at issue (work-related injury resulting in entitlement to compensation benefits) by the Commission is necessary. To the contrary, the circuit court order effectively decides all issues in these proceedings – Hudson’s status as an employee versus an independent contractor and that she sustained a compensable injury. Thus, the order is not “interlocutory” in the sense that immediate appellate review may not proceed because it determines with finality the only legal questions presented and explicitly directs the Full Commission to act according to the mandates of that order.

To the extent “further proceedings” are called for here, they consist solely of the circuit court’s requirement that it “shall” make an order consistent with the view of the facts and law as set forth by the circuit court and that it “shall” enter an order directing Appellants herein to make payments for Hudson’s on-going medical treatment. Stated differently, “further proceedings” are not necessary to determine the liability of Caregivers or the Fund – those issues have been decided with finality by the circuit court. Instead, “further proceedings” would be purely “ministerial and [would] not require the exercise of independent judgment or discretion on the part of the commission.” *Long v. Sealed Air Corp.*, ___ S.C. ___, 706 S.E.2d 34, 35 (Ct. App. 2011) (quoting *Hicks v.*

Piedmont Cold Storage, Inc., 324 S.C. 628, 632 n. 2, 479 S.E.2d 832, 834 n. 2 (Ct. App. 1996)). Inasmuch as the circuit court order does not suggest that anything further need be done to fix Appellants' liability in this case, it clearly constitutes a final order as referenced in S.C. Code Ann. § 1-23-390.

II. The Holdings In *Charlotte-Mecklenburg Hospital Authority* and *Long* Do Not Counsel In Favor Of Dismissal.

As our supreme court observed in *Charlotte-Mecklenburg Hospital Authority v. S.C. Dep't of Health & Environmental Control*, 387 S.C. 265, 692 S.E.2d 894 (2010), "[t]he right of appeal arises from and is controlled by statutory law." (citing *Ex parte U-Drive It, Inc.*, 369 S.C. 1, 630 S.E.2d 464 (2006)); see also Rule 201, SCACR. To rely on this case as authority for dismissal of the instant appeal, however, would result from an incorrect and overly broad reading of *Charlotte-Mecklenburg*. Without analysis of why the order in that case was not subject to immediate review, mis-application of this case would deny appellate review in any case when the primary legal issue has been decided with finality but where the execution of such an order is tasked to the administrative agency on remand. Upon closer examination, though, *Charlotte-Mecklenburg* hits on exactly the distinction between final orders and truly interlocutory orders. The circuit court order finally determined the legal issues of jurisdiction and compensability, is a final order subject to immediate review, and this Court should permit the appeal to proceed on this basis.

The *Charlotte-Mecklenburg* decision emphasizes the long-standing rule that an order that finally determines the substantive rights of the parties, such as the order of the

- circuit court in this case, is subject to immediate appellate review.¹ Indeed, the *Charlotte-Mecklenburg* Court emphasized the distinction as follows: "A final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined." *Id.*, 387 S.C. at 267, 692 S.E.2d at 895. By contrast, an order does not constitute a final judgment where "there is some further act which must be done by the court prior to a determination of the rights of the parties." *Id.*, 387 S.C. at 267, 692 S.E.2d at 894. In that case, the administrative law court order was not immediately reviewable because it remanded the action specifically for a determination of the central question in the case - whether the applicants involved were entitled to a certificate of need. Thus, the lower tribunal was necessarily tasked with undertaking an additional fact finding mission.

In contrast, the circuit court's order in this case concludes, as a matter of law, that Hudson is an employee for purposes of the Act and that she sustained a compensable injury - findings that unquestionably constitute a final determination of the rights of the parties to the action and leave nothing to be done by the Full Commission on remand beyond execution of that judgment. Thus, a closer reading of *Charlotte-Mecklenburg* actually supports the opposite conclusion reached by the court of appeals and militates in

¹ It is worthy of noting that the statute at issue in *Charlotte-Mecklenburg* was S.C. Code Ann. § 1-23-610 governing appeals from the Administrative Law Court. The case *sub judice* is governed by Section 1-23-390, which by its very terms provides that "[a]n aggrieved party may obtain a review of a *final judgment of the circuit court* . . . pursuant to this article by taking an appeal in the manner provided by the South Carolina Appellate Court Rules *as in other civil cases*." (emphasis added)

favor of immediate appellate review.

This Court's recent decision in *Long v. Sealed Air* is likewise distinguishable and should not be read to militate in favor of dismissal of this appeal. At issue in *Long* was the factual question of whether or not the claimant provided timely notice of her claim, a question that was remanded back to the commission "for further investigation." *Long*, 706 S.E.2d at 34. Such is not the case here, where the challenged order leaves nothing to be done by the commission apart from enforcement of the circuit court's findings and conclusions with regard to jurisdiction and compensability. Rather, this court should apply the analysis it employed in *Hicks, supra*, wherein the appeal was permitted to advance because "additional proceedings [were] not required." 324 S.C. at 632 n. 2, 479 S.E.2d at 834 n. 2. Further, and as noted by the dissenting judge in *Long*, "allowing an immediate appeal of *any* ultimate decision on the merits gives the appellant an opportunity to prevent the decision from becoming the law of the case." 706 S.E.2d at 38 (Geathers, A.J., dissenting) (internal citations and quotations omitted).

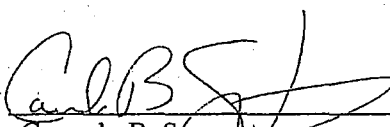
In this case, no further proceedings are necessary to finally and formally fix the rights of the parties. As such, it is ripe for review. To hold to the contrary would deprive the parties of meaningful, statutorily authorized review and subject them to needless additional time and expense in a circuitous cycle of litigation. Such cannot be the intent of the General Assembly, which obviously meant for parties to administrative proceedings access to "a meaningful opportunity to be heard." *Long*, 706 S.E.2d 39.

CONCLUSION

For all of the reasons stated herein, Caregivers respectfully submits that the circuit court order challenged in this appeal constitutes a final order and, therefore, is subject to immediate appellate review.

April 15, 2011

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EXHIBIT A

COPY

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

BEFORE THE
SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION

SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION,)

WCC File No. X-040129

Plaintiff,)

vs.)

ORDER

Caregivers of South Carolina, LLC)

Defendant/Employer.)

In re: Vennie Taylor Hudson v. Caregivers)
of South Carolina LLC)

This case was set to be heard by the undersigned on October 4, 2004 at 2 p.m. pursuant to an Order and Rule to Show Cause directing the Defendant/Employer to appear and show cause why it should not be found in violation of the provisions of the South Carolina Workers' Compensation Act by its failure to maintain workers' compensation insurance coverage for its employees during the period June 4, 2001 through the present and continuing. The Commission was represented by counsel, Janet Godfrey Griggs, Esquire. Present and available to testify on behalf of the Commission was Gary Smith, Director, Coverage and Compliance Department. The Defendant/Employer, Caregivers of South Carolina, LLC (Caregivers), was proceeding *pro se*, represented by its owner, David Teeple.

The Commission contends the Defendant/Employer, having failed to obtain workers' compensation insurance, has been in violation of S.C. Code Ann. § 42-5-10 and § 42-5-20 (1985) since June 4, 2001. The Commission's file was made part of the record in this matter including the investigator's report and the National Council on Compensation Insurance coverage reports indicating the lack of insurance.

The Defendant/Employer contends his business is a referral service, not a typical home health care business. Mr. Teeple testified as to how his business is run and presented supporting documents, which were made a part of the record.

FINDINGS OF FACT

Based upon a review of the Commission's file in this matter and the documentary evidence, the following findings of fact are made:

1. Caregivers acts as a "middle man," "a booking agent," or a "referral service." Caregivers identifies possible work assignments to which individuals may be referred. Caregivers recruits potential caregivers, they use a pre-screening process, and check references. When a potential client calls, Caregivers makes an appointment, meets with the person to assess their situation and personality, and then Caregivers makes the best personal referral from their referral list.

2. The potential client has the option of accepting or rejecting the referral. If the client hires the referred individual, the client tells the caregiver what duties they want performed, supervise the performance of those duties, and pay the caregiver. The client pays the caregiver, and they pay a separate referral fee to Caregivers.

3. Once the referred caregiver is hired by the client, the authority to control the caregiver is totally the responsibility of the client.

4. Persons seeking employment through Caregivers have to sign an agreement which informs the individual that should they choose to go on referrals for employment, they will do so as independent contractors. If the individual is hired, she will be paid by the client as an independent contractor. The agreement states that no workers' compensation or any other type of insurance is being provided by Caregivers.

5. During the initial interview, the caregiver is told that Caregivers is not the employer, but a referral service. The client will become their employer if they are offered a job and accept it.

6. Caregivers does not provide company benefits.

7. The majority of home health care businesses hire their caregivers, decide where to assign them, pay the caregivers, take out appropriate taxes, provide health benefits, and workers' compensation insurance.

8. Based on the information provided and the testimony given, the caregivers are independent contractors, not employees of Caregivers of South Carolina, LLC.

9. The record conclusively establishes the Defendant/Employer is in an exempt status S.C. Code Ann. § 42-1-360 (1985).

CONCLUSIONS OF LAW

Accordingly, as provided by S.C. Code Ann. § 42-17-40 (1985), it is the determination of the undersigned:

1. Under S.C. Code Ann. § 42-1-360 (1985), the Defendant/Employer is an exempt employer.

2. The Defendant/Employer does not have employees. The Defendant/Employer employs independent contractors. S.C. Code Ann. § 42-1-130 (1985).

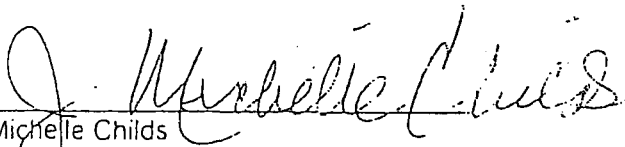
3. In an action to ascertain whether a claimant is an employee or independent contractor under workers' compensation, the court look to four (4) factors in determining the control issue: (1) direct evidence of the right or exercise of control, (2) the method of payment, (3) the furnishing of equipment, and (4) the right to fire. S.C. Workers' Compensation Commission v. Ray Covington Realtors, Inc., 318 S.C. 546, 459 S.E.2d 302 (1995), reh. den.

ORDER

IT IS, THEREFORE, ORDERED the Defendant/Employer, Caregivers of South Carolina, LLC is a referral service, and the business employs independent contractors. Therefore, the business is not required to have workers' compensation coverage.

IT IS FURTHER ORDERED, the persons who seek employment through
Caregivers of South Carolina, LLC, are independent contractors.

AND IT IS SO ORDERED.


J. Michelle Childs
Commissioner, South Carolina
Workers' Compensation Commission

Columbia, South Carolina

2-18, 2005

(a) (5) - D - C129, 1 (c)

CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above captioned action upon all parties to this cause by depositing a copy hereof, first class postage paid, or if indicated below by certified mail, return receipt requested, in the United States mail addressed to the attorney or attorneys for said parties.

This 23rd day of February, 2005

By Marion Buraczynski
Paralegal

Stephen E. Samuels, Esquire
3 Law Range
Sumter, SC 29150

BY INTERAGENCY MAIL:

Terry M. "Mickey" Mauldin, Esquire (U.E.F.)

CERTIFIED, RRR & FIRST CLASS MAIL:

David Teeple, Director
Caregivers of South Carolina LLC
821 Riverbirch Drive
Conway, SC 29526

EXHIBIT B

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC FILE NO: 0423903

VENNIE TAYLOR HUDSON,
Alleged Employee,
CLAIMANT,

vs.

CAREGIVERS OF SOUTH CAROLINA,
LLC,
Alleged Employers,

AND

SOUTH CAROLINA UNINSURED
EMPLOYERS' FUND,
DEFENDANTS.

DECISION AND ORDER

Hearing held:

December 13, 2006
Myrtle Beach, South Carolina

Appearances:

Claimant represented by Steven Samuels, Esquire, of
Columbia, South Carolina;

Alleged Employer, Caregivers of South Carolina,
LLC appeared *pro se* with David Teeple, appearing;

South Carolina Workers' Compensation Uninsured
Employers' Fund represented by Samuel T. Brunson,
Esquire of Florence, South Carolina.

Purpose of the Hearing:

To determine the issues as set forth on Forms 50 & 51
as well as any other issues which timely come before
the Commission

Decision & Order:

Honorable J. Alan Bass, Commissioner

Filed:

11 September, 2007

I. APA SUBMISSIONS

Pursuant to that Administrative Procedures Act, the following documents were offered into evidence:

- APA #1:** Reports from South Strand Ambulatory Care Center dated February 5, 2004 numbered pages 1-8;
- APA #2:** Reports from Grand Strand Regional Hospital dated February 5, 2004 through August 15, 2005 numbered pages 9-31;
- APA #3:** Reports from Allen Bennett Memorial dated February 15, 2004 numbered pages 32-44;
- APA #4:** Medical reports from Strand Regional Speciality Associates dated February 9, 2004 through October 6, 2004 numbered pages 45-71;
- APA #5:** Reports from North Myrtle Beach Internal Medicine dated November 18, 2004 through April 8, 2005 numbered pages 72-75;
- APA #6:** Reports from Bay Orthopaedic Associates dated November 18, 2004 through April 18, 2005 numbered pages 76-78;
- APA #7:** Reports from Indigo Physical Therapy dated December 10, 2004 numbered page 79;
- APA #8:** Reports from Georgetown Hospital Systems dated March 8, 2005 through March 10, 2005 numbered pages 80-157;
- APA #9:** Reports from Carolina Orthopaedic Specialists dated May 31, 2005 through July 26, 2005 numbered pages 158-159;
- APA #10:** Report of Dr. Timothy M. Zgleszewski dated November 19, 2006 numbered

In addition, the Claimant offered into evidence the following exhibits:

- APA #11: Classified advertisement regarding Caregivers, LLC;
- APA #12: Web page found at www.caregiverssc.com containing information on Caregivers, LLC;
- APA #13: Staff interview sheet and agreement between Caregivers, LLC and Vennie Hudson;
- APA #14: Statement of work requirements from Caregivers, LLC;
- APA #15: Time sheets of Vennie Hudson provided by Caregivers, LLC;
- APA #16: Statement of Cindy Joliff dated March 18, 2005;

In addition, the South Carolina Workers' Compensation Uninsured Employers' Fund requested that the Coverage and Compliance file be made a part of the record. That included the Order of Commissioner Childs dated February 23, 2005.

II. STATEMENT OF THE CASE

This matter arises out of an alleged injury by accident allegedly occurring on February 5, 2004 in Horry County, South Carolina. Shortly after the alleged accident, the Claimant, by and through her attorney, filed a Form 50 alleging that she was an employee of Caregivers of South Carolina, LLC on and before February 5, 2004. The Claimant alleged that on February 5, 2004, she sustained a compensable injury by accident and was thus, entitled to Workers' Compensation benefits. Following the filing of the Form 50, it was discovered that Caregivers of South Carolina, LLC was not insured under the South Carolina Workers' Compensation Act. Thus, the matter was referred to the Coverage and Compliance Division of the South Carolina Workers' Compensation

Commission.

During the Spring of 2004, an investigation was conducted by the Coverage and Compliance Division of the South Carolina Workers' Compensation Commission pursuant to Regulation 67-1402. It was the opinion of the Coverage and Compliance Division that the Alleged Employer, Caregivers of South Carolina, LLC was subject to the South Carolina Workers' Compensation Act on and before February 5, 2004 but operating without insurance. The Alleged Employer, Caregivers of South Carolina, LLC, disputed the findings of the Coverage and Compliance Division.

*Dr. Childs from SC
Childs from SC
1/10/05
No info from SC
UEP*

During the Summer of 2004, a Rule to Show Cause hearing was set before the South Carolina Workers' Compensation Commission. Pursuant to a subpoena issued by the Commission, Caregivers of South Carolina, LLC was required to provide numerous documents to the Commission. In September of 2004, the Commission issued a hearing notice setting a Rule to Show Cause hearing for October 4, 2004. Notice of the hearing was given to the Claimant, the Claimant's attorney, as well as to the Alleged Employer.

A hearing was held before Commission J. Michele Childs on October 4, 2004. Present at the hearing in addition to persons representing the Commission and the Coverage and Compliance Division of the Commission, were the Claimant and her attorney, Steve Samuels. The Claimant, David Teeple of Caregivers of South Carolina, LLC, and Garry Smith, testified at the hearing. In addition, numerous documents provided by Caregivers of South Carolina, LLC were introduced into evidence. Following the hearing, Commissioner Childs issued an Order on February 18, 2005 finding that the Claimant and other persons working through Caregivers of South Carolina, LLC were not employees but instead independent contractors. Commissioner Childs found that the Alleged Employer, Caregivers of South Carolina, LLC did not regularly employ four (4) or more

persons on or before the date of the Claimant's accident, and thus was not subject to the South Carolina Workers' Compensation Act.

The Order of Commissioner Childs was served upon the attorney for the Claimant, Steven Samuels on February 23, 2005. In addition, the Order was sent to the South Carolina Uninsured Employers' Fund as well as to David Teeple, director of Caregivers of South Carolina, LLC. No appeals were taken from that Order.

On March 3, 2005, the Claimant, by and through her attorney again filed a Form 50 alleging an injury on February 5, 2004 in Horry County, South Carolina while working for Caregivers of South Carolina, LLC. The Alleged Employer filed a Form 51 on March 15, 2005 denying again that the Claimant was an employee but instead an independent contractor. The matter was set for a hearing in September of 2005 in Myrtle Beach, South Carolina. At that time, the Claimant chose to withdraw her Form 50. A Form 50 was re-filed on behalf of the Claimant on September 6, 2006. The matter was set before this Commissioner and heard on December 13, 2006 in Surfside Beach, South Carolina. Following the hearing, this Commissioner requested memorandum be submitted on behalf of the Claimant and the South Carolina Workers' Compensation Uninsured Employers' Fund.

At the call of the case on December 13, 2006, the Alleged Employer, by and through its representative, David Teeple, objected to the hearing going forward. Mr. Teeple took the position that the matter had already been decided by the Commission. This Commissioner denied the Claimant's Motion to Cancel the Hearing and the matter went forward as scheduled.

In her Form 50, the Claimant alleges that she suffered injuries to her head, face, brain, left arm, knees and back when she fell on February 5, 2004. She alleged a compensation rate of One

Hundred Eight and 81/100 (\$108.81) Dollars. The Claimant was requesting temporary total benefits from February 6, 2004 through the present and continuing.

The Alleged Employer in this case, Caregivers of South Carolina, LLC, objected to the matter going forward as it had already been determined that the South Carolina Workers' Compensation Commission lacked jurisdiction to hear this case. In addition, Caregivers of South Carolina, LLC, imposed a general denial as to the compensability of this claim. Caregivers of South Carolina, LLC, also raised the defenses of *Res Judicata* and *Collateral Estoppel* to this claim as the matter had already been heard. The South Carolina Workers' Compensation Uninsured Employers' Fund raised those same issues and defenses.

III. EVIDENCE ON THE CASE

Mr. David Teeple was the first witness called by the Claimant. Mr. Teeple is the principal of Caregivers of South Carolina, LLC. He and his wife run the business. Mr. Teeple explained that Caregivers of South Carolina, LLC provides home health care services to disabled and elderly persons. Their business is located in Conway but provides services in Horry, Georgetown, Marion and Florence Counties in South Carolina.

Mr. Teeple testified that his business provides home health care through individuals that he designates as "caregivers". He admitted that the only revenue generated by his business was from the work done by those "caregivers". Without those caregivers, he would have no business. According to Mr. Teeple, his business is a referral service and he is paid a referral fee by the client for the services provided by the "caregiver".

Mr. Teeple testified that he interviews and screens caregivers and then matches them with potential clients. The client pays the "caregiver" directly at a rate of \$9.00 per hour. An additional

\$2.50 per hour is then paid to his business as a referral fee. Mr. Teeple designates the caregivers as being independent contractors. He admitted that by structuring his business in the manner he has done so, he saves money on overhead, payroll taxes, health insurance and Workers' Compensation insurance that gives his business a competitive edge over some of his competition.

Mr. Teeple testified that he interviewed Vennie Hudson in 2003. She was chosen to be a caregiver at that time and matched with a client. At the time of her accident in February of 2004, Mr. Teeple admitted that he had about fifty (50) caregivers under contract.

The Claimant placed into evidence numerous documents regarding the business of Caregivers of South Carolina, LLC. Mr. Teeple testified that those documents were generated by his business. Mr. Teeple further testified that Vennie Hudson was one of his "caregivers". He was aware that she had fallen on February 5, 2004, the day she claims she was injured.

In response to cross examination, Mr. Teeple testified that many of the documents introduced into evidence specify that the "caregiver" is not an employee but instead an independent contractor. Mr. Teeple further testified that the "caregiver" never receives a check from Caregivers of South Carolina, LLC. All checks are written by the client directly to the caregiver. A second check is written by the client to Caregivers of South Carolina, LLC as a referral fee.

Mr. Teeple testified that he has been in business in South Carolina for five and one-half (5½) years. He stated that he runs this business out of his home. He stated that he and his wife were the only employees of Caregivers of South Carolina, LLC. Mr. Teeple was present when a hearing first went before the South Carolina Workers' Compensation Commission in October of 2004. Numerous documents, including the documents introduced into evidence at the present hearing were subpoenaed and those documents were given to Commission employees in Columbia. Mr. Teeple

testified that both he and Ms. Vennie Hudson testified at the hearing in Columbia. He stated that Mr. Samuels, on behalf of Ms. Hudson, was given an opportunity to ask questions during that hearing.

Ms. Vennie Hudson was the next to testify at the hearing. Ms. Hudson was fifty-eight (58) years of age on the day of the hearing. She was divorced. Ms. Hudson testified that she attended school through the 10th grade in Spartanburg. She stated that she eventually went back to Spartanburg Technical College to take a CNA course so she could take care of the elderly.

Ms. Hudson testified that prior to working with the elderly, she was employed in a plant in the upstate in Quality Control. She stated that she first worked with Caregivers of South Carolina, LLC in the Fall of 2003. She saw an advertisement in the newspaper looking for caregivers around September of 2003.

Ms. Hudson testified that she went to the South Carolina Unemployment office of Horry County and filed an application. There, she met with Mr. Teeple and was interviewed. Ms. Hudson admitted that she filled out some paperwork at that time and signed some forms but did not remember what forms she signed until she saw them on the day of the hearing. She admitted that she remembers signing forms showing that she was responsible for her own taxes, had no health insurance coverage but does not remember reading any document stating that she was not covered under Workers' Compensation.

Ms. Hudson testified that she was first contacted by Janet, Mr. Teeple's wife. She stated that Janet would give her the patient's name and address. Because she was new to the area, it was hard for her to find certain addresses. Because she had no phone number for the patient, she could not call the patient. Eventually, she was able to find a payphone, call Janet and finally found the patient.

Ms. Hudson testified that when she was referred a patient, Janet would tell her, to the best of her knowledge, the patient's condition. In addition, she was told the hours she was needed and responsibilities and limitations and what she could do with patients.

Ms. Hudson testified that she did not negotiate with the patient regarding her employment. She stated that her rate of pay had already been set by Caregivers of South Carolina, LLC. She stated that if she was going to be late or sick and could not work a particular day, she was to notify Caregivers rather than the patient.

Regarding the accident in question, Ms. Hudson testified that the accident occurred on February 5, 2004. She stated that her patient, Mrs. Bunch, asked her to go get her mail as she did everyday toward the end of the day when the job was over. Ms. Hudson testified that as she did, she fell face down on the concrete. She stated that she was unconscious but is unsure how long she was unconscious.

In response to questioning from the Commissioner, Ms. Hudson testified that she did not know why she fell. She stated that she was not a clumsy person. She characterized her fall as a "freak accident".

Ms. Hudson testified that she did not know why she fell at the time she fell. She stated that her niece and nephew went to the scene following the fall and took some pictures. Those pictures were eventually introduced into evidence over the objection of the attorney for the South Carolina Workers' Compensation Uninsured Employers' Fund. Furthermore, the Claimant testified that her niece and nephew, who took the pictures, speculated as to the cause of her fall.

Ms. Hudson testified that she called Janet Teeple and informed her of her fall. She also informed her that she was injured very badly. Ms. Hudson also testified regarding her injuries. Ms.

Hudson claims that she injured her head, brain, cheekbones, right knee, left knee, / injured her back. She stated that she is currently unable to physically work as a

After due consideration of the evidence received, including the testimony and documents, evidence, and after considering the claim and defenses raised, this Commissioner makes the following findings of fact:

IV. FINDINGS OF FACT

1. The parties to this proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act. The Claimant was an employee of Caregivers of South Carolina, LLC on and before February 5, 2004. Caregivers of South Carolina, LLC had the right to control the Claimant. The Employer required that the Claimant be referred to as a "caregiver". They also refused to allow a caregiver to give the names of clients to anyone else, required "caregivers" to follow rules and regulations, and required caregivers to call the Employer rather than the client when they were unable to attend would be late. Furthermore, the Employer set the hours and the hourly rate. An individual caregiver was not allowed to give personal phone numbers to the client. If the Employer had a problem with the caregiver, the caregiver was removed from its list and not given further assignments. Although the Employer testified that the removal from the list was not firing authority, the caregiver would in fact be fired.
2. Caregivers of South Carolina, LLC regularly employed four (4) or more person. According to testimony from the principal of Caregivers of South Carolina, LLC, fifty (50) caregivers were under contract at the time of the Claimant's accident. The

Claimant is not an independent contractor. I did not find the testimony of principal of the Employer, David Teeple credible as it related to the Claimant admitting that she was an independent contractor. The Claimant disputed that she was informed that accidents would not be covered under the South Carolina Workers' Compensation Act.

3. At the time of the Claimant's accident, the Employer, Caregivers of South Carolina, LLC was uninsured. Thus, the South Carolina Workers' Compensation Uninsured Employers' Fund was a proper party to this hearing.
4. The Claimant alleges that she suffered a fall on February 5, 2004, arising out of and in the course of her employment. The Claimant's accident is not compensable as the cause of her fall is unexplained. The Claimant testified that she does not know why she fell. She described her fall as a "freak accident". She testified that she was walking and the next thing she knew, she fell face first on the concrete. It would be speculation to render a factual finding regarding the cause of the Claimant's fall since even the Claimant herself indicates she does not know why she fell. The Claimant admitted that all theories regarding the cause of her fall would be speculation at best. The area where the Claimant fell was clear. The Claimant's injuries occurred as a result of her falling face forward onto concrete. The Claimant's injury did not result from special danger to which she was subjected as a result of her employment. The Claimant's injuries would have been sustained if she had had a similar fall at home or in any other hard surface area. Since the Claimant's injury is an idiopathic level ground fall, it did not arise out of her employment.

5. Because the Claimant's claim is not compensable, she is not entitled to compensation for temporary or permanent disability benefits.
6. Because the Claimant's claim is not compensable, she is not entitled to medical benefits.

V. CONCLUSIONS OF LAW

The following Conclusions of Law are made pursuant to Section 42-17-40, based upon a preponderance of the evidence.

1. Under §42-1-130, the Claimant was an employee at the time in question.
2. Under §42-1-140, the Employer was subject to the South Carolina Workers' Compensation Act. The Employer was operating without insurance and thus, the South Carolina Workers' Compensation Uninsured Employers' Fund was proper party to this claim.

Prior to the hearing and the issuance of this Order, a Rule to Show Cause Hearing had been held involving the Employer in this case. The Employer and the South Carolina Workers' Compensation Uninsured Employers' Fund contended that jurisdictional issues had already been decided in this matter. They further contended that an additional hearing regarding jurisdiction was barred under the theories of *Res Judicata* and *Collateral Estoppel*. I find that *Res Judicata* and *Collateral Estoppel* are not applicable to this claim. The Claimant was not a party to the prior proceeding before South Carolina Workers' Compensation Commission. Thus, there was no privity between the Claimant and the Compliance Division of the South Carolina Workers' Compensation Commission.

3. Under §42-1-160, the Claimant did not suffer a compensable injury by accident. This

claim is governed by the cases of Crosby v. Wal-Mart Stores, Inc., 330 S.C. 489, 499 S.E. 2d 253 (Ct. App. 1998) and Bagwell v. Ernest Burwell, Inc., 227 S.C. 444, 88 S.E. 2d 611 (1955) which are applicable in determining that idiopathic, level floor falls do not arise out the Claimant's employment and are therefore not compensable under the South Carolina Workers' Compensation Act.

4. Under §42-15-60, the Claimant is not entitled to medical benefits under the South Carolina Workers' Compensation Act.
5. Under §42-9-10, §42-9-20 and §42-9-30, the Claimant is not entitled to temporary or permanent disability in this case.

VI. ORDER

Based upon the Findings of Fact and Conclusions of Law, the undersigned Commission orders as follows:

IT IS ORDERED that the Claimant's injury of February 5, 2004 arose out of an idiopathic level floor fall and is not compensable under the South Carolina Workers' Compensation Act.

IT IS THEREFORE ORDERED that the Claimant's claim for benefits is hereby denied in full.

No hearing costs are assessed in this instance.

AND IT IS SO ORDERED.

SOUTH CAROLINA WORKERS' COMPENSATION
COMMISSION

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, postage paid, in the United States mail addressed to attorney or attorneys for said parties.

This 11 day of September, 2004
By Jamesetta Riley-Reid
Administrative Assistant to the Commissioner

SS HONORABLE J. ALAN BASS, COMMISSIONER

EXHIBIT C

5

APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NO. 0423903

VENNIE TAYLOR HUDSON,

EMPLOYEE,
CLAIMANT/SECOND APPELLANT,

- V -

CAREGIVERS OF SOUTH CAROLINA, LLC,

EMPLOYER,
EMPLOYER/THIRD APPELLANT,

AND

SOUTH CAROLINA WORKERS' COMPENSATION UNINSURED EMPLOYERS'
FUND,

CARRIER,
DEFENDANT/FIRST APPELLANT.

Appellate Panel Review held in Columbia,
South Carolina on January 29, 2008 per
notices timely and properly served on all
parties of interest.

Appellate Panel Decision and Order filed
March 18, 2008.

APPEARANCES:

Claimant/Second Appellant represented by
Steven B. Samuels, Esquire, of Columbia,
South Carolina.

Employer/Third Appellant represented by
Johnnie W. Baxley, III, Esquire, of Mount
Pleasant, South Carolina.

Defendant/First Appellant represented by
Samuel T. Brunson, Esquire, of Florence,
South Carolina.

STATEMENT OF CASE

The parties were heard by Commissioner J. Alan Bass on December 13, 2006 in Myrtle Beach, South Carolina. On September 11, 2007, he issued the following Order:

Based upon the Findings of Fact and Conclusions of Law, the undersigned Commission orders as follows:

IT IS ORDERED that the Claimant's injury of February 5, 2004 arose out of an idiopathic level floor fall and is not compensable under the South Carolina Workers' Compensation Act.

IT IS THEREFORE ordered that the Claimant's claim for benefits is hereby denied in full.

No hearing costs are assessed in this instance.

AND IT IS SO ORDERED.

Within the statutory period, counsel for all parties filed Applications for Review in the case setting forth their reasons, copies of which were furnished to all interested parties prior to oral argument presented before the Appellant Panel on January 29, 2008. All proffered testimony has been taken. Such, together with all documentary evidence, has been delivered by oral argument to the individual members of the Full Commission and has since been under study and consideration.

By appeal, the South Carolina Uninsured Employers' Fund/First Appellant respectfully submits the following:

1. The hearing commissioner erred in his Finding of Fact and Conclusions of Law in finding Claimant was an employee of Caregivers of South Carolina, LLC, the error being the greater weight of the evidence and applicable law shows Claimant was an independent contractor rather than an employee and thus, an Employer/Employee relationship did not exist.

2. The hearing commissioner erred in finding Caregivers of South Carolina, LLC subject to the South Carolina Workers' Compensation Act by regularly employing four (4) or more persons, the error being the person referred by Caregivers to individuals were independent contractors rather than employees and thus, because Caregivers of South Carolina, LLC had only two (2) employees, the entity is not subject to the South Carolina Workers' Compensation Act.

3. The hearing commissioner erred in going forward with the hearing on December 13, 2006, the error being the jurisdictional issues in this case had already been decided by Commissioner J. Michelle Childs and an Order was issued on February 23rd finding Caregivers of South Carolina, LLC not subject to the South Carolina Workers' Compensation Act. Thus, the matter should not have been heard by Commissioner Bass as laws of South Carolina do not allow one (1) Judge or Hearing Officer to overrule another. In addition, the claim should have been barred by *Res Judicata* and *Collateral Estoppel*.

By appeal, the Claimant/Second Appellant respectfully submits the following:

1. The single commissioner erred as a matter of fact and law in finding Claimant's injury of February 5, 2004 arose out of an idiopathic level floor fall and is not compensable under the South Carolina Workers' Compensation Act.

2. The single commissioner erred as a matter of law in misapplying the idiopathic level floor fall doctrine to a case where there is no evidence of an internal breakdown, and the only evidence is Claimant tripped and fell when her foot got hung up in a crack or hole in the concrete sidewalk.

3. The single commissioner erred as a matter of law requiring Claimant to prove her injury arose from "special danger to which she was subject as a result of her employment" when this is not a required element of proof.

4. The single commissioner erred as a matter of fact and law in finding "The Claimant's accident is not compensable when the cause of her fall is unexplained," when the only evidence is Claimant tripped and fell when her foot got hung up in a crack or hole in the concrete sidewalk.

5. The single commissioner erred as a matter of fact and law in failing to determine the extent of Claimant's injuries which included her head (face and brain), left arm, both knees, back and ribs.

6. The single commissioner erred as a matter of fact and law in failing to award medical treatment and temporary total disability compensation.

By appeal, the Employer/Third Appellant respectfully submits the following:

1. Statement of case -- Teeple objected to case being heard. Commissioner Childs rendered a decision previously. One Commissioner of same ranking should not be allowed to overrule another. No reason stated. (Res Judicata and Collateral Estoppel)

2. Evidence of the case -- Commissioner Bass denied me to present my written presented (was allowed by Commissioner Childs) stating it was self-serving! That document was my defense. I had to win my presentation to which Commissioner Bass repeatedly yawned and looked dismayed, all of which flustered me more.

3. Finding of Fact -- Item 1 -- I am not bound to any terms/provisions -- Commissioner Childs stated I do not come under the Act, I have no employees. The relationship between Caregivers of South Carolina (referral service) and Claimant, where certain stipulations (not calling client, following rules) does not make Claimant an employee. Independent contractors will generally have rules and policies, and procedures set forth by the person paying them. We do not set the hours, and we establish a minimum rate a caregiver can be paid. Again, this does not constitute an employer relationship. Every business sets a rate, whether they have employees or

not. We did not fire caregivers! We would, on occasion, terminate our relationship, our contract with the caregiver. Commissioner Bass did not find my testimony credible because he refused to let me enter it. He said it was self-serving!

4. From the beginning of the hearing it was obvious to me Commissioner Bass had no interest in what I had to say or present. Perhaps it was because I had no lawyer.

5. I was not permitted a fair defense. This agency determined previously I did not come under its governing powers.

6. Claimant and her attorney were both a part of my first hearing. They were present. They were questioned. They were allowed to participate.

7. Lastly, I paid for and never received a copy of the transcript. Why?

In an Appellate Review, the Panel shall, pursuant to S.C. Code Ann. §42-17-50 (1985), review the Award, weigh the evidence as presented at the initial hearing and, if good grounds be shown therefore, make its own Findings of Fact and reach its own Conclusions of Law consistent with or inconsistent with those of the Hearing Commissioner. Based upon a review of the foregoing, the Panel affirms in part and reverses in part the Order of September 11, 2007 and enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The parties to this proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act. Claimant and Caregivers of South Carolina, LLC did not have an employer/employee relationship based on the four factors, (1) the employer's right to exercise or the actual exercise of control over the details of the work and how it is performed, (2) the method of payment, (3) who furnishes the equipment, and (4) the employer's right to terminate the employment. Farrar v. D. W. Daniel High School, 309 S.C. 523, 424 S.E.2d 543 (Ct. App. 1992).

2. Claimant alleges she suffered a fall on February 5, 2004 arising out of and in the course of her employment. Claimant's accident is not compensable as the cause of her fall is unexplained. Claimant testified she does not know why she fell. She described her fall as a "freak accident." She testified she was walking and the next thing she knew, she fell face first on the concrete. It would be speculation to render a factual finding regarding the cause of Claimant's fall since even the Claimant herself indicates she does not know why she fell. Claimant admitted all theories regarding the cause of her fall would be speculation at best. Claimant's injuries occurred as a result of her falling face forward onto concrete. Claimant's injury did not result from special danger to which she was subjected as a result of her employment. Claimant's injuries would have been sustained if she had had a similar fall at home or in any other hard surface area. Since Claimant's injury is an idiopathic level ground fall, it did not arise out of her employment.

3. Because Claimant's claim is not compensable, she is not entitled to compensation for temporary or permanent disability benefits.

4. Because Claimant's claim is not compensable, she is not entitled to medical benefits.

Based upon the findings of fact are the following:

CONCLUSIONS OF LAW

1. S.C. Code Ann. §42-17-50 (1985) gives the Commission the power to affirm, amend, or reverse the decision of a Single Commissioner.

2. Under §42-1-130, Claimant was not an employee at the time in question.

3. Under §42-1-140, Caregivers of South Carolina, LLC was not subject to the South Carolina Workers' Compensation Act. Prior to the hearing and the issuance of the Single Commissioner's Order, a Rule to Show Cause Hearing had been held involving the Employer in this case. The Employer and the South Carolina

Workers' Compensation Uninsured Employers' Fund contend jurisdictional issues had already been decided in this matter. They further contend an additional hearing regarding jurisdiction was barred under the theories *Res Judicata* and *Collateral Estoppel*. *Res Judicata* and *Collateral Estoppel* are not applicable to this claim. Claimant was not a party to the prior proceeding before South Carolina Workers' Compensation Commission. Thus, there was no privity between Claimant and the Compliance Division of the South Carolina Workers' Compensation Commission.

4. Under §42-1-160, Claimant did not suffer a compensable injury by accident. This claim is governed by the cases of Crosby v. Wal-Mart Stores, Inc., 330 S.C. 489, 499 S.E.2d 253 (Ct. App. 1998) and Bagwell v. Ernest Burwell, Inc., 227 S.C. 444, 88 S.E.2d 611 (1955) which are applicable in determining that idiopathic, level floor falls do not arise out of the employment and are; therefore, not compensable under the South Carolina Workers' Compensation Act.

5. Under §42-15-60, Claimant is not entitled to medical benefits under the South Carolina Workers' Compensation Act.

6. Under §42-9-10, §42-9-20 and §42-9-30, Claimant is not entitled to temporary or permanent disability in this case.

ORDER

IT IS THEREFORE ORDERED the Decision and Order of the Single Commissioner issued September 11, 2007 is hereby affirmed in part and reversed in part.

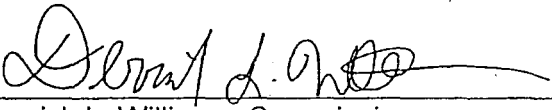
IT IS FURTHER ORDERED Claimant's injury of February 5, 2004 arose out of an idiopathic level floor fall and is not compensable under the South Carolina Workers' Compensation Act.

IT IS FURTHER ORDERED Claimant and Caregivers of South Carolina, LLC did not have an employee/employer relationship.

IT IS THEREFORE ORDERED Claimant's claim for benefits is hereby
denied in full.

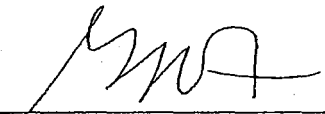
AND IT IS SO ORDERED.

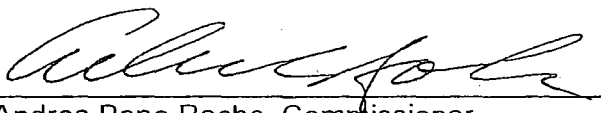
S.C. WORKERS' COMPENSATION COMMISSION


Derrick L. Williams, Commissioner

AFFIRM IN PART/REVERSE IN PART

CONCUR:


George N. Funderburk, Commissioner


Andrea Pope Roche, Commissioner

(a:\0423903.app.dlw)

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date
served this order in the above-entitled action upon all
parties to this cause by depositing a copy hereof,
postage paid, in the United States mail addressed to
the attorney or attorneys for said parties.

This 18th day of March, 2008
By Renee G. Smith
Administrative Assistant to the Commissioner

SBS
JWB
STB

EXHIBIT D

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

BEFORE THE SOUTH CAROLINA
COURT OF COMMON PLEAS

Vennie Taylor Hudson,
Appellant,

WCC FILE NO. 0423903

Civil Action No. 2008-CP-26-03032

-vs-

Caregivers of South Carolina, LLC,
Respondent,

and

SC Uninsured Employers' Fund,
Respondent,
Defendants.

ORDER REVERSING DECISION OF
WORKERS' COMPENSATION
COMMISSION, REMANDING CASE TO
COMMISSION FOR DETERMINATION OF
BENEFITS, AND RELIEVING EMPLOYER'S
COUNSEL AS TO APPEAL

FILED
2011 JAN -4 AM 10:14
CLERK OF COURT

JTB
This workers' compensation appeal was heard by this Court on August 30, 2010. There are two primary issues in this appeal, one relating to jurisdiction and the other relating to the facts of the case. After consideration of the evidence in the record and the arguments of counsel, the Court finds for the Claimant on both issues and remands the case back to the Workers' Compensation Commission for a determination of benefits.

PROCEDURAL AND FACTUAL BACKGROUND

This matter arises out of an injury by accident suffered by Claimant on February 5, 2004. The Workers' Compensation Commission denied her claim for benefits on two grounds: (1) that she was an independent contractor rather than an employee; and (2) her accident did not arise out of her employment as a matter of law because it was the result of an "idiopathic level-floor fall."

The Employer, Caregivers of South Carolina, LLC, is an agency that supplies in-home attendant care to elderly and disabled people. Caregivers is owned by David and Janet Teeple. The Teeples have approximately 50 "caregivers" who provide these services to their clients.

The Teeples contend the workers are independent contractors rather than employees. A review of the record reveals Caregivers recruits, interviews, and screens the workers. They are then assigned to a particular client. Caregivers gives the worker the work schedule and address of the client.

According to the Teeples, the worker is then "hired" by the client. The client pays \$11.50 per hour for these services. The rate is set by Caregivers. The worker fills out a timesheet supplied by Caregivers. One copy goes to the client; one copy goes to Caregivers. The client writes one check for \$9.00 per hour directly to the worker and one check for \$2.50 per hour to Caregivers.

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The workers can only provide those services specified by Caregivers. They get their work schedule from Caregivers and are required to call in to Caregivers (not the client) if they are sick or going to be late.

Hudson was employed by Caregivers in October of 2003. On February 5, 2004, Caregivers sent her to the home of one of their clients to perform work as a "caregiver." On her way out to the mailbox to pick up the client's mail, Hudson tripped and fell face forward onto the ground, knocking herself out and suffering multiple injuries.

Claimant filed a Form 50 alleging she was an employee of Caregivers of South Carolina. As Caregivers is uninsured, the SCUEF was named as a party. Caregivers denied they were subject to the Act contending they were a "referral service" and, as such, had no employees other than the two owners. Both Caregivers and the SCUEF contend Hudson was not an employee at

all, but was an independent contractor working directly for the client.

After an investigation, the Coverage and Compliance Division concluded Caregivers was the employer of Ms. Hudson. Coverage and Compliance instituted enforcement proceedings culminating in a Rule to Show Cause Hearing.

The Rule to Show Cause Hearing was held before Commissioner J. Michelle Childs. Janet Griggs prosecuted the case for the Commission. David Teeple appeared for the pro se employer. Two witnesses were called: Vennie Hudson and David Teeple.

Stephen Samuels, Hudson's counsel, was present as an observer. The record indicates Mr. Samuels made no arguments and asked no questions of the witnesses. Hudson was not listed as a party on the caption nor was Hudson's counsel listed as a participating attorney in the Order. Mr. Samuels' sole participation at the hearing was to request that Commissioner Childs explain to Mr. Teeple that regardless of the result of her ruling, the Claimant would go forward with prosecuting her Form 50.

Commissioner Childs issued an Order finding that Hudson was an independent contractor rather than an employee. Based on this finding, she further concluded that Caregivers was not an employer in violation of the Act and, as such, would not be required to obtain coverage or fined for being uninsured. The Order does not list Claimant as a party, nor is there any indication Claimant or her counsel participated in the hearing as a party.

The underlying claim was set for a Form 50 hearing before Commissioner J. Alan Bass on December 11, 2006. At that hearing, both the Employer and the SCUEF asserted the claim was barred by *res judicata* due to the Order issued by Commissioner Childs. The parties were ordered to submit written arguments on this issue.

Both the Employer and SCUEF made general denials concerning Hudson's accident and

resulting injuries.

Commissioner Bass issued an Order finding Hudson was an employee of Caregivers and that Caregivers was subject to the Act. However, although not raised as a defense by any of the defendants, he *sua sponte* found the claim not compensable as a matter of law, holding that Hudson's injuries "arose out of an idiopathic level floor fall."

All parties appealed to the Full Commission. Hudson appealed the finding the claim was not compensable. Caregivers appealed the denial of its motion to dismiss based on the decision at the Rule to Show Cause Hearing; res judicata and collateral estoppel; the Commissioner's refusal to allow Caregivers to present a written presentation; the finding Hudson was an employee; and, the finding that Caregivers was subject to the Act. The SCUEF appealed the finding Hudson was an employee; the finding Caregivers was subject to the Act; and the denial of the preclusive effect of the Rule to Show Cause Order.

94 The Full Commission affirmed in part and reversed in part. The Full Commission adopted the Single Commissioner's ruling that the claim was not compensable as a matter of law, but reversed on the finding Hudson was an employee of Caregivers, finding instead she was an independent contractor:

Hudson appealed to this Court.

LAW/ANALYSIS

Hudson raises two issues on appeal:

1. Whether the Commission erred as a matter of fact and law in finding Hudson and Caregivers of South Carolina, LLC did not have an employee/employer relationship?
2. Whether the Commission erred as a matter of fact and law in finding Hudson's injury of February 5, 2004 arose out of an idiopathic level floor fall and is not compensable under the South Carolina Workers' Compensation Act?

1. Employee/Employer Relationship.

The Commission held Claimant was an independent contractor. This Court finds this was error. The greater weight of the evidence shows Hudson was an employee of the Caregivers of South Carolina.

The existence of an employment relationship is a factual question that determines the jurisdiction of the Workers' Compensation Commission and is therefore reviewable under the preponderance of the evidence standard. Brayboy v. WorkForce, 383 S.C. 463, 681 S.E.2d 567 (2009). When the issue involves jurisdiction, the appellate court may take its own view of the preponderance of the evidence. It is South Carolina's policy to resolve jurisdictional doubts in favor of inclusion rather than exclusion. White v. J.T. Strahan Co., 244 S.C. 120, 135 S.E.2d 720, 723 (1964).

After a full review of the evidence, this Court finds that Caregivers was set up by its owners as a deliberate scheme to avoid payroll taxes and other liabilities associated with employees – including liability under the Workers' Compensation Act.¹ By denoting its workers as “independent contractors” and having their paychecks written by the client, Caregivers was able to offer in-home care services to its clients at a substantially lower cost than its competitors. [Tr. p. 15, line 8-p. 16, line 3]. Public policy strongly disfavors one business gaining an advantage over another by misclassifying its employees.

The evidence shows Hudson was an employee of Caregivers. The preponderance of the evidence shows Caregivers exercised near complete control over her activities, including her

¹Social Security and Medicare taxes are currently 7.65% of payroll. South Carolina employers are required to pay unemployment taxes. Employers are required to file returns and make the tax payments quarterly.

duties, her work schedule, her rate of pay, and her performance standards. The fact she received her paycheck from the client instead of directly from Caregivers is not dispositive.

The arrangement set up by Caregivers is similar to the arrangement in Kilgore Group, Inc. v. South Carolina Employment Sec. Comm'n, 313 S.C. 65, 437 S.E.2d 48 (1993). Although Kilgore dealt with an appeal from the Employment Security Commission, the legal test for an employee is the same as in workers' compensation cases. In Kilgore, the putative employer was an agency that supplied temporary workers to perform

a variety of tasks, including construction work, machine operation, truck driving, cleaning, stocking, and assembly. 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. Kilgore then contracted with the individual workers to fill the positions required by the client. According to Kilgore's president, the contract could be based on an hourly wage or a fixed amount for the job. However, all workers were required to turn their hours in to Kilgore. Hourly workers were permitted to take "draws" on the amount they had worked. Kilgore's president testified that the contracts expressly provide that the relationship is one of an independent contractor. Id. at 67.

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Kilgore's clients controlled the daily activities of the workers. The clients "felt free to tell Kilgore not to send a worker back if they were ever dissatisfied with his work." Id. Based on these facts, the South Carolina Supreme Court held "the workers were employees of Kilgore, and not independent contractors." Id. Kilgore controls the result in this case.

Workers' compensation awards are authorized only if an employer-employee relationship exists at the time of the injury. "The general test applied is that of control by the employer. It is not the actual control then exercised, but whether there exists the right and authority to control and direct the particular work or undertaking, as to the manner or means of its accomplishment." Young v. Warr, 252 S.C. 179, 189, 165 S.E.2d 797, 802 (1969). There are four elements which determine the right of control: 1) direct evidence of the right or exercise of control; 2) furnishing

of equipment; 3) right to fire; and 4) method of payment. These factors "should be evaluated in an evenhanded manner in determining whether the questioned relationship is one of employment or independent contractor." Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 676 S.E.2d 700 (2009). Hudson is able to establish all four elements showing the right of control.

1. Direct Evidence of the Right or Exercise of Control

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Numerous documents in the record show Caregivers had the right of control over Hudson, as does the testimony. The work application itself states Hudson was required to (1) use the title "Caregiver"; (2) "not provide any service not specified/approved by Caregivers of South Carolina; (3) not divulge the names of any Caregivers' clients to other companies; and (4) "not provide any services to 'clients' without the authorization of Caregivers of SC. : See Carter's Dependents v. Palmetto State Life Insurance Co., 209 S. C. 67, 38 S.E.2d 905 (1946)(contractual agreement "to give my full time to the service of the Company to not engage in any other occupation while in the employ of the Company" was sufficient evidence of control to make insurance agent an employee). The owners of Caregivers, David and Janet Teeple, confirmed these points in their testimony. [Tr. 20, line 4-p. 11].

Other documents specified the level of control in even more detail. An information sheet stated:

To become a *Caregiver* you must be a reliable person – someone we can trust, count on, someone the client can count on. If you agree to accept an assignment by the client, it is understood you will be there on-time, you will do it. Excuses are not part of being a *Caregiver*. If there is some unforeseen circumstance that comes up, you must contact *Caregivers of South Carolina, LLC* immediately and inform us. We cannot and will not use individuals who do not take their work seriously.

Caregivers do not provide duties that are provided by a nurse. We provide non-nursing duties. These duties include: providing personal care (assisting with

bathing, dressing, etc.); companionship; light housekeeping; meal preparation; running errands; taking clients to appointments, etc. (emphasis in original).

This passage shows that Caregivers exercised control over the specific duties and tasks performed by Claimant. David Teeple conceded specifically that "caregivers have to perform only the functions you specify they perform. . . . They cannot do LPN or CNA duties." [Tr. p. 21, lines 3-23]. He stated people wishing to perform nursing duties have "got to go work for a – a different kind of company. [Tr. p. 21, lines 22-23].

A third company document specified other details. Under Calling Out/Being Late instructions, Caregivers required the worker to, "Always call us if you are going to be late or if you are sick. Respect works both ways. Do not call the client, call us." (emphasis in original). With regard to these instructions, Teeple testified, "Well – yeah, we require it. Yes, Sir." [Tr. p. 24, line 2]. The evidence shows that Claimant was also not allowed to give out her phone number to the client, all communications went through Caregivers.

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The facts reveal that Caregivers also set the work schedule. The hearing Commissioner asked David Teeple: "When you give out an assignment – whatever you want to call it – to a caregiver, do you tell them what time to be at the client's house?" Teeple answered, "If that's the question, yes sir." [Tr. p. 26, lines 8-16]. Teeple confirmed Caregivers told them what time to be there and where to go. [Tr. p. 26, lines 21-24]. See Spivey v. D.G. Constr. Co., 321 S.C. 19, 467 S.E.2d 117 (Ct.App.1996)(employment relationship shown when employer instructed worker where to report and "explained to worker exactly what needed to be done").

2. Furnishing of Equipment.

Hudson used no equipment, tools, or materials on her job. However, she did turn her hours into Caregivers on a form provided by them. She was required by Caregivers to use the

specific form to track her time. [Tr. P. 27, line 4-p. 28, line 2]. This factor weighs towards her being an employee. See South Carolina Industrial Commission v. Progressive Life Ins. Co., 242 S. C. 547, 550, 131 S.E.2d 694, 695 (1963)(insurance agents who "were furnished supplies, which included all forms" were employees).

3. Right to Fire.

The employment application between the parties states, "I understand that should Caregivers of SC choose to utilize my services as an independent contractor, Caregivers of SC will refer me to said client and as an independent contractor I, as well as the client, have the right to terminate such relationship with no cause." The application goes on to effectively state that Hudson had the same relationship with Caregivers:

I understand that false statements made, by providing misleading information, incorrect answers, or not disclosing requested and/or appropriate information shall result in Caregivers of SC removal of your name from being considered for referral as an independent contractor.

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While the terms carefully avoid explicitly stating Hudson is an employee, the Court finds the effect of this provision indicates she was treated as an employee. See Kilgore Group, Inc. v. South Carolina Employment Sec. Comm'n, 313 S.C. 65, 437 S.E.2d 48 (1993) (While a contract entered into by the parties must be considered, language in the contract declaring the relationship to be that of an employer/independent contractor is not dispositive, because the parties do not control the legal effect of their contract.).

The Teeples testified that Hudson was not their employee because she was "hired" by their client. As such, they contend only the client has the right to fire Hudson. It is clear, however, that Caregivers also retained the right to fire Hudson throughout her employment. The Teeples may have characterized this as "removal from the referral list," but whatever terms are

used, it is still tantamount to the right to fire. See Simmons v. Robinson, 303 S.C. 201, 399 S.E.2d 605 (Ct. App. 1991)(fact that foster parent license may be revoked by DSS "if the foster family fails to maintain proper standards of care and services to children" shows that foster parents are employees of DSS).

4. Method of Payment.

The method of payment also supports a finding that Claimant is an employee. David Teeple testified that Caregivers charged its "clients \$11.50 an hour for each hour of healthcare services." [Hearing tr. P. 15, lines 14-18]. Caregivers set it up "so that the client pays \$9.00 per hour to the [worker] and \$2.50 per hour to [Caregivers]. [Hearing tr. P. 15, lines 14-18]. Both Hudson's rate of pay and work schedule were set by Caregivers.

Caregivers argues that Hudson must be an independent contractor because the client wrote the paycheck directly to her. The fact Caregivers structured the payment system so that they never wrote a check directly to Hudson is not dispositive as to her employment status.

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As stated above, Hudson was required to turn her hours in to Caregivers on a form provided by them. See Kilgore Group, Inc. v. South Carolina Employment Sec. Comm'n, 313 S.C. 65, 437 S.E.2d 48 (1993) (fact that "all workers were required to turn their hours in to" the employing agency was evidence of the employment relationship). Caregivers set the hourly rate Hudson was paid. Independent contractors are typically paid a set price for a job from which they deduct the cost of materials and other expenses. See Marlow v. E.L. Jones & Son, Inc., 248 S.C. 568, 151 S.E.2d 747 (1966). Hudson was paid by the hour. Hourly wages are a strong indicator that the worker is an employee. Kilgore; South Carolina Industrial Commission v. Progressive Life Ins. Co., 242 S. C. 547, 550, 131 S.E.2d 694, 695 (1963)(insurance agents who were paid guaranteed minimum wage were employees); Spivey v. D.G. Constr. Co., 321 S.C. 19,

467 S.E.2d 117 (Ct.App.1996)(fact worker was paid \$8.00 per hour was evidence that he was an employee). Furthermore, she was paid every week rather than upon completion of an assignment.

An analysis of all four "control" factors leads to a conclusion by this Court, based upon a preponderance of the evidence, that Claimant is an employee of Caregivers; not an independent contractor. It is therefore found as a fact that Claimant is an employee. The Commission has jurisdiction over her claim.²

2. Injury by Accident.

The Commission found Hudson's accident was not compensable as a matter of law based on the "idiopathic level-floor fall" doctrine. The Court finds this decision, based upon the facts of this case, is legal error. Hudson testified that she fell when her shoe "hung on something", specifically "a crack or a hole in the concrete there." [Tr. p. 57, ll. 19-25]. As such, her fall was not "unexplained" as determined by the Commission. The Commission misapplied the law of South Carolina when it held this was an "idiopathic level floor fall." See Pierre v. Seaside Farms, Inc., Op. No. 26777 (S.C.Sup.Ct. filed February 16, 2010)(Shearouse Adv.Sh. No. 7 at 93)(reversing commission's finding "that the risk was not associated with [claimant's] employment because the sidewalk was no different in character from other sidewalks" when the "accident occurred as a result of a hazard that existed on the employer's premises, i.e., [claimant] slipped and fell on a wet sidewalk").

²Although not necessary for the decision, if one accepts Caregivers' assertion that Hudson was employed by the client, the Court must determine if Hudson was a statutory employee. David Teeple admitted that the only revenue generated in his company is from work done by the caregivers, and without them, he would have no business. [Tr. p. 14, lines 4-15]. He specifically conceded "that the caregivers are *essential* to [his] business, that without them [he] wouldn't have a business." [Tr. p. 15, lines 4-7 (emphasis added)]. This testimony plainly meets the test for a statutory employee, to wit: that the work be "a necessary, essential, and integral part of the owner's business." Glass v. Dow Chemical Co., 325 S.C. 198, 482 S.E.2d 49 (1997).

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This issue is subject to a substantial evidence standard of review. The compensability of a particular event or injury as an accident within the purview of the South Carolina Workers' Compensation Act is a question of law to be decided by the courts. Sturkie v. Ballenger Corporation, 268 S.C. 536, 539, 235 S.E.2d 120, 121 (1977). Ordinarily, whether there is any causal connection between employment and an injury is a question of fact for the Commission. Sharpe v. Case Produce, Inc., 336 S.C. 154, 519 S.E.2d 102 (1999). When only one reasonable inference can be deduced from the evidence, it becomes a question of law for the courts. Kinsey v. Champion American Service Center, 268 S.C. 177, 232 S.E.2d 720 (1977). The issue of whether a particular event constitutes a compensable accident is for the court. Sturkie v. Ballenger Corp., 268 S.C. 536, 235 S.E.2d 120 (1977). A court may reverse or modify the Commission's decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are affected by other error of law. Broughton v. South of the Border, 336 S.C. 488, 520 S.E.2d 634, 637 (Ct. App. 1999). "Where employer and employee are subject to the compensation act, . . . an injured employee should not be excluded from the benefits of the law upon the ground that the accident did not arise out of and in the course of his employment when there is substantial doubt (arising from the proven facts) of the propriety of such conclusion." Pelfrey v. Oconee County, 207 S.C. 433, 440, 36 S.E.2d 297, 300 (1945).

The accident happened when Claimant went outside her client's house to get the mail for the client. Claimant usually performed this service for her client. As she walked across broken concrete on the way to the mailbox, Claimant suddenly fell forward landing on her face and knocking herself unconscious. Hudson did not initially realize what had happened. However, when she examined pictures of the scene taken by her niece and nephew, she saw the hole she

had stepped in which caused her to fall. She testified:

Okay. I couldn't figure out what happened. And then when I saw the pictures – okay. You know how there's sidewalks and then there's like a concrete path leading to the city mailboxes?

Okay. And there was like a – a crack or a hole in the concrete there. And my shoe evidently – I'm – I'm assuming this is how it happened – got caught in there as – because I – I went down. *What I remember before I got – before I fell down – I was like hung on something. So that's the only thing it could have been.* [Tr. p. 57, l. 13-p. 58, l.1 (emphasis added)].

Hudson went on to identify in the pictures the specific crack that caused her to fall:

"There it is right, right there. I was wearing Keds. So it just barely fit – I guess so narrow, it just fit in there." [Tr. p. 58, ll. 11-16].

Notably, Hudson gave a consistent description to the emergency room. The history from February 9, 2004 states, "This is a 56-year old lady who *tripped falling on concrete* three days ago." [APA p. 21 (emphasis added)].

Subsequent contemporaneous reports in the record confirm a fall because of the uneven concrete. Handwritten notes from the Greenville Hospital System on February 15, 2004 note she "slipped" and "fell from" a "standing position"³ The report notes a loss of consciousness, but memory of the impact and coming to the hospital. [APA p. 32]. The April 15, 2004 report from her neurologist, Dr. Schexnayder, states, "She stated that she was in her normal state of health where she works as a nursing assistant and had a fall on 2/5/04. Apparently her right foot slipped. She fell rapidly and the next thing she knew she was down, somewhat stunned, and did not have a prolonged period of loss of consciousness, but was dizzy and had some dysequilibrium, and felt relatively ill for a number of minutes afterward." [APA p. 53]. The

³The reference to a "standing position" does not imply to the Court she was standing still. It simply means from a standing position as opposed to "from height". [APA p. 32].

report from her orthopaedic surgeon makes the same point: "In February of 2004, she was at work when she apparently *slipped on some uneven concrete* going out to a mailbox." [APA p. 76 (emphasis added)]. Dr. Zgleszewski's report of November 19, 2006 has the same history: "She states that her *right foot got caught on an uneven pavement* which caused her to fall face down upon the pavement hitting her head, face, breaking with left wrist, injuring both knees." [APA p. 160]

These reports are all consistent with Hudson's testimony. Moreover, they were made directly to the doctors at a time when neither Claimant nor any other party had any idea there was even an issue of an idiopathic level floor fall in the case. Neither the SCUEF nor the Employer raised the issue in their contentions on the record.

The evidence clearly shows Hudson tripped and/or slipped on uneven concrete on the sidewalk. Her foot got caught in a hole which she was even able to identify in the pictures. There is a complete and clear explanation for how she fell. As such, it was error of the Commission to apply the idiopathic level-floor fall doctrine to this case. See Pierre v. Seaside Farms, Inc., Op. No. 26777 (S.C.Sup.Ct. filed February 16, 2010)(Shearouse Adv.Sh. No. 7 at 93)(reversing commission's finding "that the risk was not associated with [claimant's] employment because the sidewalk was no different in character from other sidewalks" when the "accident occurred as a result of a hazard that existed on the employer's premises, i.e., [claimant] slipped and fell on a wet sidewalk").

The Commission erred in disregarding the positive evidence of the hazard that caused Claimant's fall. The Commission found as fact that "Claimant testified she does not know why she fell." [Order p. 7]. A full review of the record reveals this determination is not quite correct. The complete statement was, "You know, sir, *at the time*, I couldn't tell you, because I'm not a

clumsy person. Later, my niece and nephew went down and took pictures, and there was – ”
[Tr. p. 55, lines 9-12 (emphasis added)]. Hudson never completed her statement due to an
objection interposed by the SCUEF’s attorney.

Her point is clear though, “at the time” she did not know what happened; only that it was
not her own clumsiness that caused her to fall. In this respect, Hudson is like everyone else who
slips and falls. At first, they don’t know why they fell – had they known about the hazard, they
would not have fallen in the first place. See, e.g. Felder v. K-Mart Corp., 297 S.C. 446, 447,
450, 377 S.E.2d 332 (1986)(plaintiff “did not realize there was water on the floor until he
slipped. When he hit the floor, the water wet the whole side of his clothes.”). Cf. Hancock v.
Mid-South Management, Inc., 381 S.C. 326, 673 S.E.2d 801 (2009)(reversing trial court’s grant
of summary judgment where “Although Petitioner could not identify the exact cause of her fall,
she testified that she tripped on ‘a rock or something to that effect,’ ‘something raised up,’ and
‘broken asphalt.’”).

In light of Hudson’s testimony and the photograph showing the specific hazard that
caused her to fall, it was incorrect for the Commission to conclude “It would be speculation to
render a factual finding regarding the cause of Claimant’s fall since even the Claimant herself
indicates she does not know why she fell.”

The Commission also found it significant that Hudson “described her fall as a ‘freak
accident.’” This Court finds that such a characterization should not be grounds for denying the
claim. An “accident” is an essential element of every workers’ compensation claim; a freak
accident is even more so. Compare Stillman v. Multi-States Electric, 28 Ark.App. 193, 771
S.W.2d 807 (1989)(“the evidence shows that he was able to fully perform the duties for which he
had been employed for over four months, and until he injured his back in a freak accident caused

by soapy water and oil on the floor.”), with Pierre v. Seaside Farms, Inc., Op. No. 26777 (S.C.Sup.Ct. filed February 16, 2010)(Shearouse Adv.Sh. No. 7 at 93)(reversing commission’s finding “that the risk was not associated with [claimant’s] employment because the sidewalk was no different in character from other sidewalks” when the “accident occurred as a result of a hazard that existed on the employer’s premises, i.e., [claimant] slipped and fell on a wet sidewalk”).

The Court finds that this case is controlled by the Supreme Court’s analysis in Pierre. In Pierre, the claimant slipped and fell on a wet sidewalk on the employer’s premises. The Commission denied his claim because “the risk was not associated with [claimant’s] employment because the sidewalk was no different in character from other sidewalks.” Id. In so doing, the Supreme Court determined the Commission made a legal error, which this Court perceives is the same error the Commission made in the instant case.

The source for the Commission’s reasoning came from a passage in Bagwell:

We are not prepared to accept the contention that, in the absence of special condition or circumstance, a level floor in a place of employment is a hazard. Cement floors or other hard floors are as common outside industry as within it. The floor in the instant case did not create a hazard which would not be encountered on a sidewalk or street or in a home where a hard surface of the ground or a hard floor existed.

The Commission took this statement literally in both the instant case and Pierre, essentially holding that any fall onto a level concrete surface does not arise out of the employment. The Commission overlooked the evidence in both cases of hazards on the concrete that caused the fall. In Pierre, the hazard was water; in the instant case, the hazard was a hole where the concrete was broken.

Therefore, Hudson is entitled to workers’ compensation benefits as a matter of law.

MOTION TO BE RELIEVED

Attorney Johnnie W. Baxley, III, (no relation to this Court) representing Caregivers of South Carolina, LLC, filed a Motion to be Relieved as Counsel in this case on July 8, 2010. An Amended Motion to be Relieved as Counsel was filed on August 19, 2010, after consent signatures were obtained. This motion was heard at oral arguments on this claim. In light of the fact that all parties were present and ready to proceed with the merits of the appeal, the Court ruled that Mr. Baxley would not be allowed to withdraw as counsel at that time for reasons of judicial economy, and Mr. Baxley competently represented his client in both the brief submitted to this court as well as oral arguments. Once underlying appeal was decided, Mr. Baxley renewed his Motion to be Relieved

9.7 The Court hereby grants Mr. Baxley's renewed Motion to be Relieved as Counsel before the Circuit Court and specifically finds that good and proper grounds have been presented under the South Carolina Rules of Civil Procedure. Based upon the Motion and information received before oral arguments on the underlying appeal, the Court finds that good cause exists to grant the Motion to be Relieved as Counsel. Mr. Baxley shall no longer be counsel of record for Caregivers of South Carolina, LLC as of the date of this Order, in this pending appeal. A copy of this Order shall be served directly upon Caregivers of South Carolina, LLC. Caregivers of South Carolina, LLC and its President, David Teeple, are hereby advised by this court that this corporation must be represented by an attorney and that only an attorney can appeal this decision or represent the corporation in further proceedings. Caregivers of South Carolina, LLC and its President, David Teeple, are specifically advised by this Court that they will have 30 days from the date of this order to file an appeal to the South Carolina Court of Appeals, and that only an attorney can file that appeal for the corporation. Nothing herein shall be construed to relieve

Mr. Baxley with regard to any further proceedings before the Commission, control of that decision remains with the Commission.

CONCLUSION

The Court rules in the following manner:

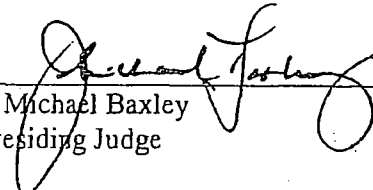
(1) The Order of the South Carolina Workers' Compensation Commission should be, and hereby is, Reversed;

(2) The case is remanded to the South Carolina Workers' Compensation Commission for further proceedings consistent with this Order;

(3) The Commission shall make findings of fact and conclusions of law consistent with this Order; and shall enter an Order providing for medical treatment for Claimant's causally related injuries and temporary total disability compensation payable from February 6, 2004;

 (4) Attorney Johnnie W. Baxley, III, shall be, and hereby is, relieved as counsel of record for Caregivers of South Carolina, LLC as of the date of this Order with regard to this appeal. A copy of this Order shall be served directly upon Caregivers of South Carolina, LLC. Caregivers of South Carolina, LLC and its President, David Teeple, are hereby advised by this court that this corporation must be represented by an attorney and that only an attorney can appeal this decision or represent the corporation in further proceedings regarding this appeal. Caregivers of South Carolina, LLC and its President, David Teeple, are specifically advised by this court that they will have 30 days from the date of this order to file an appeal to the South Carolina Court of Appeals, and that only an attorney can file that appeal for the corporation.

IT IS SO ORDERED.



J. Michael Baxley
Presiding Judge

December 13, 2010
Hartsville, South Carolina

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court Of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No: 08-CP-26-3032

RECEIVED

APR 29 2011

S.C. Supreme Court

Vennie Taylor Hudson Respondent,

v.

Caregivers of South Carolina, LLC, Employer, and
South Carolina Workers' Compensation Uninsured Employers' Fund, ... Appellants.

CONSENT MOTION TO CERTIFY APPEAL

Appellant Caregivers of South Carolina, LLC ("Caregivers"), by and with the consent of counsel for Respondent Vennie Taylor Hudson ("Hudson") and Appellant South Carolina Workers' Compensation Uninsured Employers' Fund ("the Fund"), hereby moves pursuant to Rule 204(b) of the South Carolina Rules of Appellate Procedure for certification of the instant appeal for review prior to determination by the South Carolina Court of Appeals. Certification is appropriate because the appeal involves "an issue of significant public interest [as well as] a legal principle of major importance." *Id.* Specifically, these issues include whether the order challenged on appeal is subject to immediate review and, if so, whether the circuit court improperly exercised jurisdiction and erroneously reversed the decision and order of the Appellate Panel of the South Carolina Workers' Compensation Commission denying benefits.

STATEMENT OF THE CASE

Respondent Hudson seeks compensation benefits for allegedly work-related injuries she sustained February 5, 2004. Following argument of a rule to show cause directing Caregivers to explain "why it should not be found in violation of the provisions of the . . . Act by its failure to maintain workers' compensation insurance coverage for its employees. . . .," former Commissioner Childs concluded that Caregivers "does not have employees. . . . [Rather, it] employs independent contractors." (February 18, 2005 Order, attached as Exhibit A, p. 1, 3) The commissioner ruled that Caregivers is exempt from the Act and "is not required to have workers' compensation coverage." (*Id.*, p. 3) Hudson was present for the hearing as a subpoenaed witness and was served with a copy of the order. No interested party appealed the single commissioner's ruling that Caregivers is exempt from the Act.

Following entry of the order on the rule to show cause hearing, Hudson filed a Form 50, Request for Hearing, identifying Caregivers as her uninsured employer and alleging it was responsible for payment of compensation benefits. Proceeding *pro se*, Caregivers filed its Form 51, Employer's Answer, dated March 15, 2005, in which it denied benefits on the basis that Respondent was not its employee, but rather an independent contractor who was not entitled to benefits. Thereafter, on April 4, 2005, Appellant South Carolina Uninsured Employers' Fund ("the Fund") filed its Form 51, Answer to Request for Hearing, in which it specifically denied the existence of an employer/employee relationship between Caregivers and Hudson. Hudson withdrew her Form 50 prior to the merits hearing scheduled for September 2005.

Hudson filed a second Form 50 dated September 6, 2006. In her Form 50, Hudson added a claim for brain injury with psychological overlay and again named Caregivers as her employer, as well as the Fund as Caregivers' insurance carrier. Over the objection of Caregivers, a hearing on Hudson's Form 50 occurred before the single commissioner on December 13, 2006. In his September 11, 2007 Decision and Order, attached as Exhibit B, former Commissioner J. Alan Bass acknowledged the ruling exempting Caregivers from the Act, Caregivers' objection to the hearing going forward on that basis, and Caregivers' assertion of applicable defenses, including *res judicata* and collateral estoppel. The single commissioner effectively overruled the earlier order and proceeded to a determination of the merits. Pertinent to this appeal, Commissioner Bass found Caregivers subject to the Act and that Hudson was its employee. He denied benefits, however, concluding that Hudson's fall was idiopathic and not compensable.

All parties appealed the September 11, 2009 Decision and Order to the Appellate Panel of the Full Commission, which affirmed in part and reversed in part in its Decision and Order dated March 18, 2008. The Full Commission Decision and Order is attached as Exhibit C. Specifically, the Full Commission rejected the *res judicata* and collateral estoppel arguments on the basis that Hudson was not a party to the compliance proceeding. The Full Commission also determined Hudson was an independent contractor and not an employee of Caregivers at the time in question and, therefore, reversed the single commissioner's order to the contrary. (March 18, 2008 Decision and Order, Ex. C, p. 7) The Full Commission affirmed the single commissioner's determination that Hudson sustained a non-compensable idiopathic fall. (*Id.* p. 8)

Hudson appealed to the court of common pleas, seeking review of two key holdings by the Full Commission: (1) that she was an independent contractor rather than Caregivers' employee; and (2) that she sustained a non-compensable, idiopathic fall. Following oral argument on August 30, 2010, the court entered its "Order Reversing Decision of Workers' Compensation Commission, Remanding Case to Commission for Determination of Benefits, and Relieving Employer's Counsel as to Appeal," attached as Exhibit D. In that order, the circuit court went beyond reversal and remand to the Commission for further proceedings, finding as a matter of law that Hudson was Caregivers' employee and that she sustained a compensable injury. It further directs that the Commission "*shall* make findings of fact and conclusions of law consistent with [the order]; and *shall* enter an Order providing for medical treatment" (January 4, 2011 Order, Ex. D, p. 18) (emphasis added). The circuit court noted the *res judicata* and collateral estoppel arguments raised by Caregivers, but did not address these arguments in its order.

Both the Fund and Caregivers challenged the circuit court order via timely notices of appeal in the South Carolina Court of Appeals. Thereafter, in a telephone conference on March 22, 2011, that court directed the parties to consider and brief the issue of whether the circuit court order is subject to immediate appeal. That oral order was memorialized in a written Order filed March 23, 2011, and briefing of that issue is underway.

ARGUMENT

Certification to the South Carolina Supreme Court is appropriate "where the case involves an issue of significant public interest or a legal principle of major importance."

Rule 204(b), SCACR. This appeal satisfies both prongs and is, therefore, appropriate for certification to this Court for appellate review.

The first issue is whether the challenged order constitutes a final order subject to immediate review in light of the recent holding by this Court in *Charlotte-Mecklenburg Hospital Authority v. South Carolina Department of Health and Environmental Control*, 387 S.C. 265, 692 S.E.2d 894 (2010), the decision of the court of appeals in *Long v. Sealed Air Corp.*, ___ S.C. ___, 706 S.E.2d 34 (Ct. App. 2011), as well as other applicable precedent. The express terms of the order challenged on appeal make it clear that no further proceedings are necessary to finally and formally fix the rights of the parties. As such, the order is ripe for immediate review. To hold to the contrary would deprive the parties of meaningful, statutorily authorized review and subject them to needless additional time and expense in a circuitous cycle of litigation. Such cannot be the intent of the General Assembly, which obviously meant for parties to administrative proceedings access to "a meaningful opportunity to be heard." *Long*, 706 S.E.2d 39.

The second issue involves the effect of the order of the single commissioner in the compliance proceeding that Hudson is an independent contractor and that Caregivers is not subject to the provisions of the Act. Caregivers and the Fund contend the order constitutes an unappealed ruling that became the law of the case and requires affirmance. *Transportation Ins. Co. and Flagstar Corp. v. South Carolina Second Injury Fund*, 389 S.C. 422, 431, 699 S.E.2d 687, 692 (2010) (citation omitted); *see also ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (an unappealed ruling, "right or wrong," becomes the law of the case) (citation omitted). Hudson disagrees on the basis that she was not a party to the compliance

proceeding and thus is not bound by the order.

The third issue involves whether the circuit court erred in exercising jurisdiction and in determining that sufficient evidence demonstrates that Hudson's status as an employee and that she sustained a compensable injury, thereby fixing the liability of Caregivers and/or the Fund for payment of benefits and continuing medical care for Hudson's injuries. *Paschal v. Price*, ___ S.E.2d ___, 2011 WL 1236160, *1 (2011) (the question of whether a workers' compensation claimant is an employee or an independent contractor is a jurisdictional matter subject to the Supreme Court's own view of the preponderance of the evidence); *Wilkinson ex rel. Wilkinson v. Palmetto State Transportation*, 382 S.C. 295, 676 S.E.2d 700 (2009) (holding that the four factors for determining employment status apply with equal force in both directions); *Kilgore Group, Inc. v. South Carolina Employment Security Comm'n*, 313 S.C. 65, 68, 437 S.E.2d 48, 49 (1993) (the primary consideration in determining whether an employer/employee relationship exists is whether the alleged employer has the right to control the employee in the performance of the work and the manner in which it is done).

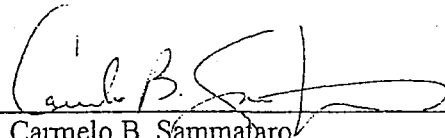
These issues are appropriate for immediate review in this Court because they are of significant public interest and constitute significant legal questions. Given the uncertainty that arises from the holding of *Long v. Sealed Air*, as well as the persuasive counter-arguments raised in the dissenting opinion in that case, this Court should overrule *Long* and clarify the final decision rule as it applies in workers' compensation proceedings. Certification also is appropriate to address the merits of the order of the circuit court and to finally determine the rights of the parties in this case, initiated nearly seven years ago.

CONCLUSION

In light of the important legal questions raised by this case, the parties request that the Court grant the motion for certification pursuant to Rule 204(b) of the South Carolina Appellate Court Rules.

April 29, 2011

By:

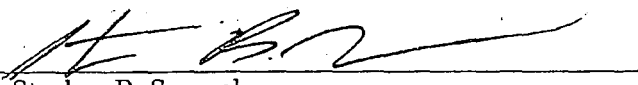

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April 29, 2011

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ATTORNEYS FOR RESPONDENT

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4/28/11, 2011

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ATTORNEYS FOR APPELLANT SOUTH
CAROLINA WORKERS' COMPENSATION
UNINSURED EMPLOYERS' FUND

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Civil Action No. 2008-CP-26-03032

Vennie Taylor Hudson, ... Respondent,

v.

Caregivers of South Carolina, LLC, and SC Uninsured Employers' Fund, ... Appellants.

**RESPONDENT'S MEMORANDUM OF LAW
IN OPPOSITION TO DISMISSAL OF APPEAL AS INTERLOCUTORY**

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Attorney for Respondent

Columbia, South Carolina
May 2, 2011

QUESTIONS PRESENTED

1. As the Order of the Circuit Court remanded this case to the Workers' Compensation Commission, must this appeal be dismissed as interlocutory per Long v. Sealed Air Corp., Op. No. 4783 (S.Ct.App. filed January 26, 2011)(Shearouse Adv.Sh. No. 4 at 57).

PROCEDURAL AND FACTUAL BACKGROUND

This workers compensation matter arises out of a work-related injury by accident suffered by the Respondent, Vennie Hudson, on February 5, 2004. The Workers' Compensation Commission denied her claim for benefits on two grounds: (1) that she was an independent contractor rather than an employee; and (2) her accident did not arise out of her employment as a matter of law because it was the result of an "idiopathic level-floor fall." The Circuit Court reversed on both issues. These rulings are the primary issues on appeal.

The Circuit Court specifically ordered:

IT IS THEREFORE ORDERED that the Order of the South Carolina Workers' Compensation Commission should be, and hereby is, Reversed;

IT IS FURTHER ORDERED that the case is remanded to the South Carolina Workers' Compensation Commission for further proceedings consistent with this Order;

IT IS FURTHER ORDERED that the Commission shall make findings of fact and conclusions of law consistent with this Order; and shall enter an Order providing for medical treatment for Claimant's causally related injuries and temporary total disability compensation payable from February 6, 2004;

On March 23, 2011, Chief Judge Few advised the parties in a telephone conference that the Court intended to dismiss the appeal pursuant to Long v. Sealed Air Corp., Op. No. 4783 (S.Ct.App. filed January 26, 2011)(Shearouse Adv.Sh. No. 4 at 57). The Court then issued an Order holding the briefing schedule in abeyance to allow the parties to submit appealability memos.

ARGUMENT

1. The Circuit Court Order is Subject to Immediate Review because it Finally Determines the Rights of the Parties.

This Court should decline to dismiss the appeal.¹ The case as presented constitutes a final order of the Circuit Court as defined in the case law and S.C. Code Ann. § 1-23-390 (2004). Moreover, even if the order is not a “final order” it is nonetheless immediately appealable because “review of the final agency decision would not provide an adequate remedy.” Id.

Two recent decisions have attempted to narrow the class of cases subject to an appeal from administrative agencies. The first, Charlotte-Mecklenburg Hosp. Authority v. South Carolina Dept. of Health and Environmental Control, 387 S.C. 265, 692 S.E.2d 894 (2010), dismissed an appeal from the Administrative Law Court as not immediately appealable because the ALC remanded the matter to the administrative agency to make a final determination of the core issue. The second, Long v. Sealed Air Corp., Op. No. 4783 (S.Ct.App. filed January 26, 2011)(Shearouse Adv.Sh. No. 4 at 57), dismissed an appeal from the Workers’ Compensation Commission on similar grounds. This Court relied largely on Charlotte-Mecklenburg, as well as the Supreme Court’s earlier decisions in Montjoy v. Asten-Hill Dryer Fabrics, 316 S.C. 52, 446 S.E.2d 618 (1994) and Leviner v. Sonoco Products Co., 339 S.C. 492, 530 S.E.2d 127 (2000).

Charlotte-Mecklenburg is easily distinguishable. In that case, two entities were competing for a single certificate of need. The ALC found both parties qualified, but remanded the case to the DHEC to determine which party actually was entitled to receive the certificate of need. As the court noted, “Although the ALC decided questions of law involved in this matter, a final determination

¹Respondent joins in the arguments made by Appellant Caregivers of South Carolina, LLC, at pages 5-9 of its Memorandum of Law Addressing Appealability

as to the certificate of need has not been made.” Charlotte-Mecklenburg at 267, 692 S.E.2d at 895. Since the respondent in that case could have been awarded the certificate of need – thus mooted the appeal – the rights of the parties had not been finally determined. Conversely, in the instant case, the obligation of the Appellants to provide benefits has been finally fixed by the Circuit Court.

At first blush, Long seems to be more similar to the instant case. The difference lies in the limited scope of the issues decided. In Long, the Commission denied the claim on one issue: failure to report the injury within the ninety days allowed under S.C. Code Ann. § 42-15-20 (2010). Long v. Sealed Air Corp., Op. No. 4783 (S.Ct.App. filed January 26, 2011)(Shearouse Adv.Sh. No. 4 at 57). The case had to be remanded because the Commission never reached the other critical issues in the case, to wit: “whether the injury occurred during the scope and course of employment, set the claimant’s average weekly wage and compensation rate, and answer other questions which may arise.” Id. Even if this Court had affirmed on the notice issue, whether the employer was ultimately liability to pay benefits could still not be determined until the Commission made further findings. Had the Commission addressed these ancillary issues, then a decision on the merits by this Court would have been proper.

In the case *sub judice*, these other issues do not need to be determined. The Circuit Court’s Order mandated that Appellants “shall [provide] medical treatment for Claimant’s causally related injuries and temporary total disability compensation payable from February 6, 2004.” In this sense, the remand does “not require the exercise of independent judgment or discretion on the part of the commission.” Hicks v. Piedmont Cold Storage, Inc., 324 S.C. 628, 479 S.E.2d 831 (Ct. App. 1996), *distinguishing* Montjoy v. Asten-Hill Dryer Fabrics, 316 S.C. 52, 446 S.E.2d 618 (1994). The Commission is required to follow the instructions from the Circuit Court.

2. Dismissal of the Appeal would be a Waste of Judicial Economy and Create a Hardship for the Parties Unintended by the Legislature.

In the case at bar, the Circuit Court reversed the Commission's findings that (1) Hudson was an independent contractor rather than an employee; and (2) that her accident did not arise out of her employment as a matter of law because it was the result of an "idiopathic level-floor fall." The anomaly here is that Hudson's initial appeal to the Circuit Court was proper because the Commission's order dismissed her case with finality. Furthermore, had her case arisen after the 2007 amendments to the statute governing appeals from the Commission, a direct appeal to this Court would be proper. Yet, had the decisions gone the other way, the Employer and SCUEF would be denied the right to immediately appeal.

This creates enormous practical problems for bench and bar. Had the SCUEF and Caregivers not appealed the Circuit Court's Order, they risked being barred in a later appeal by the law of the case doctrine. See Transportation Ins. Co. and Flagstar Corp. v. South Carolina Second Injury Fund, 389 S.C. 422, 699 S.E.2d 687 (S.C. 2010)(holding "arguments are not properly before this Court either because the issue is not preserved or the issue was unappealed and is now the law of the case").

Workers' compensation cases are unique. Unlike civil litigation (and most administrative hearings) where there is one trial and one verdict, workers' compensation cases often involve multiple hearings and multiple decisions as the case evolves. A given case could begin with a hearing on whether the accident was work-related, followed by hearings over medical treatment and temporary compensation, and ending with a hearing awarding permanent disability compensation. It would be an absurd result if the parties were only allowed to appeal after the Commission made

a permanent disability award. This is precisely why the legislature permitted an immediately appeal where "review of the final agency decision would not provide an adequate remedy." S.C. Code Ann. § 1-23-390 (2004).

Consider the result of dismissing the appeal in this already six-year-old case. The issues of employment relationship and whether the accident arose from the employment have been decided with finality by the Circuit Court. The Circuit Court specifically instructed the Commission to "enter an Order providing for medical treatment for Claimant's causally related injuries and temporary total disability compensation payable from February 6, 2004." On remand, the Commission cannot reconsider these issues. It *must* order Respondents to provide medical treatment and pay compensation.

Once the Commission issues an Order with these predetermined findings, the Appellants have a choice. They could waive their rights and abandon further appeals. A party might be driven to such decision by the economic reality of continuing litigation, but it can hardly be the result intended by the legislature or the courts. Or they could continue the appeals.

If Appellants continue to appeal, consider what happens to both sides. The parties must again go through the full appeals process – from the Appellate Panel to the Circuit Court to this Court. Yet, since the only issues in dispute are the ones already decided by the Circuit Court and raised to this Court, neither the Appellate Panel nor Circuit Court can even address those issues. Appeals must be filed, hearings must be set, orders must be issued – there is no mechanism to appeal directly back to this Court.

The case was initially tried before the Commission on December 11, 2006. It has taken over 4 years to reach this Court – and even if this Court allows the appeal to continue, a decision is

unlikely for another year. If the case is remanded only to go through the same appeals process without a final resolution of the core issues, no decision will be reached until sometime in 2016 – *twelve* years from the original accident.

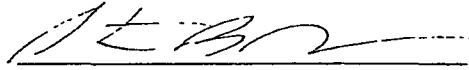
Both parties also suffer as to the merits. Once the remanded case is appealed beyond the Appellate Panel, the Appellants will be required to begin paying temporary total disability compensation. See S.C. Code Ann. § 42-17-60 (2004); Case v. Hermitage Cotton Mills, 236 S.C. 515, 115 S.E.2d 57 (1960)(weekly payments awarded by the Commission must commence upon expiration of the thirty-day supersedeas period). If the Circuit Court is ultimately reversed, Appellants will have paid compensation which was not due and is unlikely to be recovered.

Hudson similarly suffers even if she ultimately prevails. She will not receive compensation until the Appellate Panel issues its Order, nor will she know for years if she is truly entitled to the compensation. Even more importantly, she will receive no medical treatment until there is a *final* final decision.

CONCLUSION

For the foregoing reasons, this Court should find the Order of the Circuit Court is properly subject to immediate appellate review.

Respectfully Submitted,



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Attorney for Respondent

Columbia, South Carolina
May 2, 2011



The South Carolina Court of Appeals

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CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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May 13, 2011

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Re: Hudson, Vennie v. Caregivers of SC
2011184006

Dear Counsel:

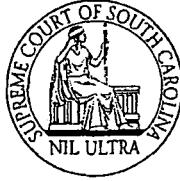
The Court has considered the memoranda submitted by the parties and has determined the appeal will proceed at this time.

Please be advised the Appellant's Initial Brief and Designation of Matter must be served and filed no later than June 13, 2011.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/laf



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

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May 25, 2011

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Columbia, SC 29250

Re: Hudson, Vennie v. Caregivers of SC

Dear Counsel:

The following Order has been endorsed on your Consent Motion to Certify Appeal in the above entitled matter.

"Consent Motion to Certify
Appeal is denied.

s/ Costa M. Pleicones J.
For the Court

May 25, 2011."

Hudson, Vennie v. Caregivers of SC
Page Two
May 25, 2011

By copy of this letter we are advising the South Carolina Court of Appeals of the action of this Court in this matter.

Very truly yours,

Daniel E. Shearman
DS

CLERK

DES/dmh

cc: The Honorable Tanya Gee

TURNER PADGET

TURNER PADGET GRAHAM & LANEY P.A.

CHARLESTON
COLUMBIA
FLORENCE
GREENVILLE
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Carmelo B. Sammataro

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September 18, 2012

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk, SC Court of Appeals
1015 Sumter Street
Columbia, SC 29201

RECEIVED
SEP 18 2012

SC Court of Appeals

Re: Vennie Taylor Hudson v. Caregivers of South Carolina, LLC and South Carolina Workers' Compensation Uninsured Employers' Fund

Tracking No.: 2011184006

File No.: 10856.101

Dear Ms. Kitchings:

In accordance with Rule 208(b)(7) of the South Carolina Appellate Court Rules, I write to advise the Court of the decision of the Supreme Court of South Carolina granting rehearing in the matter of *Cathy C. Bone v. U.S. Food Service and Indemnity Insurance Company of North America, L.L.C.*, Appellate case number 2010-171946. I also have attached a copy of the decision for ease of reference. The order is relevant to the finality question raised in the above-referenced appeal.

I am enclosing additional copies of this letter and the Order and ask that you please return clocked copies of each to me via our office courier. Thank you in advance for your time and attention, and please do not hesitate to contact me should the need arise.

With kind regards, I am

Very truly yours,

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



Carmelo B. Sammataro

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September 17, 2012
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CBS/tj

Enclosures

cc: Stephen B. Samuels, Esquire
Samuel T. Brunson, Esquire
(w/enc.)

The Supreme Court of South Carolina

Cathy C. Bone, Respondent,

v.

U.S. Food Service and Indemnity Insurance Company of
North America, Petitioners.

Appellate Case No. 2010-171946

ORDER

The petition for rehearing in the above matter is granted. Counsel will be advised when oral arguments have been rescheduled.

s/ Jean H. Toal C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

We would deny rehearing.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

Columbia, South Carolina

September 14, 2012

cc:

Carmelo B. Sammataro

John S. Nichols

Michael E. Chase

Blake A. Hewitt

G. Thomas Cooper, Jr.

Beth Carrigg

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SEP 18 2012

SC Court of Appeals

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Vennie Taylor Hudson, Respondent,

v.

Caregivers of South Carolina, LLC, and S.C. Workers'
Compensation Uninsured Employers' Fund, Appellants.

Appellate Case No. 2011-184006

Appeal From Horry County
J. Michael Baxley, Circuit Court Judge

Unpublished Opinion No. 2012-UP-569
Heard September 13, 2012 – Filed October 24, 2012

APPEAL DISMISSED

Carmelo B. Sammataro, of Turner Padgett Graham &
Laney, P.A., of Columbia, for Appellant Caregivers of
South Carolina, LLC.

Samuel T. Brunson, of Brunson Law Firm, of Florence,
for Appellant S.C. Uninsured Employers' Fund.

Stephen B. Samuels, of Samuels Law Firm, LLC, of
Columbia, for Respondent.

PER CURIAM: Caregivers of South Carolina, LLC and the South Carolina Workers' Compensation Uninsured Employers' Fund appeal the order of the circuit court reversing the decision of the Appellate Panel of the Workers' Compensation Commission (Appellate Panel) and finding (1) Vennie Taylor Hudson was an employee, as opposed to an independent contractor, of Caregivers and, thus, eligible to receive workers' compensation benefits; and (2) Hudson's injuries arose out of and in the course and scope of her employment. In its order, the circuit court reversed the Appellate Panel's order denying Hudson benefits and remanded the case for further proceedings. Accordingly, it is not a final judgment, and we dismiss the instant appeal as interlocutory. *See Bone v. U.S. Food Serv.*, Op. No. 27153 (S.C. Sup. Ct. filed Aug. 1, 2012) (Shearouse Adv. Sheet No. 26 at 113, 121) (affirming this court's order dismissing an appeal from the circuit court as interlocutory because the circuit court remanded the case to the Workers' Compensation Commission for further proceedings and noting that "a circuit court order remanding a matter to an agency is not a final judgment and it is not immediately appealable"), *reh'g granted* (Sept. 14, 2012); *see also Long v. Sealed Air Corp.*, 391 S.C. 483, 485-86, 706 S.E.2d 34, 35-36 (Ct. App. 2011) (holding that section 1-23-390 of the South Carolina Code (Supp. 2011), which is part of the Administrative Procedures Act, applies to appeals from the Workers' Compensation Commission and limits appellate review to "a final decision . . ."). The order may be appealed after final judgment.

APPEAL DISMISSED.

FEW, C.J., and WILLIAMS and PIEPER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court Of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No: 08-CP-26-3032

Vennie Taylor Hudson, ... Respondent,

v.

Caregivers of South Carolina, LLC, Employer, and
South Carolina Workers' Compensation Uninsured Employers' Fund, ... Appellants.

PETITION FOR REHEARING *EN BANC* BY
APPELLANT CAREGIVERS OF SOUTH
CAROLINA, LLC

Appellant Caregivers of South Carolina, LLC, ("Caregivers") hereby petitions this Court for rehearing *en banc*, pursuant to Rules 219, 221 and 240 of the South Carolina Appellate Court Rules, of its unpublished Opinion No. 2012-UP-569, filed October 24, 2012. That order dismissed the instant workers' compensation appeal as interlocutory pursuant to *Long v. Sealed Air Corp.*, 391 S.C. 483, 706 S.E.2d 34 (Ct. App. 2011) and *Bone v. U.S. Food Serv.*, Op. No. 27153 (S.C.Sup.Ct. filed Aug. 1, 2012) (Shearouse Adv. Sheet No. 26 at 113, 121), *reh'g granted* (Sept. 14, 2012). Caregivers' petition seeks rehearing *en banc* and reconsideration of the Court's order because: (1) the supreme court has granted rehearing in *Bone* and may alter or clarify its holding in that case; (2) this Court's order dismissing this appeal is erroneous to the extent it rests upon

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an overly broad, incorrect reading of precedent addressing finality of agency orders and to the extent that it fails to address the preclusive effect of the single commissioner's unchallenged ruling in 2005 that Caregivers is not subject to the act; and (3) this Court, sitting *en banc*, should take steps ensure that whatever pronouncement ultimately issues from the supreme court is applied uniformly.

FACTUAL AND PROCEDURAL BACKGROUND

The order challenged on appeal concludes as a matter of law that Respondent Vennie Taylor Hudson ("Hudson") is entitled to benefits and is silent with regard to the need to make any other findings on remand. Thus, the primary issue, and the core issue at this stage of the proceedings, is whether the dispositive finding that Hudson is entitled to benefits is subject to immediate review. In addition, Caregivers submits this Court failed to address its argument that the circuit court and this Court lack appellate jurisdiction over this claim in light of the unappealed ruling of the single commissioner that Caregivers is not subject to the Act. Nevertheless, this Court determined that the challenged order is interlocutory and not immediately appealable pursuant to S.C. Code Ann. § 1-23-390, its prior holding in *Long v. Sealed Air*, and the decision of the South Carolina Supreme Court in *Bone v. U.S. Food Service*.

ARGUMENT

I. THIS COURT SHOULD STAY ITS RULING PENDING THE OUTCOME OF REHEARING IN *BONE v. U.S. FOOD SERVICE AND INDEMNITY INSURANCE COMPANY OF NORTH AMERICA*.

By Order dated September 14, 2012, the South Carolina Supreme Court granted rehearing in the matter of *Bone v. U.S. Food Service and Indemnity Insurance Company of North America*, and oral argument is scheduled for Tuesday, November 12. The issue

in *Bone* is directly on point; to wit, did this Court err in dismissing the appeal of the circuit court's determination that Hudson is entitled to benefits as a matter of law. In the interests of judicial economy, this Court should stay a ruling on rehearing pending the final outcome of *Bone*. A stay of further proceedings in this appeal pending resolution of *Bone* makes sense. It prevents a successive appeal in this case in the event the Court adheres to its original holding. Additionally, it will provide additional guidance to the bench and bar on how the ruling should be applied going forward. In the alternative, in the event the court adheres to its original opinion, this Court likely will dismiss this appeal and allow it to percolate back up on appeal at a later date.

II. THE OPINION OF THE COURT MISPLIES AUTHORITY TO HOLD THAT THE ORDER OF THE CIRCUIT COURT WAS APPROPRIATELY DISMISSED AS AN INTERLOCUTORY ORDER NOT SUBJECT TO IMMEDIATE APPELLATE REVIEW.

Rehearing *en banc* is warranted inasmuch as dismissal of this appeal as interlocutory and not subject to immediate review unnecessarily adheres to a broadened definition of "final judgment" in workers' compensation cases to unfairly deprive timely appellate review to claimants and defendants who seek appellate review pursuant to S.C. Code § 1-23-390. See *Bone*, Op. No. 27153 at 119 (quoting *Charlotte-Mecklenburg Hospital Authority v. South Carolina Department of Health and Environmental Control*, 387 S.C. 265, 267, 692 S.E.2d 894, 895 (2010) (a "final decision . . . disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined.") (internal citation and quotation omitted)).

Rehearing *en banc* also is appropriate given the uncertainty stemming from *Charlotte-Mecklenburg*, *Long*, and *Bone* and the non-uniform application of those precedents by different panels of this Court. Rehearing *en banc* is necessary to ensure uniformity of this Court's decisions in workers' compensation appeals and to address questions of exceptional importance; to wit, whether dismissal deprives Caregivers of protection from further proceedings in spite of an unchallenged ruling its favor and whether rehearing is warranted to ensure fundamental fairness to Caregivers and other litigants in workers' compensation cases.

Caregivers further submits that reconsideration is warranted because (1) defining "final judgment" in this manner conflates "the requirements to initially appeal an administrative order with the requirements for further appellate review beyond the circuit court or the court of appeals" Op. No. 27153 at 134 (Hearn, A.J., dissenting); and (2) application of the holdings of *Bone*, *Charlotte-Mecklenburg*, and *Long* to this case (and other workers' compensation appeals pursuant to Section 1-23-390) results in an inflexible and unworkable heightened finality requirement that overlooks the hybrid nature of workers' compensation proceedings and unfairly deprives workers' compensation litigants of meaningful review.

South Carolina Code Section 1-23-390 contemplates appellate review of "any final judgment of the circuit court" sitting in an appellate capacity to review agency decisions in workers' compensation proceedings. As aptly noted by the dissent, the definition of "final judgment" as used in Section 1-23-390 is "[a]t the heart of this case." *Bone*, Op. No. 27513 at 124. Heretofore, binding and persuasive authority relied upon careful examination of whether or not the challenged order "finally determines an issue

affecting a substantial right on the merits.” *Id.* at 125-128 (collecting cases). If so, the order was subject to immediate review. By extending the holdings of *Bone*, *Charlotte-Mecklenburg* and *Long* to workers’ compensation appeals proceeding pursuant to Section 1-23-390, displaces the flexible finality rule emanating from the *Montjoy* and *Brown* line of cases, which is well-suited to case-by-case analysis of finality, in favor of a rigid and formulaic approach that mandates dismissal of any interlocutory appeal regardless of whether the challenged order finally determines the rights of the parties and irrespective of the tasks to be accomplished on remand. *Id.* at 129 (quoting *Charlotte-Mecklenburg*, 387 S.C. at 267, 692 S.E.2d at 894-895 (internal citations omitted in the original)).

It is true that *Bone*, relying on *Charlotte-Mecklenburg*, rejected an “involving the merits” analysis in administrative proceedings; however, *Charlotte-Mecklenburg* stemmed from administrative review of an agency order¹ and not from a petition for appellate review “beyond the circuit court or the court of appeals.” In adopting the faulty reasoning advanced in *Bone*, *Charlotte-Mecklenburg*, and *Long*, to appeals pursuant to Section 1-23-390, our appellate courts have summarily rejected years of settled case law emanating from *Montjoy*, *Brown*, and their progeny. These more

¹ As the dissent observed, “*Charlotte-Mecklenburg* . . . examined a different statute and a different stage in the appellate process for administrative cases. Rather than determining whether an order of the circuit court sitting in an appellate capacity or the court of appeals is ripe for further review under the applicable statute - section 1-23-390 - *Charlotte-Mecklenburg* only concerned whether the *administrative* order itself is final and therefore appealable to the judicial branch in the first instance. Put in the context of this case, *Charlotte-Mecklenburg* governs the appealability of the full commission’s decision, not the circuit court’s order reviewing it in an appellate capacity. **Because the full commission found Bone’s claim was not compensable, it rendered a final judgment and the circuit court could entertain the appeal under *Charlotte-Mecklenburg*.** At this point, appealability ceased to be governed by *Charlotte-Mecklenburg* and is now controlled by section 1-23-390, and nothing in our opinion suggests we intended to abrogate the existing framework under it.” Op. No. 27153 at 130 (emphasis added).

recent holdings also have obviated the flexibility inherent in *Montjoy*, *Brown*, and related decisions, which permitted appellate review of final orders involving the merits and denied review where the challenged orders did not finally determine “an issue affecting a substantial right on the merits.” Op. No. 27153 at 128.

In this case, the appellate panel of the full commission affirmed the denial of benefits. At that point, the agency decision became final, Caregivers and the Workers’ Compensation Uninsured Employers’ Fund rightfully sought review pursuant to Section 1-23-390, and the matter ceased to be governed by *Charlotte-Mecklenburg*. Pursuant to long-standing precedent construing the applicable appellate review statute – Section 1-23-390 – the circuit court’s order in this case likewise constituted a final order because it reversed the final decision of the commission and concluded, as a matter of law, that Hudson sustained a compensable injury. That finding constituted a final determination of the rights of the parties to the action and left nothing to be done by the Commission on remand other than execute that judgment. Nevertheless, “[r]ather than permit an appeal to the court of appeals to review that decision, which potentially could find her injuries are not compensable and end the matter,” the Court would require the case go back to the commission. Op. No. 27153 at 130. Such a result is untenable, portends significant waste of judicial resources and the resources of litigants on both sides, and should be rejected. On this basis, Caregivers urges this Court to grant rehearing.

III. REHEARING IS WARRANTED BECAUSE THE OPINION OF THE COURT FAILS TO ADDRESS RESPONDENTS’ ARGUMENT THAT THE UNAPPEALED FEBRUARY 18, 2005 ORDER IS ENTITLED TO PRECLUSIVE EFFECT AND DEPRIVED THE CIRCUIT COURT AND THIS COURT OF APPELLATE JURISDICTION.

This Court should grant rehearing because it failed to address the dispositive issue of whether the single commissioner’s February 18, 2005 Order is entitled to preclusive

effect as the law of the case, thereby depriving the circuit court and this Court of appellate jurisdiction. In failing to seek appellate review of the February 18, 2005 Order, Hudson and the Commission waived further review, and the show cause rulings became the law of the case. It was error for the Commission and the circuit court to proceed further. Further, the law of the case deprived this Court of appellate jurisdiction, and this Court should have dismissed the appeal on this basis rather than on the basis that the decision of the circuit court is not a final decision subject to immediate appellate review.

The single commissioner correctly noted all the way back in 2005 that the proper remedy from an adverse ruling on the employment question would have been a timely Form 30, Request for Commission Review, filed within fourteen days as required by S.C. Code Ann. § 42-17-50. See *Goodman v. City of Columbia*, 318 S.C. 488, 490, 458 S.E.2d 531, 532 (1995) (“§ 42-17-50 confers jurisdiction upon the Commission and provides for fourteen days to apply for review.”). A Form 50 in lieu of a timely appeal was no substitute and did not provide a proper vehicle for review of the single commissioner’s February 18, 2005 Order. *Brunson v. American Koyo Bearings*, 367 S.C. 161, 164-165, 623 S.E.2d 870, 872 (Ct. App. 2005) (absent timely appeal, “the findings of fact and law by the hearing commissioner become and are the law of the case. . .”), quoting *Green v. City of Columbia*, 311 S.C. 78, 80, 427 S.E.2d 685, 687 (Ct. App. 1993).

Numerous opinions from this Court recognize the jurisdictional nature of Section 42-17-50. See, e.g., *Brunson v. American Koyo Bearings*, *supra*, 367 S.C. at 166, 623 S.E.2d at 872 (“Only issues within the application for review under S.C. Code Ann. § 42-17-50 (1976) are preserved for appeal to the commission.”) (internal quotation omitted);

Lloyd v. AT & T Nassau Metals Corp., 299 S.C. 207, 383 S.E.2d 257 (Ct. App. 1989) (“the proper remedy is a timely appeal to the full Commission and then to the courts.”), citing S.C. Code Ann. §§ 42-17-50 and -60. As a jurisdictional limitation imposed by enactment of the General Assembly, the fourteen day requirement can neither be waived by the parties nor expanded, modified, or selectively enforced by the Commission. *South Carolina Coastal Conservation League v. South Carolina Department of Health and Environmental Control*, 380 S.C. 349, 376-377, 669 S.C. 899, 913-914 (Ct. App. 2008), *reh’g denied* (Dec. 19, 2008).

Inasmuch as no party affected by the single commissioner’s order finding Hudson is an independent contractor and that Caregivers is exempt from the Act filed a timely application for review, those findings became the unappealed law of the case. All subsequent efforts to re-litigate those findings were improper. As a result, all subsequent orders in this case result from error and should have been reversed, and the February 18, 2005 Order should be affirmed. On this basis, Caregivers submits it is entitled to rehearing and dismissal of the appeal on the basis that no party appealed the initial ruling that it is not subject to the Act, and, therefore, Caregivers is not a proper party to these proceedings.

CONCLUSION

For all of the reasons stated herein, the full commission order is subject to immediate appellate review. This Court should therefore permit rehearing and dismiss the appeal on the basis that the decision exempting Caregivers from the Act is entitled to preclusive effect. In the alternative, the Court should reconsider its decision that the appeal is not subject to immediate review and allow the appeal in this matter to proceed

to a determination of the merits or stay further acting pending the outcome of rehearing in
Bone.

November 8, 2012

By:



Carmelo B. Sammataro

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ATTORNEYS FOR APPELLANT

CAREGIVERS OF SOUTH CAROLINA, LLC

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Civil Action No. 2008-CP-26-03032

Vennie Taylor Hudson, ... Respondent,

v.

Caregivers of South Carolina, LLC, and SC Uninsured Employers' Fund, ... Appellants.

**RESPONDENT'S RETURN TO APPELLANT CAREGIVERS
PETITION FOR REHEARING *EN BANC***

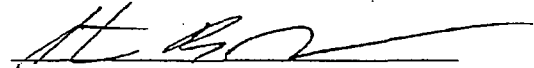
Respondent hereby files her Return to Appellant Caregivers Petition for Rehearing *en banc*. Respondent joins in Appellant Caregivers' Petition as to arguments I and II. As to Argument III, Respondent opposes the argument on the merits, as the circuit court properly held the coverage and compliance order by the Commission did not have preclusive effect as to Hudson on the merits of her underlying case. However, Respondent does believe that all issues raised on appeal are properly before this Court and should be addressed on the merits.

For the reasons stated by Caregivers in Arguments I and I, and the reasons stated previously in Respondents' Memorandum of Law in Opposition to Dismissal of Appeal as Interlocutory,¹ the

¹Respondent filed the Memorandum on May 2, 2011 at the request of Chief Judge Few.

Court should stay the Order dismissing the appeal as interlocutory until such time as the Supreme Court issues its Decision on Rehearing in Bone. In the alternative, the Court should hold this case is immediately appealable and should affirm the Circuit Court's Order on the merits.

Respectfully Submitted,



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Attorney for Respondent

Columbia, South Carolina
November 9, 2012

The South Carolina Court of Appeals

Vennie Taylor Hudson, Respondent,

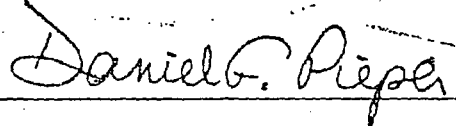
v.

Caregivers of South Carolina, LLC, and S.C. Workers'
Compensation Uninsured Employers' Fund, Appellants.

Appellate Case No. 2011-184006

ORDER

After 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. Accordingly, the petition for rehearing is denied.

 C.J.
 J.
 J.

Columbia, South Carolina

cc:

Carmelo Barone Sammataro
Stephen Benjamin Samuels
Samuel Thompson Brunson

FILED

January 18, 2013