THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Case Number 2021-000633

RECEIVED
Jul 23 2021
SC Court of Appeals

Rachel J. Turner, Employee, Appellant-Respondent,

v.

Medustrial Healthcare Staffing Service and Condustrial, Inc.; Guarantee Insurance Company; Countrywide Staffing Solutions Group, Inc.; South Carolina Department of Corrections; State Accident Fund; and South Carolina Uninsured Employer's Fund, Respondents

of which Condustrial, Inc. f/k/a Medustrial Healthcare Staffing Service, Employer, is the Respondent-Appellant.

Return to Appellant-Respondent's Motion for Partial Remand

George D. Gallagher, Esquire
Speed, Seta, Martin, Trivett & Stubley, LLC
P.O. Box 11669
Columbia, SC 29211
(803) 748-2919
Attorney for Respondent-Appellant

Pursuant to SCACR 240(e), Respondent-Appellant Condustrial files the following Return in opposition to Appellant-Respondent Rachel J. Turner's ("Turner") Motion for Partial Remand. Because of the complexity of the matters contained in the Workers Compensation Commission's ("the Commission") final order, Turner's request to remand portions of this case to the Commission for admittance of new evidence regarding certain issues is improper. All other Respondents to this action join Condustrial in their opposition to the Motion. For these reasons, as set forth more fully below, this Court should deny Turner's motion.

ARGUMENT

As an initial matter, remand back to the Commission to consider Turner's Motion to Admit Newly Discovered Evidence is unnecessary because the Commission has already disposed of the Motion via its June 21, 2021 Order denying the motion. Specially, the Commission ruled that it had no jurisdiction to entertain Turner's Motion. WCC Regulation 67-707 governs the admission of newly discovered evidence on appeal to the Commission's Appellate Panel and only contemplates cases *where review of a Single Commissioner's ruling is still pending*. Regulation 67-707 (C)(2)(d) states, in pertinent part, "[i]f the Commission grants the motion, then the review hearing is stayed." (emphasis added).

In this case, the Review Hearing was held on November 10, 2020, and the Commission entered its Order on April 6, 2021. Both dates are obviously before Turner filed her Motion to Admit Newly Discovered Evidence on May 4, 2021. Therefore, the Commission correctly held that it could not entertain the Motion under the governing regulation. Furthermore, there is no relief available to an aggrieved party before the Commission *after* the Appellate Panel has already issued its final ruling other than a Motion to Reconsider pursuant to WCC Regulation 67-215 (B). Condustrial filed a Motion for Reconsideration on April 12, 2021, and the Commission issued its Order denying the motion on May 17, 2021. Accordingly, the Commission properly found it did not have jurisdiction to consider Turner's Motion to Admit Newly Discovered Evidence.

Regardless, Turner's purported newly discovered evidence patently fails to meet the Commission's regulation's requirements for admission on the merits. Admission of newly discovered evidence under WCC Regulation 67-707 requires the following: a) the evidence not be of a cumulative or impeaching nature; b) likely would have produced a different result had the evidence been procurable at the first hearing; c) the evidence was not known to the moving party at the time of the first hearing; d) the new evidence could not have been secured by reasonable diligence; and e) the new evidence is being brought to the Commission's attention immediately upon its discovery.

Here, the purported evidence fails to satisfy elements (b), (c), and (d) Regulation 67-707. First, the purported newly discovered evidence would not have likely produced a different result on the issue of Turner's entitlement to temporary total disability benefits ("TTD") beyond the finite period awarded. This is because the Commission did not base its denial of additional periods of TTD solely on the absence of supporting disability notes from medical providers or other experts as Turner contends. The Commission also found that Turner refused a suitable employment offer which affirmatively bars her entitlement to TTD pursuant to S.C. Code §42-9-190 and other applicable law. **[Full Commission Order p. 30 Findings 16 and 17]**. Therefore, because additional grounds support the Commission's denial of TTD, the admission of new alleged disability notes would not have changed the final decision on this issue.

Next, the evidence in question was known to Turner at the time of the Hearing before the Single Commissioner. Turner herself acknowledges her belief that other disability notes existed at the time of the original Hearing. **[Motion to Admit p. 2 Ground # 6]**. Based on that knowledge, she could have exercised a number of potential remedies to discover the actual disability notes at that stage of the proceedings, including, but not limited to, a Motion to adjourn the Hearing to investigate further, but failed to do so. For these reasons, element (c) for the admission of newly discovered evidence per the Regulation is not satisfied.

Moreover, because reasonable diligence could have secured the additional evidence at any point before the Single Commissioner issued her ruling and/or she issued her formal Decision and Order, not to mention at any point prior to the Review Hearing before the Full Commission on November 10, 2020, the

evidence is not admissible under WCC R. 67-707 (C)(2). The Hearing concluded on November 7, 2017, and the Single Commissioner issued her Order three years later on July 31, 2020. **Yet, Turner's counsel took no action to follow up on his client's testimony regarding the existence of additional disability notes during that nearly three-year interim**.

Further, Turner admits in her Motion to Admit Newly Discovered Evidence that the evidence was specifically sought to counter the Single Commissioner's ruling denying TTD beyond September 30, 2015. **[Motion to Admit p. 3 Ground # 8]**. Although her counsel purportedly sought all evidence of ongoing disability from the State Office of Victim's Assistance ("SOVA") through normal discovery processes before the Hearing before the Single Commissioner, Turner acknowledges the actual impetus for her follow-up efforts to secure the evidence was in response to the Single Commissioner's adverse ruling. This curious timing does not constitute the exercise of reasonable diligence to expedite legitimate outstanding discovery requests; rather, it is clearly just an attempt to get a second bite of the apple following an unfavorable ruling.

Finally, the purported evidence does not even support the relief Turner ultimately seeks. Her Motion to Admit Newly Discovered evidence requests a running award of TTD from the date of the accident; yet, even if admissible, this specific evidence would only support an additional finite period of TTD and certainly not a running award.

CONCLUSION

For all the aforementioned reasons, Appellant-Respondent Rachel J. Turner's Motion for Partial Remand must be **DENIED**.

Respectfully Submitted,

George D. Gallagher, Esquire
Counsel for Appellant-Respondent Condustrial, Inc.
f/k/a Medustrial Healthcare Staffing
S.C. Bar # 12149

Columbia, SC
July 23, 2021

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PROOF OF SERVICE

STATE OF SOUTH CAROLINA
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APPEAL FROM THE
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Appellate Case No. 2021-000633

Rachel J. Turner, Employee, Appellant-Respondent,

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of which Condustrial, Inc. f/k/a Medustrial Healthcare Staffing Service, Employer, is the Respondent-Appellant.

PROOF OF SERVICE

I certify that I have served the Respondent-Appellant Condustrial, Inc.'s Return to Motion for Partial Remand of Appellant-Respondent by electronic mail and/or by depositing a copy of it in the United States Mail, postage prepaid, on July 23, 2021, addressed to all attorneys of record at the addresses below:

The Honorable Amy Bracy
Judicial Director
S.C. Workers' Compensation Commission
Post Office Box 1715
Columbia, SC 29202
judicial@wcc.sc.gov

Gregory M. Alford, Esq.
Attorney at Law
PO Drawer 8008
HILTON HEAD ISLAND, SC 29938
gregg@alfordlawsc.com

Erin Farthing, Esq.
State Accident Fund
PO Box 1166
Lexington, SC 29071
EFarthing@saf.sc.gov

Lisa C. Glover, Esq.
SC Uninsured Employers' Fund
P:O Box 1815
Lexington, SC 29071
lglover@saf.sc.gov

T. Jeff Goodwyn Jr., Esq.
Attorney at Law
2309 Devine Street
COLUMBIA, SC 29205
jgoodwyn@goodwynlaw.com

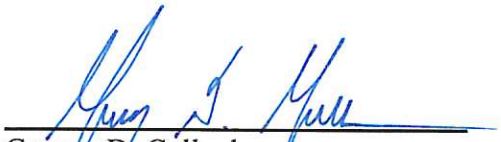
Beth Richardson, Esq.
Robinson Gray Stepp & Laffitte, LLC
PO Box 11449
Columbia, SC 29211
brichardson@sowellgray.com

Grady L. Beard, Esq.
Robinson Gray Stepp & Laffitte, LLC
PO Box 11449
Columbia, SC 29211
gbeard@robinsongray.com

James P. Newman, Jr., Esq.
Howser, Newman & Besley, LLC
P O Box 12009
Columbia, SC 29211
jnewman@hnblaw.com

Stephen B. Samuels, Esq.
Samuels Reynolds Law Firm
1320 Richland Street
Columbia, SC 29201
stephen@samuelsreynolds.com

July 23, 2021



George D. Gallagher
Speed, Seta, Martin, Trivett & Stubley
Bar No. 12149
Post Office Box 11669
Columbia, South Carolina 29211
Attorney for Appellant-Respondent Condustrial, Inc.

APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO.: 1514359

Rachel J. Turner ..... CLAIMANT

v.

Medustrial Healthcare Staffing Service and
Condustrial, Inc; Guarantee Insurance Company;
Countrywide Staffing Solutions Group, Inc.;
South Carolina Department of Corrections;
State Accident Fund; and
South Carolina Uninsured Employer's Fund ..... DEFENDANTS

Appellate Panel Review Hearing
held electronically via the Zoom
application on November 10, 2020, per notices
timely and properly served upon
all parties of interest.

Appellate Panel Decision and Order
filed, April 6, 2021

APPEARANCES:

CLAIMANT/APPELLANT represented by Stephen B. Samuels, Esquire, of Samuels Law Firm, LLC.

DEFENDANT/APPELLANT Medustrial Healthcare Staffing Service and Condustrial, Inc., represented by George D. Gallagher, Esquire of Speed, Seta, Martin, Trivett & Stubley, LLC and T. Jeff Goodwyn, Esquire, of the Goodwyn Law Firm, LLC.

DEFENDANT/APPELLANT The South Carolina Property and Casualty Insurance Guaranty Association on behalf of Guarantee Insurance Company represented by Beth Richardson, Esquire

(coverage), and Grady L. Beard, Esquire (merits), both of Robinson Gray Stepp & Laffitte, LLC.

DEFENDANT/RESPONDENT Countrywide Staffing Solutions Group, Inc., represented by James P. Newman, Jr., Esquire (merits), of Howser, Newman & Besley, LLC, and Gregory M. Alford, Esquire (coverage).

DEFENDANT/APPELLANT South Carolina Department of Corrections and State Accident Fund represented by Erin Farthing, Esquire.

DEFENDANT/RESPONDENT South Carolina Uninsured Employer's Fund represented by Lisa C. Glover, Esquire.

STATEMENT OF THE CASE

Claimant, Defendant Condustrial, Defendant Guarantee Insurance Company, Defendant South Carolina Department of Corrections, and Defendant State Accident Fund appealed the Decision and Order of Commissioner Melody L. James (the Single Commissioner) filed July 31, 2020. The Single Commissioner heard the matter over the course of several days beginning on July 24, 2017, and concluding on November 6, 2017. The parties' arguments relative to the appeals of the Single Commissioner's Order are as follows:

Claimant

Claimant contends the Single Commissioner erred on multiple grounds in denying temporary total disability compensation after September 30, 2015. Claimant notes the Single Commissioner found she was physically unable to return to work as a nurse and was specifically written out of work for her psychological overlay through September 30, 2015. She further contends the medical evidence shows she never recovered from her psychological injury such that she was continuously unable to return to work in any capacity. She notes the psychiatric treatment records consistently state she cannot work due to the assault: "Due to incident 9/5/15, patient has not worked since that date." As such, the evidence shows Claimant has been disabled by her doctors since she was assaulted on September 5, 2015.

Claimant further contends that the putative offer of light duty was neither bona fide nor could Turner have accepted it. It is undisputed that Turner was incapable of accepting any offer on September 24, 2015 when the alleged offer of employment was made. Even when Turner tried to contact Condustrial after that date, they refused to take her calls all the while insisting she was not their employee. As Turner testified, "They haven't contacted me since they told me I was not their employee. I've tried contacting them and they refuse to talk to me." [Tr I, page 340, lines 1-

9]. As Condustrial never renewed the offer nor even accepted communication from Turner, even if she had been capable of accepting at some later point, there was no way for her to do so nor was there a current offer.

Claimant argues that as the conditions to suspend or terminate Temporary Total Disability (TTD) under Section 42-9-260 were never met after September 30, 2015, Turner is legally entitled to a running award of TTD.

Claimant argues that the single Commissioner erred in holding she was legally barred by the Burnette case from awarding TTD after September 30, 2015.

Defendant Condustrial

Condustrial contends the Single Commissioner erred in refusing to find Claimant is an independent contractor and not entitled to benefits under the Act. Further, Condustrial contends that if the Appellate Panel concludes Claimant is found to be an employee, then her AWW should be based on earnings after deduction of business expenses in accordance with *Stephen v. Avins Construction*, 324 S.C. 334,478 S.E.2d 74 (Ct. App. 1996).

Further, Condustrial contends that if Claimant is adjudicated to be Condustrial's employee instead of an independent contractor, then she would be covered *ab initio* as an "assigned employee," "Selected Staffing/Employee," or co-employee via its service agreement with Countrywide. Guarantee Insurance Company as the carrier for Countrywide on this date of loss would then be responsible for providing coverage for the claim. Guarantee Insurance Company's remedy for having to cover a previously unclassified employee under its policy would then be to audit its coverage of Countrywide and assess additional premium to cover the risk assumed by their insured via the Commission's determination. In turn, Countrywide's recourse against Condustrial would be an action to recover the additional premium assessed against it by Guarantee

Insurance Company under the indemnification provision of its service agreement with Condustrial.

Condustrial contends that if Condustrial is deemed to be Claimant's employer for purposes of the Act, and the service agreement with Countrywide is somehow not implicated, then Condustrial is left "uninsured" relative to Claimant's employment. Under that scenario, Condustrial argues that Countrywide is a *de facto* professional employment organization (PEO) subject to all conditions and responsibilities imposed by S.C. Code § 40-68-10 et seq. Guarantee Insurance Company would still be vicariously liable for the claim by operation of S.C. Code §40-68-70 (C) and S.C. Code §40-68-120(A)(7). According to Condustrial, those statutes impose liability for benefits under the Act on the carrier for a PEO when a non-assigned employee of the PEO's client company is injured and the client company has no other coverage. Condustrial claims that if Condustrial indeed failed to secure and maintain worker's compensation coverage, then liability still defaults to Countrywide and Guarantee Insurance Company.

Defendant Guarantee and Defendant Countrywide

Defendant Guarantee contends the Single Commissioner erred in finding and concluding (1) all four factors of the test used by South Carolina to determine whether a worker is an employee or an independent contractor preponderate in favor of Claimant having the status of employee and concluding Claimant was an employee; (2) the primary method of calculating aww should be employed, such that the AWW is $1,130.86 and the compensation rate is $753.94; and (3) Claimant developed posttraumatic stress disorder as a direct result of the assault and surrounding injuries. Defendant Guarantee further contends the Single Commissioner erred in finding and concluding Claimant was disabled within the meaning of the Act from September 6, 2015, until September 30, 2016. Guarantee argues that to the extent the Appellate Panel concludes Claimant was an employee, the denial of benefits after September 30, 2015, was proper.

Defendant Guarantee further argues that to the extent Claimant is an employee rather than an independent contractor, Condustrial was an uninsured employer relative to Claimant's employment and failed to acquire workers compensation coverage for Claimant under the Condustrial/Countrywide Agreement. Guarantee asks the Appellate Panel to affirm the Single Commissioner's Decision and Order relating to the Contract Labor Services Agreement between Condustrial and Countrywide and the workers compensation insurance policy between Guarantee and Countrywide. Specifically, Guarantee asks the Appellate Panel to affirm the Single Commissioner's Decision and Order that: (1) Countrywide is not liable for any losses because Condustrial failed to acquire workers compensation coverage for Claimant under the Condustrial/Countrywide Agreement, and reformation of contract is not warranted under common or statutory law; and (2) Guarantee is not liable for any losses suffered by Claimant because Condustrial was not an insured under the Policy; Claimant was never an employee of record of Countrywide; and even if Claimant had been an employee of record of Countrywide, Claimant was not among the workers in class codes and locations approved by Guarantee under the Policy. Countrywide joined Guarantee in its arguments.

Defendants Department of Corrections and SC State Accident Fund

SCDC and SAF contend the Single Commissioner properly found that Claimant was not entitled to TTD benefits from the date of injury, and this decision should be upheld.

SCDC and SAF contend the Single Commissioner properly found that Claimant was not a direct employee of SCDC. Further, SCDC and SAF contend any liability they may have with regard to this matter is dependent upon and secondary to Condustrial's liability for this claim as the Claimant's direct employer. In the event the Appellate Panel finds that Claimant is an independent contractor, or that Condustrial had workers' compensation insurance covering

Claimant at the time of her accident, SCDC and SAF's liability for this claim would necessarily cease.

SCDC and SAF contend that the Single Commissioner erred in concluding that (1) Claimant's AWW is $1,130.86 and her CR is $753.94 when such finding is unsupported by law, and is unfair to Claimant's employer in violation of S.C. Code Ann. §42-1-40; (2) Claimant was disabled from September 6, 2015, until September 30, 2016, and is entitled to TTD from September 6, 2015, until September 30, 2015, at the CR of $753.94; and (3) Claimant is unable to physically work as a nurse as such a finding is not supported by the evidence, especially in light of the fact that Claimant has not been found to be at maximum medical improvement.

Defendant SC Uninsured Employers' Fund

As a respondent, South Carolina Uninsured Employers' Fund (SCUEF) contends the Single Commissioner did not err in finding as fact and concluding as a matter of law that liability should not be transferred to the SCUEF.

Per Decision and Order dated July 31, 2020, the Single Commissioner issued the following Findings of Fact and Conclusions of Law:

SINGLE COMMISSIONER'S FINDINGS OF FACT

A. **Background:**

1. Claimant Rachel Turner is 44 years old. She has three children aged 20, 21 and 24.

2. Turner has a high school diploma from Horizon High School in California and a nursing degree from Pacific Coast College. She holds an LPN.

3. Turner moved to South Carolina after receiving her LPN.

4. Turner has worked as a nurse for numerous nursing agencies including Medical Express, Medical Staffing Network, MedAmerica and Condustrial (Medustrial).

B. Employee versus Independent Contractor withMedustrial/Condustrial.

1. This matter is a determination of the Claimant's status and relationship with Condustrial (Medustrial).

2. Collateral Estoppel

a. Condustrial contends Turner is estopped from claiming employee status as that issue has previously been decided in favor of Condustrial in an administrative hearing before the South Carolina Department of Employment and Workforce. Claimant contends she is not estopped because: (1) orders of DEW have no preclusive effect in proceedings before the Commission; and (2) she was not a party nor in privity to any party to the DEW hearing, such that she cannot be bound by the DEW order.

b. In Shelton v. Oscar Mayer Foods Corp., 325 S.C. 248, 254, 481 S.E.2d 706, 709 (1997), the South Carolina Supreme Court held that the factual findings of the employment security commission (now DEW) are not preclusive in a subsequent action for wrongful discharge. The Court reasoned giving preclusive effect to informal unemployment proceedings would make them "become lengthy and more detailed, and will no longer be suited to the prompt resolution of unemployment compensation claims." Accordingly, the Court held "because application of the doctrine of collateral estoppel would frustrate the purposes of the [DEW], findings of fact made during an [DEW] hearing will not be given preclusive effect in any subsequent litigation between the employer and employee." Id. I therefore conclude that the DEW order has no preclusive effect in this case.

c. As further grounds for finding no preclusive effect, there is no privity of the parties, which is required for estoppel. 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). One not a party to a prior action can be precluded from litigating an issue only if he is in privity with a party to the prior action against whom an adverse finding is made. Privity deals with a person's relationship to the subject matter. Having an interest in the same question or in providing or disproving the same set of facts does not establish privity. Even if one whose interest is almost identical to that of a party, but who does not claim through him, is not in privity with that person. 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. Wade v. Berkeley County, 330 S.C. 311, 317, 498 S.E.2d 684, 687 (Ct.App.1998) ("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."). In the instant case, I find there is no privity of the parties. Turner was unaware of the DEW proceeding; could not have participated; and cannot reasonably expect that her interests would be decided in that hearing. Applying offensive collateral estoppel would violate Claimant's due process rights, such that the motion to give the unrelated DEW order preclusive effect is denied. The facts as they actually occurred in this matter may not mirror the facts/model presented to DEW, as a basis for its decision.

3. General Law and Analysis.

a. Jurisdiction

An Employment relationship is required for jurisdiction of the Commission and application of the Act. The burden of proving the relationship of employer and employee is upon the claimant, and this proof must be made by the greater weight of the evidence. South Carolina's policy is to resolve jurisdictional doubts in favor of the including of employers and employees under the Act.

See, e.g., Sellers v. Tech Serv., Inc., 803 S.E.2d 731 (Ct. App. 2017).

Condustrial is subject to the Act as it is undisputed that, including its tradespeople, it regularly employs four or more people within the state.

b. Test for Employment Relationship.

South Carolina uses a four-factor test to determine whether a worker is an employee or an independent contractor. All four factors are weighed equally to determine whether the putative employer possesses the right of control—which is the lynchpin of the analysis. The factors are: 1) direct evidence of the right or exercise of control; 2) furnishing of equipment; 3) right to fire; and 4) method of payment. Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 676 S.E.2d 700 (2009). The test is not the actual control exercised, but whether there exists the right and authority to control and direct the undertaking. In the instant case, all four factors preponderate in favor of status as an employee. The Supreme Court has previously ruled that a nurse anesthetist in a similar employment arrangement was an employee. See Shatto v. McLeod Reg'l Med. Ctr., 406 S.C. 470, 753 S.E.2d 416 (2013).

c. Application of the four-factor test for employment between Turner and Condustrial.

The factors predominate in favor of an employment relationship. I therefore conclude that Turner was an employee of Condustrial on September 5, 2015.

d. Direct Evidence of the Right to Control.

This factor shows Turner is an employee. There are numerous documents—some of which state she is an employee; some of which state she is an independent contractor. It is uncontroverted that when Turner was given the package of documents at the time of her initial engagement she was told that the package was her employment package, and that the one document she read and filled out was an employment application. [Tr. 1]. Turner repeatedly testified "I don't remember all the

documents. I just signed whatever they gave me to sign." [Tr. 1, page 138, lines 20-21]. Turner further testified repeatedly that "I didn't read any of the documents. I signed where it said to sign." [Tr. 1, page 209, lines 20-21]. While there are other documents to the contrary, I find that the great weight of the documents weigh strongly toward an employment relationship.

Condustrial, in particular, relies on a LICENSED PROFESSIONAL CONTRACTOR AGREEMENT executed by Turner on February 8, 2012 and October 9, 2014. At the outset, I note that such a written document is not dispositive, but merely evidence of the intent of the parties. As our supreme court noted in Wilkinson, "These arrangements must be carefully scrutinized to ensure that the actual relationship between the [employer] and the purported independent contractor truly reflects the parties' stated agreement. We are sensitive to the unequal bargaining power that may exist between the [employer and putative employee]." Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 676 S.E.2d 700 (2009). See also 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."). Moreover, Condustrial did not strictly enforce the Agreement. Notably, Turner was not required to provide her own professional liability coverage, such coverage being provided by Condustrial. In many other aspects, Condustrial treated Turner as an employee.

While the LICENSED PROFESSIONAL CONTRACTOR AGREEMENT supports the argument that Turner was an independent contractor, the record contains many documents and practices indicating that Turner was considered an employee. The Defendant, Medustrial, argues that these were mistakes by a "blue collar" worker. Mistake or not, it occurred in 2013 at the time of engagement, and in 2014 when the company did its yearly update.

Two other agreements signed by some of the parties to this case strongly indicate an employment relationship. Condustrial contracted with the Department of Corrections to provide

employees rather than independent contractors. Condustrial specifically contracted that "Contractor shall provide workers' compensation coverage for Contractor's *employees* who are assigned to SCDC." [Claimant's Exhibit G]. The fact Condustrial represented to SCDC that the nurses were employees covered by workers' compensation insurance is evidence favoring an employment relationship. See Sellers v. Tech Serv., Inc., 803 S.E.2d 731, 421 S.C. 30 (Ct.App.2017) (Commission properly considered fact that "In obtaining permits with the City for the job on which Sellers was injured, Tech Service represented that no subcontractors or independent contractors would be involved."). Indeed, the contract between SCDC and Condustrial is particularly important because Condustrial contracted to provide employees and that workers' compensation insurance would be provided for the employees.

While Condustrial represented to SCDC that the nurses were covered by workers' compensation insurance, Condustrial represented to its former workers' compensation insurer (Guarantee) that nurses assigned to SCDC were covered by the State of South Carolina, such that the nurse payroll (in excess of two-million dollars) would not be included in the premium[1].

A key document is an APPLICATION FORM WAIVER signed by Turner on October 9, 2014. This document states the applicant agrees that no act can "change in any respect the employment-at-will relationship between [Condustrial] and the undersigned . . . ." The form further states "I further understand that my employment with the Company shall be probationary for a period of ninety (90) days and . . . my employment relationship with the Company is terminable at will for any reason by either party." [Claimant's Exhibit U]. Condustrial's president confirmed on cross-examination that only he can alter the terms of the at-will employment relationship described in this

[1] Condustrial's primary line of business was providing skilled tradespeople to the construction industry. Condustrial considered these workers to be employees (along with other nurses assigned to private employers) which were included in the payroll audit for its workers' compensation premium determination. Medustrial was created as a separate division or trade name to provide nursing.

agreement, which he did not do in Turner's case. The APPLICATION FORM WAIVER unambiguously describes an at-will employment relationship.

Other documents signed by Turner weigh strongly towards an employment relationship. When she was first hired, Turner filled out an *Employment Application* and a *Form I-9, Employment Eligibility Verification.* [Claimant's Exhibits H and I]. She completed a *Form W-4, Employee's Withholding Allowance Certificate.* [Claimant's Exhibit O]. She also signed a document stating:

> I am orienting at DMH through Medustrial Healthcare. I am an employee of Condustrial, Inc. I will work my first forty hours through Medustrial and if I want more hours it is my responsibility to notify my employer. I will also notify my employer of the agency I will do over forty hours with before doing so. [Claimant's Exhibit P].

Turner signed a CONDUSTRIAL FAIR CREDIT REPORTING ACT DISCLOSURE AND AUTHORIZATION authorizing Condustrial to obtain a "'consumer report' or an 'investigative consumer report' from a 'consumer reporting agency' when: 1) considering your application for employment, 2) making a decision to offer you employment, 3) deciding whether to continue your employment (if you are hired), or 4) making other employment-related decisions directly affecting you." [Claimant's Exhibit J].

A written substance abuse policy indicated that the "Employee is to keep this page." [Claimant's APA page 265].

The documents signed by Turner and testimony of the witnesses strongly show that Condustrial and SCDC had "the right and authority to control and direct the particular work or undertaking." Young v. Warr, 252 S.C. 179, 189, 165 S.E.2d 797, 802 (1969).

In the specific area of workers' compensation documents, Turner was given an Accident/Injuries Procedure sheet. [Claimant's APA page 266]. This document presents procedures for an injury to be followed by an injured "employee." (Please note that this document is captioned

AMS Staffing. This is a PEO or staffing group that Condustrial previously used. However, the record establishes that these are the documents presented by Condustrial at the time of engaging Turner's services). Also, Condustrial presented and had Turner fill out a Post-Offer-of-Employment Form. [Claimant's APA page 268]. This would be applicable to an employer's application to the Second Injury Fund (no longer in existence), or possible defenses in a workers' compensation matter.

Nurse Sidney testified that the nurses were required by Medustrial and SCDC to wear a uniform, scrubs, closed-in shoes, and socks or stockings. They had to cover any piercings, earrings or studs. Jewelry had to be a wedding ring and watch. Hair had to be neatly in place. [Tr. 8 at 35-36].

Although there was flexibility with whether a nurse took a shift or not, once the shift was filled the nurses were required to work. This was not on a daily or even weekly basis. The shifts were set a month in advance. [Testimony of Nurse Sidney, Tr. 8 at 52-53]. If the nurse was out sick, the contract stated that nurses were required to find their own replacement. However, in practice, the testimony showed that Claimant never found her own replacement, but Condustrial replaced her absence like any other employee. Condustrial contends one of the differences in an employee versus an independent contractor is the flexibility in taking shifts. However, it is noted in the *Terms of Employment* that hourly pay may change based on duties performed and/or assignments, and further that "the decision to accept that pay and assignment will be yours." [Claimant's APA page 272]. (This is one of the documents Condustrial contends is a document given to Turner by mistake that belongs to an employee package and not with an independent contractor package). Furthermore, a flexible schedule is hardly inconsistent with an employee/employer relationship as many hourly jobs offer flexible schedules. The fact there is a written schedule with specific shifts which the

nurses are required to work is evidence showing the nurses are employees.

On a day to day basis, there was no difference between nurses employed by SCDC directly and those placed at SCDC by Condustrial and MedFirst. SCDC required nurses to wear specific uniforms; carry specific identification badges; and park in employee parking. LPN's were directly under the control of the nursing supervisor (charge nurse or an RN) as to where they worked; what hours they worked; which patients they treated; how they charted the care they provided; and myriad other daily tasks. "The right to control does not require the dictation of the thinking and manner of performing the work. It is enough if the employer has the right to direct the person by whom the services are to be performed, the time, place, degree, and amount of said services." Nelson v. Yellow Cab Co., 343 S.C. 102, 110, 538 S.E.2d 276, 280 (Ct.App.2000), *overruled on other grounds by* Wilkinson, 382 S.C. at 300 n. 3, 676 S.E.2d at 702 n. 3.

The direct evidence of a right to control overwhelmingly indicates an employee/employment relationship between Turner and Condustrial/Medustrial.

e. Furnishing of Equipment.

Turner was not furnished any equipment by Medustrial. However, this was essentially the same with the W-2 nurses also employed by Medustrial. Tony Durham indicated that some safety equipment was provided to the W-2 nurses, but there was no testimony indicating what the safety equipment would be. The physician's offices or nursing homes where the W-2 nurses were placed provided equipment. Also, because of security concerns, the nurses placed at the Department of Corrections could not bring in nursing supplies. The items/equipment were provided by the Department of Corrections. Essentially, the nurses assigned to SCDC provide their skill and labor. [Nurse G, Transcript 1, page 77]. Due to the unique circumstances/facts of this case, this factor is somewhat neutral. Items could never have been provided by Medustrial because of the limitations

of the Department of Corrections. Consideration was also given to the supreme court's pronouncement in Lewis that "Because the Club, and not Lewis, bore the risk of the capital investment inthe equipment used by Lewis to perform her work, we find this factor weighs in favor of an employee relationship." Lewis v. L.B. Dynasty, 411 S.C. 637, 770 S.E.2d 393 (2015).

Although Claimant contends the fact SCDC provided Turner "with everything she needed to work, including medical equipment [and] hospital supplies" as in Shatto, I find this factor to be somewhat neutral because Claimant's primary contention is that Condustrial was the direct employer.

On a checklist beside the line entitled malpractice insurance, not applicable (n/a) is indicated, and Medustrial provided the malpractice insurance for the Claimant and 1099 nurses.

f. Right to Fire.

The evidence shows Condustrial retained the right to fire its nurses. Turner was presented and executed a *Facility and Client Requirement* documents in 2013 that indicated that failure to comply with the requirements would prevent her from working as an "employee" until such time as the non-compliant issue had been resolved. [Claimant's APA page 271]. Turner was presented with a *Terms of Employment* document that she and the office manager signed. [Claimant's APA page 272]. This document indicates a number of offenses that can result in disciplinary action, including termination."

In 2014, Turner and the office manager signed a document entitled *Attendance Policy* that states that a violation of a no show/no show policy could result in disciplinary actions up to "termination of employment." [Claimant's APA page 275]. An *Application Form Waiver* signed in 2014 indicated that the relationship was an "employment at will" relationship, and that misrepresentations in the application is call for cause for "dismissal." [Claimant's APA page282].

This factor strongly preponderates for a finding that Turner is an employee.

g. Method of Payment

Payment of a time basis is a strong indication of the status of the employment, while payment on a completed project basis is indicative of independent contractor status. Shatto. In this matter, Turner was not paid by the job, but was paid by the hour. Also, Turner and other nurses were paid overtime at time and a half. [Testimony of Turner; Testimony of Tony Durham; Testimony ofNurse Sidney]. In addition to regular hours and overtime hours, Turner was paid for "other hours." [Claimant's APA pages 230-232 (the definition of *other hours* was not established in the record.)]. Also, Turner was paid by Medustrial for some training time at the Department of Corrections. Medustrial paid for Turner's orientation class with the Department of Mental Health. [Turner Tr. Page 1, 147]. Although Turner received a 1099 from Condustrial, she was presented with a W-4 to sign in 2013. [Claimant's APA page 273]. There was no evidence Turner negotiated her hourly rate of pay. Turner testified she was paid "Twenty-two dollars an hour. I started at twenty-one, but they raised me up, saying that I was a good employee, so they gave me a raise to twenty-two dollars an hour." [Turner Tr. 1, page 157, lines 6-11].

In Shatto, the Supreme Court held the method of payment favored the independentcontractor relationship. The distinction here is that Shatto was paid by her agency but was seeking to be found an employee of the hospital where she was placed. As such, the Court found payments made to Shatto by the agency did not favor an employment relationship with the hospital. Here, Turner contends she is the direct employee of Condustrial. This case is distinguishable from Shatto for that reason.

The Weekly Time Sheets were required to be filled out and signed by the "employee." [Claimant's APA pages 284-287]. The hourly wages paid to Turner by Condustrial favor an

employment relationship.

C. Statutory Employment with the Department of Corrections.

While I find that Turner was a direct employee of Condustrial, I further conclude Turner is a statutory employee of the Department of Corrections. I further conclude the Department of Corrections has primary liability for this case as they are an insured employer, whereas Condustrial is an uninsured employer subject to the Act.

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).

Turner worked within the correctional institute as a nurse providing medical care to inmates. She worked alongside nurses who were direct employees of SCDC. Provision of medical care

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). Additionally, SCDC directly employed nurses who were performing identical activities to those performed by the Medustrial nurses. Having found Turner an employee and not an independent contractor, I therefore find Turner is a statutory employee of the South Carolina Department of Corrections.

D. Average Weekly Wage and Compensation Rate.

1. The parties assert contrary positions on the Average Weekly Wage.

2. Claimant contends her average weekly wage should be based on her actual wages paid over the preceding 52 weeks, as this is the primary method set forth in § 42-1-40. Using this method, her average weekly wage would be $1,130.86 resulting in a compensation rate of $753.94.

3. The Defendants contend this method would be unfair, arguing for various alternative methods, most particularly calculating the average weekly wage based on Turner's net income after taxes. Defendants argue that she benefitted from deducting various expenses because she was paid on a 1099 rather than a W2. Defendants rely on Stephen v. Avins Constr. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996) for the proposition that "a subcontractor's compensation rate should be determined based on his net taxable income . . . ."

Claimant contends this method should not be used because she has proven she is an employee rather than an independent contractor. She contends her situation is different than an independent contractor or business owner who elects to come under the Act.

Using net income, the average weekly wage would be $333.29 per week resulting in a compensation rate of $222.20.

4. Consideration was also given to various other methods including an average weekly wage based on an SCDC nurse and on paying an average weekly wage based on an analysis of

Claimant's tax returns considering some but not all her deductions.

5. I conclude the primary method of calculating average weekly wage should be employed, such that I find the average weekly wage is $1,130.86 and the compensation rate is $753.94.

a. The relevant language in the statute states:

> "Average weekly wages" means the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of fifty-two weeks immediately preceding the date of the injury . . . "Average weekly wage" must be calculated by taking the total wages paid for the last four quarters immediately preceding the quarter in which the injury occurred as reported on the Department of Employment and Workforce's Employer Contribution Reports divided by fifty-two or by the actual number of weeks for which wages were paid, whichever is less.
>
> When for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

S.C. Code Ann. § 42-140 (2007).

The statute requires use of the preceding fifty-two weeks of wages unless exceptional reasons exist which would make this method unfair either to the employer or employee. "The commission must use this method unless 'the employment, prior to the injury, extended over a period of less than fifty-two weeks,' or unless 'for exceptional reasons' it would be unfair to do so. . . . the commission should make factual findings of these two predicate conditions." Pilgrim v. Eaton, 391 S.C. 38, 703 S.E.2d 241 (Ct. App. 2010). "The overriding goal of the Workers' Compensation Act "is to compensate workers for reductions in their earning power caused by work-related injuries . . . ." Stephenson v. Rice Servs., Inc., 323 S.C. 113, 473 S.E.2d 699 (1996).

b. Turner produced fifty-two weeks of wage records covering the third quarter of 2014

through the second quarter of 2015. She provided sufficient evidence to meet her burden under the primary method. I therefore find it is practicable to use the primary method. I further find, as discussed below, that there are no exceptional reasons making use of this method unfair to the Defendants. Indeed, I find use of any other method would be unfair to Claimant.

Our appellate courts have considered various scenarios where exceptional reasons exist to depart from the primary method. The common thread to these decisions is that there are some reason why historical wages used in the wage calculation was unfair. Average weekly wage must account for increases in the rate of pay; in a difference in hours worked due to seasonal or work flow variations; for seasonal or short term employment which artificially inflate the employee's annual earning calculations; and for a situation where a very young employee with catastrophic injuries had not yet begun a full-time career[2]. None of these circumstances apply here. There is no exceptional reason to depart from the primary method, particularly as the wage records inevidence cover a full fifty-two weeks, are not disputed as to accuracy, and can reasonably be inferred to be indicative of Turner's future earnings with Condustrial had she not suffered her injuries.

c. Consideration was given to the various Defendants' arguments that Turner's average weekly wage should be based on her net taxable income. Defendants rely on Stephen v. Avins

[2] See, e.g. Booth v. Midland Trane Heating and Air Conditioning, 379 S.E.2d 730, 298 S.C. 251 (Ct. App. 1989)(merit increase in pay rate was an exceptional circumstance; Elliott v. South Carolina Department of Transportation, 362 S.C. 234, 607 S.E.2d 90 (Ct. App. 2004)(pre-injury salary increase should be considered in calculating average weekly wage); Brunson v. Wal-Mart Stores, Inc., 344 S.C. 107, 542 S.E.2d 732 (Ct. App. 2001)("grossly unfair to Wal-Mart to require payments based on [employee's] dual employment status since he did not intend to work both jobs after the holidays."); Bennett v. Gary Smith Builders, 271 S.C. 94, 98, 245 S.E.2d 129, 131 (1978)(reversing the lower court's calculation of claimant's average weekly wage as a full-time, year-round employee "as grossly unfair to the employer" since it would require the employer to pay almost twice what the employee, who only worked three to four months out of the year, actually earned); Pugh v. Piedmont Mech. & Zurich Ins., 396 S.C. 31, 719 S.E.2d 676 (Ct. App. 2011)(unfair to use limited period of wages following return to work from previous injury because the "natural variance in available work in this industry makes capturing the ebb and flow of work in a seventeen-week period difficult."); Sellers v. Pinedale Residential Center, 564 S.E.2d 694, 350 S.C. 183 (Ct. App. 2002)(exceptional circumstances applied to support "determination that [high school student who had not yet begun his career] most probably would have been earning and was thus entitled to a compensation rate of an electrician were it not for his spinal cord injury").

Const. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996). The claimant in Stephens was "self-employed as a subcontractor . . . , however, Avins Construction Company deducted a percentage for workers' compensation insurance and, therefore, he was their statutory employee." Stephens contended his average weekly wage should be based on his gross income; Avins contended it should be based on his after-tax income as shown on his tax returns. Noting the "statute does not specify whether 'wages' refers to net or gross earnings of a business owner operating as a subcontractor," the Court of Appeals held the average weekly wage should be "based upon his tax returns as a self-employed subcontractor." Id.

This argument is rejected as it is premised on a logical flaw, to wit, that Turner is an *independent contractor operating a business* whose expenses must be deducted from her wages to arrive at her average weekly wage. The statute is plain that for an *employee* the average weekly wage is based on the wages paid by the employer. Had Condustrial completed a Form 20, it would show the same average weekly wage calculated by Claimant. Taken to its logical conclusion, Defendants' argument would require the Commission to review the tax returns of every single injured worker to determine if there are any business-related tax deductions that should be used to reduce the average weekly wage. It would also result in a windfall for employers, particularly those who issue 1099s in an effort to misclassify their employees as independent contractors. These are absurd results plainly contrary to the legislature's intent.

The case law on this issue supports the conclusion that a putative independent contractor later determined to be an employee is to be paid based on actual gross earnings. There are no cases holding an employee's average weekly wage is based on after-tax earnings.

In Paschal, a case virtually identical to this one, the Court of Appeals affirmed the Commission's determination that the average weekly wage for a misclassified independent

contractor found to be an employee was to be based on the wages reported by the employer on the Form 20. Paschal worked as a "repo man" repossessing automobiles. Paschal was paid on a 1099 and deducted expenses on his tax return. Paschal's employer argued "the Form 20 was erroneously based on Paschal's gross earnings rather than his net earnings, that is, his gross earnings less his expenses." The Court of Appeals rejected this argument, affirming the Commission's finding that "this result, regardless of the method that is used, most accurately reflects Paschal's earnings and is fair to both Price and Paschal." Paschal v. Price, 670 S.E.2d 374, 380 S.C. 419 (Ct.App. 2008)*(quotation in original)*. As the Court explicitly rejected the identical argument made here by the Defendants, Paschal controls the result in this case. The Commission is required to use wages paid from the employer to the employee as the determinative evidence of average weekly wage.

Other cases support this approach. In Lewis, the Supreme Court was faced with determining the average weekly wage for an exotic dancer who worked for tips, kept no wage records, and filed no tax returns. Her employer had misclassified her as an independent contractor; a determination reversed by the Supreme Court. The only evidence was the testimony of the dancer/employee and a coworker about how much each earned each day in tips as an exotic dancer. The Commission held the average weekly wage was the statutory minimum of $75.00 based on the lack of documentary evidence. The Supreme Court reversed and remanded because "the commission's finding thatLewis presented 'no evidence whatsoever' as to the amount of money she earned is plainly wrong." Lewis v. L.B. Dynasty, Inc., 799 S.E.2d 304, 419 S.C. 515 (2017). Lewis is significant for its focus on the evidence of gross earnings and absence of instruction for the Commission to consider after-tax earnings on remand.

In Mozie, the claimant "was engaged in the logging business as a producer and was working exclusively for Frazier Pulpwood." The Commission was faced with three different sets of evidence

from which to determine the average weekly wage: (1) Form 1099 showing earnings of $19,129.83; (2) unsigned tax returns introduced "in an attempt to show low annual incomes in those years after deductions for business expenses;" and (3) "statements of Frazier Pulpwood with handwritten calculations showing Mozie earned well in excess of the $19,129.83 . . . ." Mozie v. Frazier Pulpwood, 378 S.E.2d 61, 298 S.C. 34 (Ct. App. 1989). The Commission based the average weekly wage on the handwritten calculations, rejecting the employer's attempt to use tax deductions to show a lower annual income. The Court of Appeals affirmed, holding the Commission's determination complied with the evidence and § 42-1-40.

Consideration was also given to the Craft case decided by our sister state of North Carolina. In Craft, the employee was paid a fixed price for each job, from which he deducted expenses on his taxes. The Court held "Even if such expenses were incurred by the plaintiff, the Commission is not required to deduct those expenses from the income earned to properly calculate the average weekly wages." The Court affirmed the commission's finding that it "would be unjust and unfair to treat plaintiff employee as a subcontractor." Craft v. Bill Clark Const. Co, 474 S.E.2d 808 (N.C. App. 1996).

Although they present somewhat different facts than Pascal and the instant case, Craft, Lewis and Mozie are consistent that the correct method is to follow the statute and rely on gross wages.

I also find it would be unjust and unfair to treat Turner as a subcontractor when she is in fact an employee of Condustrial. A review of her earnings for the relevant four quarters totals more than $58,000. Her wages are the result of working over 2,700 hours. The determination of an average weekly wage of $333.29, as requested by the Defendants, would result in the Claimant's effective hourly rate being $6.40 an hour. This would not be consistent with the earning capacity of an LPN, as indicated in the record. (This would also be inconsistent with Mr. Durham's

testimony in regard to pricing and payment of actual LPNs.)

It is therefore concluded that the average weekly wage in this case is to be based on gross wage records using the primary method set forth in the statute. This results in an average weekly wage of $1,130.86 and a compensation rate is $753.94.

E. Accident and Injuries.

1. Turner and another nurse were held hostage by two inmates in the infirmary at Broad River Correctional Center for approximately six hours on September 5, 2015. During this time the inmates physically assaulted Turner. I find Turner proved she suffered an injury by accident arising out of and in the course of her employment during the assault and its aftermath.

2. As to her injuries, Turner testified: "My neck hurt, my back, my right shoulder, my right elbow, and I had some blurred vision in my right eye. My left leg feels like it goes out from under me from time to time. But mostly my back, my neck, my shoulder, and may elbow as far as my physical injuries are concerned." [Turner Tr. 1, page 168, line 18-page 169, line 4].

3. Treatment records from Dr. Hess show Turner sustained injures to her right elbow, right shoulder, neck and back.

4. An evaluation by Dr. Daniel Westerkam showed multiple injuries including the right elbow, right shoulder and mid-thoracic spine. Dr. Westerkam also diagnosed posttraumatic stress disorder as a direct result or aggravation of the assault on September 5, 2015.

5. Based on the testimony and medical evidence, I find Turner sustained injuries to her right arm, right shoulder, back and neck. I further find she developed posttraumatic stress disorder as a direct result of the assault and surrounding injuries.

6. Although not necessary to the decision, I further find Turner was exposed to unusual and extraordinary stress on her job which directly resulted in her psychological injuries.

F. **Medical Treatment.**

1. Based on the testimony and medical evidence, I find Turner is not at maximum medical improvement.

2. Additional treatment would tend to lessen her period of disability. She is entitled to causally related treatment until she reaches MMI and thereafter so long as additional treatment tends to lessen her period of disability. Dr. Westerkam issues his opinion as to recommended treatment. He specifically recommended an MRI, EMG and NCS of her right shoulder and arm, after which she is to receive physical therapy, injections or surgery, as well as other modalities. He also opines that she needs ongoing counseling and treatment for PTSD, including a psychologist for counseling on a weekly basis and a psychiatrist for medication management.

3. I do not find Dr. Westerkam able to provide these necessary modalities. Additionally, the specific treatment and modalities should be determined by the physicians that will be currently treating the Claimant. I therefore instruct the liable party to identify and provide physicians and other providers who are ready, willing and able to treatment. The liable party shall "furnish or cause to be furnished, free of charge to the employee, and the employee shall accept, an attending physician and any medical care or treatment that is considered necessary by the attending physician." S.C. Code Ann. § 42-15-60 (2017). Should the liable party fail to designate attending physicians within 30 days of this order, the undersigned will designate the providers pursuant to Section 42-17-30 and 42-15-60.

G. **Temporary Disability Compensation.**

1. The parties assert contrary positions on payment of temporary total disability.

2. Claimant contends she is entitled to temporary total disability compensation from the date of the accident and continuing on a running award. Claimant contends that her injuries—

particularly her psychological injuries—render her disabled within the meaning of the Act. Claimant further contends that the putative offer of light duty was not a bona fide offer of employment, but rather a cynical attempt by Condustrial to minimize liability should she be ultimately determined to be an employee. She contends she has never been able to return to employment and could not have accepted such an offer.

3. Condustrial, joined by the other Defendants, contends Turner was offered employment suitable to her capacity which she willfully declined, thus barring her from receipt of temporary compensation. Condustrial further contends Turner presented no medical proof of disability, such that regardless of whether suitable employment was offered, Turner is not disabled.

4. Under the Workers' Compensation Act, a claimant is entitled to compensation for a total disability resulting from a work-related injury. S.C. Code Ann. § 42-9-10 (2007). Disability is statutorily defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." S.C. CODE Ann. § 42-1-120 (2007).

5. The analysis requires the Commission to first determine whether Turner is disabled. The second step is to determine if Condustrial offered employment suitable to her capacity, and if so, whether Turner refused to accept suitable employment.

6. In terms of work restrictions assigned by medical providers for her physical injuries, Turner was treated at the Palmetto Health Richland emergency room. She was treated for the physical assault but given no specific work restrictions. [Claimant's APA pages 1-13].

7. As part of her application to the Office of Victim's Assistance, her family doctor signed a SOVA *Physician's Disability Report - Lost Wages* stating "Multiple contusions on back (middle) above left elbows on right upper arm. Pat states hands & back are tender & stiff. States

she is having issues with night sweats, sleeping, and small places. She is having difficulty eating . . . . Not permanent physical but appears to be anxious and fearful. However Patient states she is having mental health issues due her altercation. She is to f/u with PCP in 2 wks. As well as MHC." Most importantly, "Patient will be totally unable to work from 09/16/2015 through 09/30/2015." [Claimant's APA page 291].

8. There are no other out of work notes from her family doctor, and no further SOVA forms in the record that address work ability or disability. (There is an additional SOVA form (Mental Health Counselor's Report) dated December 11, 2015 that does not address work status. Claimant's APA page 294. The visit note and this form are further addressed below.)

9. Turner was placed on specific work restrictions on October 20, 2015, when she saw Dr. Hess. Dr. Hess "limit[ed] her lifting to less than 10-20 pounds for approximately six weeks." [Claimant's APA page 25].

10. The Claimant saw Dr. Westerkam on September 5, 2017 for an independent medical evaluation. Dr. Westerkam "recommend[ed] that she not lift any more than 10 pounds with the right arm and that she avoid all overhead work with the right arm." He also recommended "that she not do any bending, stooping, or crawling." [Claimant's APA pages 215A-215C].

11. Turner is unable to physically work as a nurse. The restrictions from Drs. Hess and Westerkam prevent her from working as a nurse. She testified she is unable to work as a nurse due to her physical injuries. [Turner Tr. 1, page 172, lines 18-23].

12. Records from the Claimant's psychological treatment indicate in the reporting of symptoms that the Claimant had not returned to work. The Claimant was treated at Palmetto Day Treatment from October 21, 2015 until November 20, 2015. The Claimant asked her therapist at Palmetto on October 21, 2015 if she would be able to get a note to give to her employer excusing

her from work. (Claimant's APA page 38) The counseling note states that the LMSW told patient that program therapist could provide a note signed by the doctor. The record in this case does not contain such note. On November 23, 2015, Dr. Berg (Palmetto) authored a note discharging the Claimant and stating that the Claimant was psychiatrically stable. (Claimant's APA 54)

13. The Claimant was also treated by Lexington County Mental Health from November 12, 2015 until May 2, 2017. There are other references in the psychological records of Lexington Mental Health noting that the Claimant was seeking disability. However, the records do not contain an actual opinion of a medical provider. In the December 11, 2015 treatment record, the Claimant was asked if she just didn't feel like going back to work by the therapist, Mandy Burgett. (Claimant's APA page 94) (Mandy Burgett is the therapist that filled out the SOVA form (Mental Health Counselor's Report) dated December 11, 2015 that does not address work status. Claimant's APA page 294.)

14. As mentioned above, the Claimant saw Dr. Westerkam on May 18, 2017. (Claimant's APA 215B) Dr. Westerkam not only concluded that the Claimant had physical injures, but he also opined that the Claimant sustained posttraumatic stress disorder as a direct result or aggravation of the assault.

Dr. Westerkam stated his opinions as to the Claimant's work restrictions and treatment. He issued work limitations for the Claimant's physical injuries, and recommended treatment modalities. He provided his opinion as to the Claimant's post-traumatic stress condition, the required treatment for her psychological condition, but did not issue any work restrictions related to the Claimant's mental injuries.

15. The Claimant was not written out of work by any medical provider due to psychological disability, except for the period of time from September 16, 2015 through September

30, 2015. (Claimant's APA page 291). As indicated above, a doctor's note requested of the therapist by the Claimant in October of 2015 was not within the record. It would be speculation as to whether one was refused, issued, or if issued, what it may have contained. Further, Dr. Berg discharged the Claimant as being psychiatrically sound on November 25, 2015. Dr. Westerkam does not place any restrictions on the Claimant's psychological ability/disability to work. In the psychological treatment records there is mention of Claimant's not working in the reporting symptoms and problems, but the undersigned cannot extrapolate a reporting of symptoms to be the actual opinion of the provider or physician with regards to ability or disability to work related to the injury. In releasing Claimant, Dr. Berg found on November 23, 2015 that Claimant was psychiatrically sound and Dr. Westerkam did not issue any psychological work restrictions. The Commission cannot issue an opinion that would be the equivalent of a medical opinion. Burnette v. City of Greenville, 401 S.C. 417, 737 S.E.2d 200.

16. Condustrial presented Turner with a letter at her home on September 24, 2015. (Condustrial APA page 142) extending Claimant an offer to work in the office performing light duty work assisting with minor filing and paperwork needed. The offer allowed Claimant to work in a facility with no prisoners and for Claimant to set her own schedule. The offer was within the restrictions issued by Dr. Hess and Dr. Westerkam. Claimant did not accept the offer. (Hrg. Tr. P. 245, l. 24- P. 247, l. 21).

17. The statute provides: "If an injured employee refuses employment procured for him suitable to his capacity and approved by the commission he shall not be entitled to any compensation at any time during the continuance of such refusal." S.C. Code Ann. § 42-9-190 (2007). Pollack v. Southern Wine & Spirits of America, 405 S.C. 9, 747 S.E.2d 430 (2013)

18. The award of disability is denied from September 30, 2015 through the date of the

hearing. This opinion does not purport to deny benefits beyond the date of the hearing, as the Commission would not have knowledge of whether the Claimant has or has not been issued work restrictions applicable to periods after the date of hearing.

19. As Turner is not at MMI, a finding of permanent disability is not ripe for determination at this time.

H. The Contract Labor Services Agreement between Condustrial and Countrywide Staffing Solutions, Inc.

1. A valid, binding and enforceable contract existed between Condustrial and CSSG.

Condustrial and CSSG are both sophisticated business entities who negotiated and executed a Contract Labor Services Agreement ("Contract"). Neither party argued that a contract did not exist. The record before this Court shows that Condustrial failed to acquire workers compensation coverage for Claimant under its Contract with CSSG, nor did it acquire coverage for Claimant from any other source. Condustrial seeks to modify the contract to provide coverage. For the reasons set forth below, Condustrial is not entitled to any remedy from the Commission.

The Contract provided:

> **"CSSG will perform the following with respect to Selected Staffing/Employees performing services for Client based on timely, accurate, and complete information and payment provided by Client: . . . provide . . . workers' compensation benefits . . . and handle . . . workers' compensation claims involving Selected Staffing/Employees." (APA 43 ¶ 1 & 1.c.)**

The "Selected Staffing/Employees" covered under the Contract were those "furnish[ed] and/or provide[d]" by Condustrial "to perform the type of work described on Exhibit B under [Condustrial]'s supervision at the locations described on Exhibit B." (*Id.* ¶ 1.a.).

2. Claimant is not a "Selected Staffing Employee" as contemplated in the Contract because Condustrial did not to submit Claimant to be included as a Selected Staffing/Employee. Therefore, neither CSSG nor CSSG's insurance carrier have any liability to Claimant.

The testimony of Tom Sears, Condustrial's General Counsel, confirms that Condustrial had to provide to CSSG the National Council on Compensation Insurance (NCCI) codes used to classify types of businesses for workers compensation insurance and locations of these businesses to CSSG and that CSSG had to agree to accept to be contractually bound to provide workers compensation coverage for those businesses at those locations. (Trial Tr. 4 at 309.). Condustrial submits no evidence to show even an attempt to submit Claimant as a "Selected Staffing/ Employee," until well after the claim had been submitted.

The record in its entirety demonstrates that Condustrial, as part of a business strategy, never intended to submit Claimant (or other 1099 employees) to be included as "Selected Staffing Employees." The Contract provides in pertinent part:

> **"Client shall make any and all strategic, operational and other business-related decisions regarding its business. Such decisions and related outcomes shall exclusively be the responsibility of Client and CSSG shall bear no responsibility or liability for any actions or inactions by Client . . . ." (APA 43 ¶ 2.a.)**

For employees that Condustrial wanted to put within the ambit of the Contract, Condustrial was required to "submit timely, complete, and accurate payroll information" which was "not misleading." (*Id.* ¶ 2.c.)

The record is clear that Condustrial never submitted Claimant to CSSG for workers compensation coverage under the contract. Condustrial never reported to CSSG (a) Claimant's payroll information (or any 1099 workers' payroll information for that matter) and (b) that of any of its 1099 workers were staffed at the Kirkland Correctional Institution. (GIC APAs 27-28 pp. 568-641 (Condustrial Payroll for August and September 2015) & GIC APA 32 pp. 735-737 (List of locations provided by Condustrial to Countrywide).)

Sear's testimony, likewise, affirms that Condustrial never intended for Claimant to be

covered by the contract with CSSG. According to Sears:

> **Q. So any understanding or thing you might have told them about Medustrial, if its not in this agreement, its not a part of the deal?**
>
> **A. When we met with Mr. Hansen, We told him about Medustrial and said "But They're 1099's so we are not asking you for insurance for 1099's."**

(Trial Tr. Page 311.) In addition, the list of locations Condustrial provided to CSSG never included the Kirkland Correctional Institution. (GIC APA 32 pp. 735-737 (List of locations provided by Condustrial to Countrywide).) The testimony of Condustrial's President, Tony Durham, as well as Sears, confirmed that Condustrial never submitted any prison facility location to CSSG for workers compensation insurance coverage for any individual under the Contract. (Sears Trial Tr. 4 at p. 315; Sears Depo II at p. 182; Durham Trial Tr. 6 at p. 264.) Under the plain and unambiguous terms of the Contract, CSSG cannot be liable for any employee Condustrial failed to report to it in a timely manner, or those for which it failed to identify the location at which an employee would be working.

Condustrial argues that under the Contract a "new hire" would be covered by the Contract even before the newly employed individual was reported to CSSG, and therefore it should not matter that it did not report Claimant in this instance. There is no support for that argument in the plain language of the contract. In addition, Claimant was not a "new hire." She had been in Condustrial's employ for many years. Finally, Sears testimony as set forth above makes it clear that the parties never intended for the "1099's" to be a part of the Contract.

Condustrial also argues that Claimant was already covered under the Contract because the NCCI Code classifying other nursing-type workers were provided workers compensation coverage under the Contract. However, Sears also testified that Condustrial failed to submit Claimant's

name, payroll information and the Kirkland Correctional Institution as a location in which Claimant's type of business would work. In addition, as discussed in further detail below, Claimant's class code, that is, one for workers in a prison facility, was never submitted or covered under the Contract. Rather, Condustrial had submitted for coverage nursing-type workers in class codes that worked in private hospitals and nursing homes, for example. Indeed, the credible and reliable evidence in the record demonstrates that Claimant's class code and location were never submitted to CSSG for coverage.

3. Reformation of the Contract is not appropriate because the record demonstrates that no mutual mistake of fact was present at the time the Contract was formed.

Condustrial attempts to argue that when the parties were negotiating the Contract, CSSG misrepresented itself as a Professional Employment Organization (PEO), even though it was not licensed as one. Because of this, Condustrial argues that the Contract should be reformed to provide for workers compensation coverage for Claimant as if CSSG were a PEO. Condustrial makes these arguments in an attempt to retroactively provide coverage for Claimant. However, these arguments, have no merit and are not supported but rather contradicted by the testimony of the parties, the Contract, and applicable law.

A reformation remedy is utilized to conform writings to the actual agreement of the parties. *Crosby v. Protective Life Ins. Co.*, 293 S.C. 203, 359 S.E.2d 298 (Ct. App. 1987). "[R]eformation is adjudged because the instrument, by reason of mistake or fraud, does not embody the true agreement of the parties." *S. Realty & Constr. Co. v. Bryan*, 290 S.C. 302, 350 S.E.2d 194 (Ct.App. 1986) (quoting 66 Am.Jur.2d Reformation of Instruments Section 6 (1973)). "A contract may be reformed on the ground of mistake when the mistake is mutual and consists [of] the omission or insertion of some material element affecting the subject matter or the terms and stipulations of the

contract, inconsistent with those of the parol agreement which necessarily preceded it." *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 747 S.E.2d 178 (2013).

The existence of a mutual mistake must be shown by clear and convincing evidence before equity will reform a contract. *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 747 S.E.2d 178 (2013) "Reformation is not available for the purpose of making a new and different contract for the parties but is confined to establishment of the actual agreement; thus, a court of equity cannot, and should not, undertake to make a new contract between the parties by reformation." *56 Leinbach Investors, LLC v. Magnolia Paradigm, Inc.*, 411 S.C. 466, 769 S.E.2d 242 (Ct. App. 2014).

Condustrial admits that it was well-aware the Contract with CSSG set forth an arrangement different from and less than that provided by a PEO. Condustrial testified that during initial discussions between it and CSSG regarding coverage for Condustrial's workers, CSSG representatives indicated that either it or one of its other business entities was a licensed PEO. Sears states, however, that "[t]he intent was for [CSSG] to act more like an A.S.O.; it wasn't a true P.E.O, because they didn't take over Condustrial's employees." (Trial Tr. 4 at 291). Durham likewise testified that Condustrial was not willing to do a PEO arrangement at the time and wanted to be able to pick services. (Trial Tr. 6 at 89; 280; 445). Durham testified that a PEO was a full-service package, but Condustrial wanted something less than that, something less expensive, where it could unbundle the package and just pick certain pieces out. (Trial Tr. 6 at 226). Condustrial only wanted a piece of a PEO package. (Trial Tr. 6 at 227.) Indeed, had Condustrial contracted with a licensed PEO, the PEO statute would have required Condustrial to agree to certain contractual terms that it explicitly rejected when negotiating the terms of the Contract.[3]

[3] Trial Tr. 11/3/17 at p. 243, l. 13 – 22 ("Q: WHAT YOU WANTED WASN'T A P.E.O. YOU TOOK OUT THE ASSIGNMENT PROVISION. A: WE DIDN'T WANT THE FULL SERVICE OF A P.E.O.");

Despite its argument before the Commission, therefore, Condustrial rejected terms which would have been part of a PEO arrangement. That is, Condustrial did not want CSSG to have control over its employees, to be the employer of record, or to take over payroll functions. *Cf.* S.C. Code Ann. § 40-68-70 (requiring licensee in a PEO arrangement to take control of client company employees, payroll functions, and so forth).

In negotiating for something less than a PEO arrangement, moreover, these sophisticated business parties executed the Contract which makes clear that:

> **"this agreement constitutes the entire understanding and agreement between the parties hereto...this agreement may be modified or amended only by a written modification or amendment signed by both parties." (GIC APA 43 pp. 762-771 ¶20).**

The contract also has a supremacy clause which states

> **"[t]his agreement supersedes all previous Agreements or understandings between the parties hereto, and all other such Agreements or understandings, whether oral or written, shall become null and void as of the date of the execution." (GIC APA 43 pp. 762-771 ¶22).**

Trial Tr. 11/3/17 at p. 244, l. 22 – p. 246, l. 10 (Q: DOES AN ASSIGNMENT OF EMPLOYEES HAVE ANYTHING TO DO WITH A P.E.O.? A: IT HAS THEM BEING THE EMPLOYER OF RECORD IN MOST CASES. Q: WHERE YOU ASSIGN THEM, RIGHT? A: WHERE YOU WOULD MAKE THEM THE EMPLOYER OF RECORD, PERIOD. Q: OKAY. AND Y'ALL WEREN'T GOING TO DO THAT? A: WE WEREN'T GOING TO DO THAT.");

Trial Tr. 11/3/17 at p. 249, l. 7 - 23 ("Q: ALL RIGHT. WELL, LET'S TALK ABOUT WHAT YOU AGREED TO. YOU DIDN'T AGREE TO A P.E.O., DID YOU? A: NOT A FULL FLEDGED P.E.O., I DID NOT.");

Trial Tr. 11/3/17 at p. 280, l. 1 – 25 ("Q: BUT MR. SEARS AND YOURSELF, YOU TALKED ABOUT P.E.O.s IN YOUR EMAILS LEADING UP TO THE CONTRACT AND SAID 'WE DON'T WANT IT.' A: WE DIDN'T WANT THE FULL PACKAGE P.E.O. Q: IN FACT, YOU DIDN'T WANT – YOU WANTED TO MAINTAIN CERTAIN CONTROLS AND CERTAIN CONTROLS --- A: ABSOLUTELY. Q: OVER CONTRACTS AND EMPLOYEES, WHICH TAKES IT OUT OF THE REALM OF A P.E.O.? A: ABSOLUTELY.");

Trial Tr. 11/3/17 at p. 445, l. 5 – 12 ("Q: AND I THINK YOUR TESTIMONY HAS BEEN IN THIS EMAIL IS THIS IS WHERE YOU START UNBUNDLING THE – LETTING SCOTT HANSON KNOW THAT YOU WANT TO START UNBUNDLING THE P.E.O. YOU DON'T WANT THE FULL SERVICE P.E.O. SITUATION. A: THAT'S TRUE. Q: YOU WANT SOMETHING LESS THAN THAT? A: ABSOLUTELY."); Trial Tr. 11/3/17 at p. 446, l.11

To this end, the undersigned notes the Contract fails to contain any provision referencing a professional employer organization or warranting in any way that CSSG is a PEO. (Trial Tr. 11/3/17 at p. 233, l. 3 – 24; Trial Tr. 11/3/17 at p. 234, l.11 – 25; Trial Tr. 11/3/17 at p. 235, l.14 – 20; Trial Tr. 11/3/17 at p. 235, l.14 – 20.) For all the reasons above, reformation of contract is not warranted.

4. Section 40-68-10(7) of the South Carolina Code of Laws Regulating Professional Employer Organizations Cannot Reform the Contract.

Condustrial also argues that if the Commission does not find reformation by contract appropriate in this matter for the reasons above, then the provisions of section 40-68-10 *et seq.* of the South Carolina Code of Laws ("PEO Statute") should apply, so that CSSG, is declared by the Commission to be a statutory PEO, and then it or Guarantee, its insurer, would be required to cover Claimant, a non-leased employee, under this statute as well. Chapter 68, however, does not apply here. The provisions and obligations of Chapter 68 apply only to those persons "licensed" as a professional employer organization and their client companies. S.C. Code Ann. 40-68-10(7). A person may be licensed as a PEO only after review and approval of an application for the same submitted to the Department of Consumer Affairs. S.C. Code Ann. § 48-60-30-55. There was no evidence presented at trial that CSSG ever applied for or was approved as a licensed PEO.

The PEO statute and related case law, moreover, do not provide any measure for the Commission to declare CSSG a PEO under the PEO statute, and then apply certain PEO statutory requirements to the parties in this matter. Although the undersigned does not make any such finding, to the extent CSSG represented to Condustrial that it was a PEO, when in fact CSSG was not a licensed PEO, the statute provides for other remedies. S.C Code Ann. §§ 40-68-150-160 (providing remedial avenues for wrongs caused by someone offering professional employer services without a license). In addition, Condustrial did not rely on such representation when

seeking coverage for its employees and specifically rejected a PEO arrangement. Specifically, as discussed above, ample evidence demonstrates that Condustrial negotiated for something other than and less than a PEO arrangement. Condustrial expressly rejected contract terms that would have been required under section 40-68-10 *et seq.* had it been a client company of a professional employer organization. Thus, the Contract negotiated by these sophisticated business entities makes no reference to CSSG as a PEO, that CSSG would serve as something like a PEO, or provide for a PEO arrangement.

For all the reasons above, CSSG is not liable for any losses suffered by Claimant.

I. The Workers Compensation Insurance Policy Between The Guarantee Insurance Company and Countrywide Staffing Solutions, Inc.

1. There is no direct insurance policy between Guaranty Insurance Company (GIC) and Condustrial.

GIC provided workers' compensation insurance to CSSG from June 30, 2015 through June 30, 2016 for properly reported CSSG employees in States and locations approved by GIC under Workers Compensation Insurance Policy Number WCP500069701GIC, with Endorsements dated July 20, 2015 and July 30, 2015 (collectively referred to as "GIC/CSSG Policy").[4]

Only CSSG is insured under the GIC/CSSG Policy, and only properly reported CSSG employees in States and locations approved by GIC were insured under the GIC-CSSG Policy. GIC regularly reviewed CSSG's requests to cover new codes of employees at new or old locations or new or old codes of employees at new locations under the GIC/CSSG Policy and would approve or deny coverage.[5]

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[4] GIC Trial Ex. 7 & APA 51 pp. 796-825 (July 20, 2015 Endorsement deleting multiple employers) & Nov. 4 2017 Trial Tr. (Becky Barnette, GIC's Vice-President of Underwriting and Manager of the PEO Unit), pp. 37-47 (regarding terms of the first endorsement); GIC Ex. __ & APA 25 pp. 535-567 (July 30, 2015 clarifying and adding locations) & Nov. 4 2017 Trial Tr. Direct of Becky Barnette, GIC's Vice-President of Underwriting and Manager of the PEO Unit, pp. 60-64 (regarding second endorsement updating the locations subject to coverage).

[5] GIC Ex. 8 & APAs 740-753; November 4, 2017 (Becky Barnette) Trial Tr. at 48-55 (demonstrating that GIC reviewed CSSG's requests to cover new codes of employees at new or old locations or new or old codes of employees

Thus, the GIC/CSSG Policy did not cover Condustrial's employees, unless they were made an employee of CSSG through the Contract and then properly reported by CSSG to GIC and approved by GIC for coverage.

2. **CSSG never reported Claimant for coverage under the GIC/CSSG Policy, as Claimant was not an employee of record of CSSG, or among workers in class codes and in locations approved by GIC under the GIC/CSSG Policy.**

The undisputed evidence shows that Condustrial never reported Claimant for coverage under the Contract, and consequentially, CSSG never reported Claimant for coverage under the GIC/CSSG Policy. Claimant too was not among the codes of employees even generally approved for coverage under the Contract or the GIC/CSSG Policy. (Becky Barnette) Trial Tr. November 4, 2017 at pp. 20-28 (describing the use of the N.C.C.I. Scopes Manual for underwriting purposes).

Condustrial argued that it had generally submitted nurses falling under N.C.C.I. class codes 8829 and 8833 for approval under the Contract, and therefore Claimant, a nurse, should also be covered under the Contract and GIC/CSSG Policy. However, the testimony at trial regarding the issue to receive the greatest weight showed that N.C.C.I. class codes 8829 and 8833 apply to nurses working in convalescent or nursing homes and public and private hospitals.[6] Claimant was a nurse

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at new locations and would approve or deny coverage under the GIC/CSSG Policy as part of its ongoing underwriting process.)

[6] The testimony of Becky Barnette, GIC's Vice-President for Underwriting and Manager of the PEO Unit, must receive the greatest weight. Her experience and expertise in underwriting workers compensation insurance coverage and understanding of PEO arrangements far outweighs that of any other witness having various roles in the insurance process who testified during trial and attempted to interpret the facts, Contract, or GIC/CSSG Policy at issue. Barnette has been employed in the insurance industry for more than 30 years, specifically working since 2014 as Vice-President of Underwriting and Manager of the PEO Unit for Guarantee Insurance Company, a monologue workers compensation insurance carrier. (Nov. 4, 2017 Trial Tr. at 8-18.) Barnette testified how workers compensation is a specialty coverage that is not underwritten the same way as other lines of coverage. Barnette noted how an underwriter in workers compensation must have a deep knowledge of the classification system for workers, and how to properly investigate and analyze companies' operations. No other witness who testified at trial had anywhere near this depth of experience in underwriting, much less specific knowledge of doing so in the specialize field of workers compensation, or of PEO arrangements which Condustrial suggested provided a theory for coverage in this case. For instance, and without needlessly comparing and contrasting every witness who had ties with the insurance industry, Condustrial's witness, Charles Edward Lee, Jr. testified as an insurance agent, first licensed in Georgia in 1986, and then received a property and casualty license in South Carolina in 1997, and handled Condustrial's workers compensation coverage from 2003-2010. While Lee testified how an insurer would treat a worker who was treated by their insured as a 1099 and later determined to be an insured's employee in a direct insurance relationship, Lee also

at the Kirkland Correctional Institution at the South Carolina Department of Corrections, however, and properly classified under Code 7720.[7] The Kirkland Correctional Institution was never submitted by Condustrial to CSSG as a location for workers under the Contract or consequently, requested as a location for coverage and approved by GIC under the GIC/CSSG Policy. The Policy and Endorsements do not include Kirkland Correctional Institute or any correctional facility for that matter.[8] Finally, even Condustrial admitted that any time it sought to add a code and location for workers compensation coverage under the Contract, CSSG could have rejected that request under the Contract. (Trial Tr. 4 (Sears) at 65 and 128.)

Becky Barnette, Vice-President of Underwriting, moreover, testified that Claimant would not have been approved for coverage under the GIC/CSSG Policy, even if Condustrial had followed its contractual obligations and submitted Claimant for coverage by providing Claimant's proper class code and location of work under the Contract and then CSSG would have submitted Claimant properly for approval under the GIC/CSSG Policy. GIC has never covered any worker at a prison location and would not have done so in this instance either. (Nov. 4, 2017 Trial Tr. (Barnette) at pp. 78-79

> Q. AND . . . WHILE YOU'VE BEEN V.P. OF UNDERWRITING FOR . . . GUARANTEE INSURANCE COMPANY, HAVE YOU EVER APPROVED A

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testified that he did not know what would happen in the PEO or ASO arrangement. He did not have any exposure to that situation or scenario. (Nov. 6, 2017 Trial Transcript 6 at 60.) Other insurance representatives with various roles in the insurance process had similarly limited understanding of the underwriting process for workers compensation insurance policies and/or of PEO and ASO workers compensation insurance arrangements. (See GCI Trial Exs. 10-11 (N.C.C.I. Scopes Manual Codes 8829 and 8833) & November 4, 2017 Trial Tr. (Becky Barnette) at pp. 65-66, 77-78, 127-129 (discussing interpretation of Codes 8829 and 8833, and why they cannot be properly assigned to Claimant for underwriting purposes.)

[7] (GCI Trial Exs. 12-13 (N.C.C.I. Scopes Manual Codes 7720 and 9410) & November 4, 2017 (Becky Barnette) Trial Tr. at 71-76 (discussing interpretation of Codes 9410 and 7720 and proper classification of Claimant as an employee under Code 770).

[8] (GIC Trial Ex. 5 & APA 24 pp. 375-534 (the June 30, 2015 Policy); GIC Trial Ex. 7 & APA 51 pp. 796-825 (July 20, 2015 Endorsement deleting multiple employers); GIC Ex. __ & APA 25 pp. 535-567 (July 30, 2015 clarifying and adding locations); Nov. 4, 2017 Trial Tr. pp. 79-80 (stating that Claimant, her Code Class, and the location of her employment were never submitted to GIC for review and approv[a]l).

WORKER AT A MAXIMUM LEVEL THREE SECURITY FACILITY?

A. ABSOLUTELY NOT. . . . WE WOULD NOT WRITE AN ACCOUNT WHOSE EXPOSURE WAS A CORRECTIONAL FACILITY." . . .

Q. ANY CORRECTIONAL FACILITY?

A. ANY CORRECTIONAL FACILITY.

Q. MAXIMUM SECURITY LEVEL THREE OR NOT?

A. CORRECT. [Nov. 4, 2017 Trial Tr. (Barnette) at pp. 93].

3. **The GIC/CSSG Policy does not provide any indirect method for coverage, nor does any statute provide for the same.**

Finally, the GIC/CSSG Policy does not provide any indirect method for coverage, nor does any statute provide for the same. (*See supra* discussion of Reformation of Contract and application of Section 40-68-10 et seq. of the South Carolina Code of Laws; *see also* November 4, 2017 (Becky Barnette) Trial Tr. at 80-81 (reiterating time and time again that the GIC/CSSG policy only insured CSSG employees, and Claimant, whether under the GIC/CSSG Policy or a PEO arrangement, was not a leased employee of CSSG).)[9] Therefore, for all the reasons provided above, Claimant was not and cannot be covered under the GIC/CSSG Policy, and GIC is not liable for any losses suffered by Claimant.

[9] The Commissioner cannot ignore either that GIC had issued in the past a high deductible workers compensation insurance policy to Condustrial as its insured, and thus Condustrial was well-aware of how to make itself a direct "insured." What is more, when Condustrial was audited by GIC pursuant to this past policy, GIC discovered that Condustrial had hundreds of 1099 workers. (GIC Trial Ex. 14 (Audit Worksheet) & November 4, 2017 (Becky Barnette) Trial Tr. at 86-92 (noting Condustrial had a direct policy with Guarantee in the past, and the audit reveal hundreds of 1099 employees). The audit records show, however, that GIC deducted this 1099 payroll exposure, Condustrial having classified the 1099 exposure as "OCIP" or an "owner-controlled insurance program," and indicating that these employees were insured by the South Carolina Department of Corrections, among other governmental agencies, and noting that the board of directors at Condustrial represented these governmental agencies do not provide certificates of insurance. (GIC Trial Ex. 14 (Audit Worksheet) & November 4, 2017 (Becky Barnette) Trial Tr. at 92-100, 116-117; *see also* CSSG Trial Ex. 5 ACORD Standard Commercial Insurance Applications and Form 130 & November 4, 2017 (Becky Barnette) Trial Tr. at 104-109 (expressing the importance of honesty in insurance application process for underwriting and noting that Condustrial did not represent that it had any 1099 employees or any 1099 employees working under class code 7720 for purposes of applying for insurance)

J. Transfer of Liability to the South Carolina Uninsured Employers' Fund.

Section 42-1-415 states that transfer of liability may be made to the South Carolina Uninsured Employers' Fund (herein after referred to as SCUEF) when the contractor or owner collects documentation of insurance at the time that the contractor is engaged to perform work.

A contract to provide nursing staff was entered into between Medustrial and SCDC on or about September 11, 2008. (APA 254-259) There is no evidence in the record that a Certificate of Insurance from Medustrial was requested or provided to SCDC at this time. Our Supreme Court found in Hardee v. McDowell, 381 S.C. 445, 673 S.E2d 813 (2009) that the express language of the statute in the phrase "engaged to perform work" means each time that a subcontractor is actually hired to perform work. On September 11, 2008 SCDC did not verify coverage of insurance of Medustrial as required by Section 42-1-415. Further, there is no verification of insurance in 2008.

The terms of the contract provided for a yearly renewal. SCDC did not verify coverage on each renewal. The initial term of the agreement was for one (1) year, and that at the conclusion of each one year term, the Agreement will automatically renew for one year unless notice of intent not to renew was provided. If the renewal terms of the Agreement are considered separate dates of hire the record is devoid of evidence that SCDC sought or received proof of insurance on any of the actual renewal dates. There is not a certificate of insurance for September 11, 2009.

The next renewal period is September 11, 2010. A certificate of insurance was issued on April 30, 2010. However, there is no evidence as to when this certificate was obtained. Even if it was obtained on April 30, 2010, it could not apply to the contract renewal date of September 11, 2010. Hopper v. Terry Hunt Construction, 383 S.C. 310, 680 S.E.2d 1 (2009). The contract

renewed for the years from 2011 through the date of accident. If the dates of renewal are considered new dates of hire, then SCDC did not have a certificate of insurance for these dates.

SCDC and Accident Fund argue that April 30, 2010 certificate of insurance should be considered proof of insurance from April 30, 2010 forward due to the language of the certificate. Assuming that the certificate was obtained on April 30, 2010, the certificate lists the insured as AMS Staff Leasing l/c/f: Condustrial, Inc. The contract of SCDC is with Medustrial. Although, Medustrial is a trade name for Condustrial, there is no indication that SCDC knew of Condustrial in 2010. If the certificate was received in 2010, they could not rely on it as proof of coverage for Medustrial.

Even if the certificate of insurance was obtained at the hiring and had the party known to SCDC, Medustrial, was listed, SCDC could not rely on the certificate on its face. Although, there is language about the certificate being good for as long as the account being in good standing, it is clear that the proof of policy period as only for April 1, 2010 to April 1, 2011. The additional certificates of insurance in evidence were obtained after the date of accident.

Based on the record as a whole, including testimony of Tommy Burgess, which I find to be credible and the dates reflected on the certificates, I find that liability of this claim cannot be transferred to the SC Uninsured Employers' Fund per Section 42-1-415.

K. <u>Transfer of Liability upstream to the South Carolina Department of Corrections.</u>

As I find that Claimant was an employee of Condustrial at the time of her accident, I find that they are primarily responsible for the provision of medical treatment and payment of compensation to Claimant pursuant to the South Carolina Workers' Compensation Act as a result of her September 5, 2015 work accident. However, for the reasons set forth above, I find that Condustrial failed to maintain workers' compensation insurance covering Claimant at the time of

the accident. As I also find that Defendant SCDC was a statutory employer of Claimant on the date of injury and that liability cannot properly be transferred to the UEF pursuant to S.C. Code Ann. §42-1-415, I find that liability under the South Carolina Workers' Compensation Act for injuries sustained by Claimant as a result of her September 5, 2015 work accident transfers upstream to the SCDC and its carrier SAF pursuant to S.C. Code Ann. §§42-1-400 through 42-1-450. However, Defendants SCDC and SAF retain all rights for indemnification against Condustrial for any and all compensation, including medical and other expenses, paid, or to be paid by Defendants SCDC and SAF set forth in S.C. Code Ann. §42-1-440. Defendants SCDC and SAF are also entitled to pursue any other such right to indemnification or recovery under any statute or other theory of law.

L. **Indemnity**

CSSG, and derivatively The SC Guaranty Association defending GIC as CSSG's insurer, argue that under the "Indemnity" provision of the Contract and the "Recovery from Others" paragraph of the GIC Policy, Condustrial is liable to CSSG and SC Guaranty Association for their attorney's fees, costs, and expenses. Under the statutes and common law that apply to this Worker's Compensation Commission, however, the undersigned finds that it does not have the jurisdiction to decide this particular contractual issue. The Commission only has jurisdiction to determine the issue of coverage in this forum and finds that there are other forums in which CSSG and the SC Guaranty Association can pursue these claims.

SINGLE COMMISSIONER'S CONCLUSIONS OF LAW

1. South Carolina uses a four-factor test to determine whether a worker is an employee or an independent contractor. All four factors are weighed equally to determine whether the putative employer possesses the right of control—which is the lynchpin of the analysis. The

factors are: 1) direct evidence of the right or exercise of control; 2) furnishing of equipment; 3) right to fire; and 4) method of payment. Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 676 S.E.2d 700 (2009). In the instant case, the factors preponderate in favor of status as an employee.

2. Claimant sustained an injury by accident arising out of and in the course of her employment on September 5, 2015, within the meaning of S.C. Code Ann. § 42-1-160 (2007).

3. Claimant is entitled to additional medical treatment necessary to lessen the period of disability. S.C. Code Ann. § 42-15-60 (2005); Dodge v. Bruccoli, Clark, and Layman, Inc., 518 S.E.2d 593 (S.C. 1999); Dykes v. Daniel Constr. Co., 202 S.E.2d 646 (S.C. 1974). When the employee has not reached maximum medical improvement, medical care to treat injuries related to the injury by accident tends to lessen the period of disability. Additional medical care after reaching maximum medical improvement must be provided if it tends to lessen the period of disability.

4. During any period of disability resulting from the injury, the employer, at his own option, may continue to furnish or cause to be furnished, free of charge to the employee, and the employee shall accept, an attending physician and any medical care or treatment that is considered necessary by the attending physician, unless otherwise ordered by the commission for good cause shown. S.C. Code Ann. § 42-15-60 (2007).

5. The employer's representative shall provide and pay for medical care while a claimant is receiving or entitled to receive temporary compensation benefits. Reg. 67-509. Medical, surgical, hospital and other treatment which will tend to lessen the period of disability within the judgment of the Commission shall be provided by the employer. For good cause shown, the Commission may order such further medical, surgical, hospital or other treatment as may in the discretion of the Commission be necessary. S.C. Code Ann. § 42-15-60 (2007). The Commission has discretion to

designate the authorized treating physician and require the employer's representative to pay for causally related treatment. Id.; Martin v. Rapid Plumbing, 369 S.C. 278, 631 S.E.2d 547 (Ct. App. 2006).

6. Disability is defined as "Incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 25A S.C. Reg. 67-502 (1997). Claimant was disabled within the meaning of the Act from September 6, 2015 until September 30, 2016.

7. Condustrial failed to acquire workers compensation coverage for Claimant under its Contract with Countrywide Staffing Solutions, Inc., and reformation of contract is not warranted under the common law or any statutory law. Therefore, Countrywide Staffing Solutions, Inc. is not liable for any losses suffered by Claimant.

8. Condustrial was not an insured under the GIC/CSSG Policy. CSSG never reported Claimant for coverage under the GIC/CSSG Policy. Claimant was not an employee of record of CSSG, nor among the workers in class codes and locations approved by GIC under the GIC/CSSG Policy. Therefore, the Guaranty Insurance Company is not liable for any losses suffered by Claimant.

ORDER OF THE APPELLATE PANEL

In an appellate review, the Appellate Panel shall, pursuant to S.C. Code Ann. § 42-17-50, review the award, weigh the evidence as presented before the Single Commissioner, and, if good grounds be shown, make its own Findings of Fact and reach its own Conclusions of Law consistent with or inconsistent with those of the Single Commissioner.

After careful review and consideration of all the evidence presented to the Single Commissioner including the live testimony, the APA submissions, any exhibits, the Commission

file, any proffered evidence, the parties' appellate and respondent briefs, and oral argument before us, the Appellate Panel rules as follows:

1. It is the decision of the Appellate Panel, by unanimous vote, that all of the Single Commissioner's Findings of Fact and Conclusions of Law are correct as stated, **except** for the findings and conclusions in **Section D** related to Claimant's Average Weekly Wage and Compensation Rate. In accordance with the Supreme Court's opinion in Fox v. Newberry Cnty Memorial Hosp., 319 S.C. 278, 461 S.E.2d 392 (1995), the Single Commissioner's Findings of Fact and Conclusions of Law, **except** for the findings and conclusions in **Section D** related to AWW and CR, are hereby **AFFIRMED AND ADOPTED** by the Appellate Panel as if repeated verbatim herein.

2. The Appellate Panel **REVERSES** the Single Commissioner's Findings of Fact and Conclusion of Law regarding the Average Weekly Wage/Compensation Rate in **Section D** of the Single Commissioner's Order cited in its entirety above. The Appellate Panel finds and concludes the correct Average Weekly Wage is **$762.21** and the Compensation Rate is **$508.17**. The goal of wage calculation for compensation purposes is to fairly approximate the actual earnings the injured party would be earning but for the injury. See Sellers v. Pinedale Residential Center, 350 S.C. 183, 564 S.E.694 (Ct. App. 2002). In this case, the Single Commissioner was presented with a false dilemma of choosing between two extreme results—an AWW extrapolated from gross payments Claimant received before deduction of business expenses for federal income tax purposes or an AWW based on Claimant's NET taxable income as reflected on her returns. The Single Commissioner chose the former, which was error.

The Panel specifically rejects the arbitrary framing of this issue by the parties because neither methodology fairly approximates Claimant's actual earnings, which is the ultimate goal of

wage calculation for compensation purposes. Instead, the Panel has employed an analysis of Claimant's income tax returns to discern and approximate her "actual earnings" in accordance with South Carolina law. In Avins supra, the Court noted the unequivocal rule in South Carolina that mileage deductions should NOT be included in wage calculations. See also Wright v. Wright, 306 S.C. 331, 411 S.E.2d 829 (Ct. App. 1991) (mileage deductions taken on his federal income tax returns are not includable as income for calculation of benefits). The Court also cited favorably a case from North Carolina holding that expenses incurred in producing revenue should be excluded from earnings. See Baldwin v. Piedmont Woodyards, 58 N.C. App. 602, 293 S.E.2d 814 (N.C. Ct. App. 1982). Applying these principles, the Panel can extrapolate Claimant's "earnings" from her 2014 Schedule C by excluding mileage deductions and expenses unequivocally incurred to generate the gross payments.

Claimant's 2014 Schedule C reflects gross income/revenue of $56,180.00. Claimant deducted $11,020.00 for mileage and vehicle deductions, which per the aforementioned case law clearly cannot be included as earnings. That leaves revised net earnings of $45,160.00. Claimant's Schedule C also deducts numerous other business expenses, some of which may or may not have been directly incurred, or only partially incurred, to generate her gross income. However, some of Claimant's deductions, including—$2840.00 for insurance, $900.00 for contract labor, $220.00 for continuing education requirements, and $1565.00 for nursing uniforms—were clearly only incurred as a result of her occupation as an LPN and to produce her income/revenue. This yields unequivocal net earnings of $39,635.00, which divided by 52 weeks = an **AWW of $762.21** and a **CR of $508.17.**

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Decision and Order of the Single Commissioner is **AFFIRMED IN PART AND REVERSED IN PART!**

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

T. Scott Beck, Chairman
for the Appellate Panel

CONCURRING:

R. Michael Campbell, II, Commissioner

Gene McCaskill, Commissioner

Amended

1514359 Rachel J. Turner v SCDCC

Order Served via E-Mail:

lglover@saf.sc.gov Lisa C. Glover, Esquire EFarthing@saf.sc.gov Erin Farthing, Esquire gbeard@robinsongray.com Grady Beard, Esquire brichardson@sowellgray.com Beth Richardson, Esquire jnewman@hnblaw.com James P. Newman, Jr., Esquire gregg@allfordlawsc.com Gregory M. Alford, Esquire JGoodwyn@GoodwynLaw.com T. Jeff Goodwyn Jr., Esquire ggallagher@speed-seta.com George D. Gallagher, Esquire stephen@samuelsreynolds.com Stephen B. Samuels, Esquire	

Order Served via USPS:

CERTIFICATE OF SERVICE

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

By Valerie D. Deller on April 6, 2021

SPEED, SETA, MARTIN, TRIVETT & STUBLEY, LLC
ATTORNEYS AT LAW

WALLACE SPEED (1940-2020)
LESLI R. SETA (GA & FL)
SETH C. MARTIN (GA & FL)
ERIC L. TRIVETT (GA)
M. STEPHEN STUBLEY (SC)
STEPHANIE A. ROCKWELL (GA & TN)
JAMES E.L. FICKLING (SC & NC)
ANDREA S. OWEN (GA)

REPLY TO
P.O. BOX 11669
COLUMBIA, SOUTH CAROLINA 29211
PHONE (803) 748-2919
FAX (803) 748-2735
www.Speed-Seta.com

ALEXANDER ADKINS (GA & TN)
SCOTT H. ANDREWS (GA)
HUNTER CHANDLER (GA & TN)
MELISSA CRUZ (GA & TN)
JEREMY T. ENGLAND (AL & MS)
C. BENTON HILBURN (GA)
SARA P. MORRIS (SC & NC)
CALEY A. PITTS (GA)
KELSIE L. QUEEN (SC & NC)
JENNIFER S. RAY (GA)
BRITTANY SCHWANITZ (GA)
SARAH V. SNIPES (GA)
LINDSEY R. STEWART (GA)
MARK M. STUBLEY, JR. (AL & NC)
BRIGGS P. TUCKER (SC)
BRITTANY BELL TURNER (GA & FL)
LILY D. WILKERSON (GA & FL)

GEORGE D. GALLAGHER (SC), of counsel

RECEIVED
Jul 23 2021
SC Court of Appeals

July 23, 2021

VIA EMAIL: CTAPPFILINGS@SCCOURTS.ORG
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: ***Rachel Turner v. SC Department of Corrections – Kirkland, et al***
Appellate Case No.: 2021-000633
WCC No.: 1514359
DOA: 9/5/2015
Our File No.: 8400-0101

Dear Ms. Kitchings:

Please find enclosed Condustrial's Return to Appellant-Respondent's Motion for Partial Remand in the above-referenced matter.

By copy of this letter to all counsel of the involved parties, I am serving them with the Return.

Sincerely,

George D. Gallagher

GDG/kgl

Enclosures
cc: The Hon. Amy Bracy
Stephen B. Samuels, Esq.
Erin Farthing, Esq.
Gregory M. Alford, Esq.
Lisa C. Glover, Esq.
T. Jeff Goodwyn Jr., Esq.
Beth Richardson, Esq.
Grady L. Beard, Esq.
James P. Newman, Jr., Esq.
Tom Sears, Esq.