THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Case Number 2021-000633

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.

INITIAL BRIEF OF THE RESPONDENT-APPELLANT CONDUSTRIAL, INC.

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STATEMENT OF ISSUES ON APPEAL

1. Was Turner an independent contractor or employee of Condustrial when a) Turner and Condustrial specifically rejected an employment relationship via the execution of a valid independent contractor agreement in 2014; b) the terms of that independent contractor agreement closely mirror the practical real world relationship of the parties; and c) application of the four-prong employment test otherwise mitigates in favor of an independent contractor relationship because Condustrial exercised no control over Turner?
2. If Turner is an "employee" entitled to benefits under the Act, then is Countrywide her co-employer liable for same via its Contract with Condustrial?
3. Can Countrywide deny liability for the claim via operation of law and/or estoppel pursuant to S.C. Code § 40-68-70 (C) and/or S.C. Code § 40-69-120 (A)(7) by failing to obtain a license as a PEO as required by South Carolina law?
4. Does South Carolina law permit GIC to deny coverage for this claim under the risk of its insured Countrywide?

STATEMENT OF THE CASE

I. Background and Facts

This matter stems from an accident sustained by Rachel Turner ("Turner") on September 5, 2015 while working as a licensed professional nurse (LPN) at the Kirkland Correctional Institution in Columbia, South Carolina. ("Kirkland"). Specifically, Turner was taken hostage and assaulted by inmates in the infirmary. At the time in question, Turner was operating under an independent contractor agreement with Medustrial dated October 9, 2014. (Cl's Exhibit D pp. 233-237). Medustrial is a division of Condustrial, Inc. ("Condustrial"), an industrial staffing company.[1] Turner specifically acknowledges that she is an "independent contractor" in the 2014 agreement, including a stipulation that she will perform her duties in reliance upon her professional training, experience, and judgment, will not be under the direction or control of Condustrial, and agreeing to payment for professional services on an hourly basis via a Form 1099.

Condustrial in turn had an agreement with the South Carolina Department of Corrections ("SCDC") for the provision of medical staffing personnel, including LPNs like Turner, to staff SCDC medical facilities. (Cl's Exhibit G pp. 253-259). Under that agreement, the nurses performed medical services for SCDC's inmates, at SCDC facilities, and generally under SCDC's direction. Condustrial itself never agreed to undertake any nursing work on behalf of SCDC; it merely acted as a broker for provision of nurses to SCDC. All other administrative functions related to payments for professional nursing services were Condustrial's responsibility. Claimant

[1] Medustrial previously operated as a separate legal entity, including at the inception of Claimant's agreement with them in 2013. Medustrial's book of business was subsequently acquired by Condustrial. Thereafter, Condustrial elected to continue operation of Medustrial's business under that moniker or trade/brand name. Medustrial is not a separate legal entity apart from Condustrial. As such, Condustrial is the relevant business entity for all purposes pertaining to this matter.

agreed to her assignment as a nurse for SCDC. She was free to accept or decline any shifts for work offered by SCDC.

Condustrial entered into a service agreement with Countrywide Payroll & HR Solutions, Inc. d/b/a Countrywide Staffing Solutions Group (collectively referred to herein as "Countrywide") to address its worker's compensation coverage on March 26, 2015 (Cl's Exhibit F pp. 243-252). That agreement states that Countrywide is a "contract labor service (CLS) entity" that will "outsource" certain "Selected Staffing/Employees" for Condustrial's "normal business operations." Further, the service agreement provides that Countrywide shall "provide unemployment insurance and worker's compensation benefits; and handle unemployment and worker's compensation claims involving Selected Staffing/Employees. The service agreement also states that "all labor and/or employment performed by the Selected/Staffing Employees under this agreement *shall be performed under the mutual direction and control of both parties as co-employers, as recited throughout this agreement…* ." (emphasis added).

Countrywide and Condustrial executed a separate document modifying Countrywide's standard service agreement. [Cl's APA Exhibit F]. The modified agreement stated that Condustrial would process payroll under its own federal tax identification number (FEIN). Under the modified terms, Condustrial would still upload new employee information and applicable class codes into Countrywide's system for employment administrative purposes. Moreover, Condustrial would also report all payroll tax and other payroll deductions, including workers compensation premiums, to Countrywide. Countrywide would then "report all required payroll tax reports and remit those monies on Condustrial's behalf." Based on its belief that its contract nurses for SCDC were independent contractors not subject to the workers compensation laws, Condustrial never

submitted any assigned employee information regarding Turner and other contract nurses to Countrywide.

Countrywide's workers compensation carrier on the date of Turner's accident was Guarantee Insurance Company ("GIC"). GIC's policy for Countrywide (policy period 6/30/2015-6/30/2016) specifically states that it "will pay promptly when due the benefits required of you by the workers' compensation law." (GIC APA # 24). The policy also provides that the premium on the Information Page of the policy is just an "estimate," and that final premium due shall be determined at the end of the term by using "actual premium basis" and the "proper classifications and rates *that lawfully apply to the business and work covered by this policy.*" (emphasis added).

II. Position of the Parties

Turner contends she is a covered employee under the South Carolina Workers Compensation Act ("Act"). She alleges Condustrial is her "employer" for purposes of the Act, although she also acknowledges in the alternative that SCDC could also be deemed her employer pursuant to Shatto v. McCleod Regional Medical Center, 406 S.C. 470, 753 S.E.2d 416 (SC 2013). (7/24/17 HT p. 10). She seeks medical and compensation benefits for physical and psychological benefits under the Act.

All Defendants submitted as a common defense that Tuner is an independent contractor and not entitled to benefits under the Act.[2] Regarding the liable party and coverage issues presented, defendants' respective positions diverge sharply. First, Condustrial argues that if Turner is adjudicated to be its employee, then she would be covered *ab initio* by operation of law as an

[2] After the evidentiary Hearing was convened, GIC was declared insolvent and responsibility for the claim was assumed by the South Carolina Property and Casualty Guaranty Association ("Guaranty") per S.C. Code § 38-31-10 *et seq.* Guaranty essentially "stepped into the shoes" of GIC to defend the claim.

"assigned employee," "Selected Staffing/Employee," and/or co-employee via the plain language and effect of its service agreement with Countrywide. GIC as the carrier for Countrywide would then be responsible for providing coverage for the claim. GIC's remedy for having to cover a previously unclassified employee would then be to audit its coverage of Countrywide and assess additional premium to cover the risk assumed via the Commission's determination. In turn, Countrywide's recourse against Condustrial would be an action to recover the additional premium assessed by GIC under the indemnification provision of its service agreement with Condustrial. (*See* Section 9 of service agreement)

Next, if Condustrial is deemed to be Turner's employer for purposes of the Act and the service agreement with Countrywide is not implicated, then Condustrial is essentially left with the untenable situation of being "uninsured" relative to Turner'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.* As such, GIC 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), which impose liability under the Act on the carrier of a PEO when a non-assigned employee of the PEO's client company is injured and the client company has no other coverage. If Condustrial indeed failed to secure and maintain worker's compensation coverage for Turner's employment, then liability still defaults to Countrywide/GIC as Countrywide's "client company."

Countrywide and GIC, by and through Guaranty as its successor in interest, jointly submit that Turner's purported employment with Condustrial does not implicate the service agreement

between Condustrial and Countrywide.[3] Specifically, Turner was not a "Selected Staffing/Employee" within the meaning of that agreement because she was never submitted to Countrywide as such. Further, Turner's employment was never otherwise contemplated by Countrywide in its agreement with Condustrial. Further, both GIC and Countrywide aver that the d/b/a party to the service agreement with Condustrial- Countrywide Staffing Solutions Group (CSSG)- is not a licensed PEO in South Carolina. Therefore, liability cannot be imputed to Countrywide and GIC via operation of S.C. Code § 40-68-70 and/or §42-9-120.

However, GIC and Countrywide part ways regarding the issue of coverage for the claim if Countrywide is deemed Turner's employer under the agreement with Condustrial. Specifically, GIC argues that its policy for Countrywide did not cover appropriate class codes in line with Turner's work at a dangerous high security prison infirmary. GIC further submits that it never would have underwritten such a risk had it been disclosed to them. GIC does not argue for cancellation or rescission of its policy for Countrywide based on misrepresentation or fraud. Rather, GIC contends it can simply carve out coverage of Turner's purported employment even if she is otherwise subject to the Countrywide/Condustrial agreement by operation of law.

SCDC submits Turner was not its direct employee per the holding of Shatto *supra*. SCDC also points to the terms of its contract with Condustrial, which specifically states that contract nurses are not SCDC employees. In the alternative, SCDC contends any potential liability on its part as an "upstream" or "statutory" employer of Claimant is secondary to that of Condustrial as Claimant's direct employer. SCDC reserves all rights of indemnity against Condustrial via S.C. Code §42-1-440 and other applicable law. Finally, SCDC submits any liability imposed upon it

[3] Countrywide and GIC also argued in the alternative at the 7/24/17 Hearing that Claimant is an employee of SCDC per Shatto *supra*.

for this claim should be transferred to the UEF pursuant to S.C. Code §42-1-415. UEF in turn submits there is no evidence supporting the transfer of liability under the statute and WCC Regulations, including, but not limited to, the absence of a certificate of insurance properly relied upon by SCDC for the proposition that Claimant was somehow a covered employee.

III. The Commission's Orders

By Order dated July 31, 2020, Commissioner James found, *inter alia*, the following regarding the employment, coverage and liable party issues: 1) Applying the four prong legal test for determination of an employment relationship, Turner was Condustrial's "employee," not an independent contractor; 2) Claimant is not a "Selected Staffing/Employee" within the meaning of the service agreement between Condustrial and Countrywide; 3) there is no basis for "reformation" of the contract between Condustrial and Countrywide to confer coverage under that agreement; 4) Condustrial failed to acquire workers compensation insurance coverage for Turner via its contract with Countrywide or otherwise; 5) Countrywide/GCI is not liable for the claim via the PEO statutes because Countrywide was not a licensed PEO in South Carolina; 6) GIC's policy for Countrywide would not cover the claim because: a) Countrywide never reported the appropriate class codes corresponding with Tuner's employment and location to GIC; and b) GIC underwriting would not have approved insuring that risk regardless; 7) Condustrial was essentially "uninsured" as to Turner's employment at the time of her accident; 8) SCDC is Turner's upstream "statutory employer" liable for benefits under the Act per S.C. Code §42-1-400 *et seq* because the nursing work performed by Turner was of the same type performed by SCDC's direct employee nurses;

and 8) there is no basis for transferring liability from SCDC and SAF to the UEF under §42-1-415.[4]

STANDARD OF REVIEW

The usual standard of judicial review of a decision and order of the Workers Compensation Commission is the "substantial evidence rule." Under this standard, the court may not substitute its judgement for that of the Commission on questions of fact but may reverse if the decision is affected by an error of law. Gibson v. Spartanburg school District No. 3, 338 S.C. 510, 526 S.E.2d 725 (Ct. app. 2000). However, the existence of an employment relationship is jurisdictional; therefore, the Court's standard of review of whether Claimant is an employee or independent contractor is *de novo. See* Fortner v. Thomas M. Evans Constr. And Development LLC, 402 S.C. 421, 741 S.E.2d 538 (Ct. App. 2013) (determination of whether a worker is a statutory employee under the Act is jurisdictional; therefore, the question on appeal is a matter of law and the Court has the power to review the entire record to decide the jurisdictional facts in accordance with its own view of the preponderance of the evidence).

Likewise, the determination of coverage under an insurance policy is a question of law. *See* Nationwide Mut. Ins. Co. v. Prioleau, 359 S.C. 238, 597 S.E.2d 165 (Ct. App. 2004). Under the Administrative Procedures Act ("APA") the Court may reverse the Commission if its judgement is affected by an error of law. S.C. Code §1-23-380(5)(d). Moreover, the appellate court's standard of review in equitable matters is *de novo*, meaning its own view of the preponderance of the evidence. Belle Hall Plantation Homeowner's Association v. Murray, 419

[4] Thereafter, all parties appealed the Hearing Commissioner's adverse rulings on their respective positions to the Full Commission Appellate Panel ("Panel"). By Order dated April 6, 2021, the Panel affirmed the Hearing Commissioner on the employment, coverage, and liable party issues by adopting her findings of fact and conclusions of law verbatim. [Full Commission Order].

S.C. 605, 799 S.E.2d 310 (Ct. App. 2017) (it is the appellant's burden to satisfy the appellate court that the *preponderance of the evidence* is against the findings of the master) (*emphasis added*). Pursuant to these authorities, this Court owes no deference to the Commission regarding the employment relationship, insurance coverage, and equitable issues presented.

ARGUMENTS

Condustrial argues the Panel erred as follows: 1) By finding Turner was its employee and not an independent contractor; 2) Finding that Condustrial was "uninsured" relative to Turner's employment; 3) Failing to find Countrywide liable for the claim via the "four corners" of its contract with Condustrial and coverage via Countrywide's insurance policy with GIC; 4) In the alternative, failing to find Countrywide and GIC liable under the PEO statutes- S.C. Code §40-68-10 *et seq*; 5) Failing to find that Countrywide is estopped from denying it is a *de facto* PEO and subject to all laws governing same; and 6) Failing to find that GIC's policy should cover all of Countrywide's liability under the Act as lawfully determined by the Commission.

I. THE PREPONDERANCE OF THE EVIDENCE IN THE RECORD CONFIRMS TURNER WAS AN INDPENENDENT CONTRACTOR AND NOT CONDUSTRIAL'S EMPLOYEE.

An "independent contractor" is one who, exercising an independent employment, contracts to do work according to his own methods, skill, and expertise, without being subject to the control of an employer except to the results of his work. *See* Chavis v. Watkins, 256 S.C. 30, 180 S.E.2d 648 (SC 1970). It is elementary that in the absence a statutory provision to the contrary, an injured person who is not an employee, but an independent contractor, is not within the scope of the Act. Tillotson v. Keith Smith Builders, 357 S.C. 554, 593 S.E.2d 621 (Ct. App. 2004). The determination of whether a claimant is an employee or an independent contractor focuses on the issue of control, specifically, whether the purported employer had the right to control the method

or manner of the work. Wilkinson v. Palmetto State Transport Co., 382 S.C. 295, 676 S.E.2d 700 (SC 2009).

Under its *de novo* standard of review (*See* Fortner *supra*), the Court must examine four factors to analyze parties' working relationship: 1) direct evidence of the right or actual exercise of control; 2) the furnishing of supplies and/or equipment; 3) the method of payment; and 4) the right to fire. Ray Covington Realtors, 318 S.C. 546, 459 S.E.2d 302 (SC 1995). Evidence of a purported employer's actual exercise of, or right to exercise, control mitigates in favor of an employment relationship. *Id.* All four factors must be analyzed even handedly in both directions to determine whether the totality of the circumstances favor an employment or independent contractor relationship. Wilkinson *supra.* No one factor alone is outcome determinative of the issue. *Id.*

A. The direct evidence of the right or exercise of control factor favors a finding that Turner was an independent contractor.

The Panel erred in relying on Shatto v. McLeod Reg'l Med. Ctr., 406 S.C. 470, 753 S.E.2d 416 (2013) for its finding that the "exercise of/right to control" prong of the employment test indicates an employee/employer relationship between Turner and Condustrial. As an initial matter, Shatto is distinguishable from the instant case. Unlike the claimant in Shatto, who alleged an employment relationship with the hospital where she was assigned and not the agency who assigned her, Turner does not contend she is SCDC's employee. Rather, she seeks to impute SCDC's requirements and control over its contract nurses to Condustrial. The Panel erroneously bought this argument, which is simply contrary to South Carolina law, as well as the documentary evidence and testimony in the record. Even if SCDS's requirements for its contract nurses vicariously implicate Condustrial, they do not rise to the level of control required for an

employment relationship. [5]

First, Courts across the country, including North Carolina, have had the opportunity to determine whether nursing agencies with business models similar to Condustrial's contract nursing brokerage are "employers" of the nurses they placed at various facilities.[6] Those courts generally agree that the nursing brokerage in those arrangements were not employers.

In Rhoney v. Fele, 134 N.C. App. 614, 618-19, 518 S.E.2d 536, 540 (1999), the North Carolina Court of Appeals reviewed its state's workers' compensation precedent and determined that a nurse in a similar nursing brokerage was an independent contractor and not an employee of the staffing company, Nursefinders. The Court reasoned that the following factors support a finding that the nurse was an independent contractor: (1) as a registered nurse, he was engaged in an independent profession; (2) the nurse was free to provide nursing services through other placement services; (3) the nurse exercised his duties and responsibilities as a nurse at the hospital, free from supervision by Nursefinders; (4) the nurse's work through Nursefinders was sporadic rather than regular; (5) the nurse was able to accept or reject a job assignment offered by Nursefinders; and (6) Nursefinders did not provide the nurse with valuable equipment. As to control, the Court stated:

> These factors demonstrate that while Nursefinders exercised control over extraneous aspects of [the nurse]'s work, such as the dates and times when work was offered and collection of his salary, Nursefinders exercised no control over [the nurse]'s nursing, the function for which hospitals sought him. To the contrary, [the nurse] was a free agent who could and did maintain similar arrangements with other suppliers of medical personnel, and who could and did

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[5] Although Turner alleges Condustrial is her "employer" for purposes of the Act, she also acknowledges in the alternative that SCDC could be deemed her employer pursuant to Shatto v. McCleod Regional Medical Center, 406 S.C. 470, 753 S.E.2d 416 (SC 2013). (7/24/17 HT p. 10).

[6] "Because South Carolina adopted large portions of the North Carolina Workers' Compensation legislation, we rely on North Carolina precedent in Workers' Compensation cases." Stephen v. Avins Const. Co., 324 S.C. 334, 340, 478 S.E.2d 74, 77 (Ct. App. 1996).

> accept or reject work offered to him through Nursefinders, as suited him. Conversely, Nursefinders could not compel [the nurse] to take any particular assignment. Once [the nurse] accepted work proposed by Nursefinders, [the nurse] was not under any control by Nursefinders while working. Apparently, the relationship could be terminated at will by either party at any time. Thus, Nursefinders' role was similar to that of a broker or other middleman. We therefore agree with the trial court that, as a matter of law, Nursefinders exercised insufficient control to create an employee-employer relationship between the nurse and Nursefinders. *Id.* at 619, 518 S.E.2d at 540-41.[7]

Likewise, Condustrial's brokerage model is inapposite to a finding that it exercised control over Turner. Like the nursing brokerage in Rhoney, the overwhelming evidence in the instant case demonstrates Condustrial never considered Turner to be an employee, never treated her as an employee, and did not exercise control over the method or manner of her work. *See, e.g.*, [Condustrial APA p. 42-47] (Condustrial's completed "Questionnaire for the Purpose of Determining the Employment Relationship of Workers by Request of S.C. Employment Security Commission" asserting that the nurses similar to Turner were independent contractors and that the Employment Security Commission had found Condustrial "to properly use I.C.s in this way by SCDEW several times in the past").

Tom Sears, General Counsel and Vice President of Administrative Services with Condustrial, explained that the company operated on a brokerage model with respect to the nurses supplied to SCDC. He stated Turner and other similarly situated nurses were independent contractors under the brokerage model. [Oct. 12, 2017 Hearing H.T. 175]. He testified that

[7] This finding is not a legal anomaly, as other states' courts have likewise held nurses to be independent contractors under similar facts and circumstances as presented in the instant case. *See* Health Care Assocs., Inc. v. Oklahoma Employment Sec. Comm'n, 2001 OK 50, ¶¶ 2-3, 26 P.3d 112, 113 (2001) Trauma Nurses, Inc. v. Bd. of Review, New Jersey Dep't of Labor, 242 N.J. Super. 135, 144-45, 576 A.2d 285, 290 (App. Div. 1990), Contract Mgmt. Servs., Inc. of Texas v. State ex rel. Dep't of Labor, Office of Employment Sec.CMSI–TX. 745 So. 2d 194, 199 (La. Ct. App. 1999),HRP of Tennessee, Inc. v. State, Dep't of Employment Sec., No. E2005-01176-COA-R3CV, 2006 WL 1763673, at *1 (Tenn. Ct. App. June 28, 2006).

Claimant operated as an independent contractor during the entire time that she worked with Condustrial. [October 13, 2017 hearing p. 240].

Sears explained that Condustrial received confirmation from the South Carolina Department of Employment and Workforce that those nurses were properly classified and were in fact true independent contractors with Condustrial. [Oct. 12, 2017 Hearing H.T. 203]. He stated that had the nurses been classified as employees, Condustrial would have taken out taxes from their payroll and offered them insurance and other standard employee benefits. [H.T. 175 Oct. 12, 2017 Hearing; October 13, 2017 hearing p. 236-37]. He explained Claimant's own testimony regarding her tax deductions while working with Condustrial clearly indicated she was an independent contractor. [H.T. 177 Oct. 12, 2017 Hearing]. Moreover, months before the incident leading to this claim, Claimant contacted Sears regarding an issue related to overtime pay. [H.T. 179-80 Oct. 12, 2017 Hearing]. During that conversation with Claimant, Sears discussed with Claimant her status as an independent contractor and the fact that she was not an employee. [H.T. 181]. Per Sears, Claimant did not question her status as an independent contractor at that time or at any time before the incident. [H.T. 181, 186 Oct. 12, 2017 Hearing].

Sears explained that Condustrial had a written independent contractor agreement with Claimant that she signed in 2013 and 2014. [H.T. 205 Oct. 12, 2017 Hearing]. Pursuant to the independent contractor relationship, the company did not control her work, guarantee her a set number of hours or minimum amount of pay, provide equipment or uniforms, or pay for continued education or licensures or any other normal employment. [P. 267-71 Oct. 13, 2017 Hearing]. Condustrial did not provide her any supplies or materials or reimburse her for the performance of her services. [H.T. 205-207 Oct. 12, 2017 Hearing].

Sears testified that Condustrial did not provide training or instruction on the way her work was to be performed. [H.T. 205 Oct. 12, 2017 Hearing]. Condustrial did not have onsite supervisors at SCDC. [H.T. 129, October 13, 2017 Hearing]. Claimant was not required to follow a routine established by Condustrial and she did not report to Condustrial to perform her work. [H.T. 205-207 Oct. 12, 2017 Hearing]. Condustrial could not change the methods Claimant used and the company did not require that Claimant be supervised or controlled in the performance of her services. [H.T. 205 Oct. 12, 2017 Hearing]. In sum, Turner exercised her own professional judgement, skill, and training to conduct her nursing duties without any supervision or control from Condustrial.

Sears further explained that Claimant was able to work for other nursing agencies and was not prohibited from competing with Condustrial. [H.T. 209 Oct. 12, 2017 Hearing]. In fact, as an independent contractor, she was encouraged to go work for other agencies. [October 13, 2017 hearing p. 238]. He explained that Claimant received all the benefits and flexibility that came with the independent contractor relationship—she could take off when she wanted, negotiate her rate of pay, accept jobs with other agencies and in fact was encouraged to do so, choose her own shifts, refuse shifts, have no taxes withheld from her pay, and was able to deduct business expenses from her taxes. [H.T. October 13, 2017 p. 239-42, 268, 271, 274].

Similarly, Tony Durham, the Owner/President of Condustrial, explained that Durham inherited the healthcare staffing business model and the SCDC client from Palmetto Healthcare Staffing. [11/3/2017 H.T. 12-15]. Durham was unfamiliar with healthcare staffing when he inherited the company. Further, no one on his staff had any nursing qualifications or expertise in nursing. At that time, his company employed hundreds of construction workers as employees. The construction workers were full-time employees who completed numerous standard employment

documents. [H.T. 7-9]. They received health benefits and other employee benefits. [H.T. 9]. Durham explained that by contrast, the independent contractor nurses who worked at SCDC did not want to become employees of Condustrial and the company never considered them to be employees. [H.T. 17-19; Condustrial's APA p. 149-53] (Condustrial's completion of an IRS questionnaire to determine that the nurses were independent contractors). Durham testified that he would have preferred for the nurses to be employees, but those nurses insisted on remaining independent contractors because they did not want to take on the responsibilities of becoming employees. [H.T. 19-22, 27-28, 39-40.] They wanted the option to have dual employment, did not want assignments restricted to certain areas, and preferred negotiating their pay and selecting their shifts. [H.T. 19-22, 28, 40-41]. They could "come and go at they please." [H.T. 22.]

Like Sears, Durham explained that had the nurses been Condustrial's employees they would have received health insurance, vacation pay, drug cards, and many other employment benefits. [H.T. 40]. However, the trade off would have been that their pay would have been non-negotiable, they would have had taxes withdrawn from their checks, and they could not decline assignments—the nurses did not want those requirements. [H.T. 41, 158, 182]. He explained that he made less money with the nurses being independent contractors and it resulted in more "hassle" from him as the business owner. [H.T. 42-43]. He stated three of the nurses in the same group as Claimant filed unemployment claims and the Department of Employment and Workforce ("SCDEW") issued an opinion ruling those nurses were independent contractors. [H.T. 32-37; Condustrial's ABA Ex. 36-40] (written determination from SCDEW finding the nurses similarly situated to Claimant were independent contractors). He completed the IRS questionnaire and checked with his attorneys who drafted the Independent Contractor Agreement and who closed the

deal with Palmetto Healthcare Staffing to verify that these nurses were correctly classified as independent contractors. [H.T. 30-31, 38].

Consistent with Sears and Durham's testimony, several other witnesses testified regarding the independent contractor relationship. Justin Gudvangen[8] was the Nurse Administrator with the SCDC. [July 24, 2017, H.T. 96]. Nurse Gudvangen was familiar with the independent contract relationship with Medustrial because his career path with SCDC began as an independent contractor with Medustrial. [H.T. 60]. He testified that he understood that he was a 1099 independent contractor when he worked with Medustrial. [H.T. 85]. Further, he stated Medustrial never misled him to believe that he was covered by workers' compensation while he was an independent contractor with the company. [H.T. 85]. He testified that SCDC had employee nurses and contract nurses and in 2015, 70% of SCDC's nursing shifts were covered by contract staff. [H.T. 62, 96]. Nurse Gudvangen testified that Claimant was classified as a contract nurse placed at SCDC. [H.T. 96].

Despite the Panel's finding that "[o]n a day to day basis, there was no difference between nurses employed by SCDC directly and those placed at SCDC by Condustrial, Nurse Gudvangen testified about the numerous differences between the employee nurses and contract nurses placed at SCDC by Condustrial. First, Nurse Gudvangen testified that SCDC did not have control over Claimant's or any contract nurse's schedule. As part of his job duties, he set the schedules for all the nurses at SCDC. He explained that the scheduling process for the employee nurses was different than for the contract nurses. [H.T. 96.] The employee nurses *were required* to work on a rotating schedule and as the supervisor, Gudvangen could make the employee nurse work any particular shift, and if the employee nurse refused, it would be considered insubordination. [H.T.

[8] The Single Commissioner referred to Nurse Gudvangen as "Nurse G." *See* Nov. 6, 2017 H.T. 14-15.]

97]. The employee nurses were expected to appear for the shifts for which they were scheduled, but "[i]f it's a contract person, they can cancel it within a certain time limit window." [H.T. 67].

By contrast to the employee nurses, the contract nurses provided their availability of the shifts they could work. Gudvangen had to set the schedule around the contract nurse's availability, and the contract nurse "basically picked their own schedule." [H.T. 88.] SCDC had no control over the contract nurse's availability. [H.T. 89.] Further, although the employee nurses were required to request leave, the contract nurses did not. [H.T. 91, 106-07]. The contract nurses, like Claimant, were not required to work any shift. [H.T. 89]. According to Gudvangen, the contract nurses "didn't have to work at all" and Gudvangen could not make those contract nurses work a specific shift. [H.T. 89, 97]. He stated there were occasions when a contract nurse would work one shift and never return to the facility. [H.T. 111]. He explained that if Claimant decided that she was no longer interested in working for SCDC, she would not need to resign as a contractor, but the employees were required to resign. [H.T. 113]. Claimant also confirmed that she would not need to resign from SCDC if she no longer wanted to work at the facility, she could simply stop taking shifts. [H.T. 321].

Further, Nurse Gudvangen explained that the independent contractor nurses at SCDC were readily distinguishable because the employees of SCDC wore identification badges with blue letters stating "employee," while the contractors' badges stated "temporary" in red letters. [H.T. 64, 118]. Although the Kirkland SCDC location divided the parking lot into "staff parking" and "visitor parking" and the contract nurses parked in the "staff" lot, Gudvangen believed that it would have been strange to further divide the staff lot into "employee nurse" and "contract nurse." He stated he had worked in several different types of organizations as a nurse and he had never seen a facility designate a specific parking area for contract employees. [H.T. 98-99].

Nurse Gudvangen further testified that the contract nurses at SCDC did not receive the same training as the employee nurses. The employee nurses received annual training which consisted of eight hours of a new employee orientation class, a week of basic training at the training academy, some nursing-specific classes to complete within a year, and training related to hostage situations. [H.T. 90, 92, 103-04]. On the other hand, the contract nurses only received a three-day orientation shift, which was similar to a job shadow. During those three days, SCDC transitioned the independent contractor into doing the job. [H.T. 90, 103-04]. The contract nurses did not receive training related to hostage situations. [H.T. 92].

Turner's own testimony supports finding she was not a direct employee of Condustrial, and by extension, not a statutory employee of SCDC. She admitted she never asked to be an employee of SCDC because the schedule would not be "flexible", and she preferred a flexible schedule. [H.T. 222, 224-26, 306]. She agreed she could decline shifts if the supervisor at SCDC asked her to work a certain shift. [H.T. 154]. She admitted she had the flexibility to choose the shifts she wanted to work and decline any shifts she did not want to work. [H.T. 217-19].

Turner admitted Condustrial did not supervise her work at SCDC or control how she did her work as an LPN. [H.T. 304-305]. She was not required to report to Condustrial before, during, or after any shift on how the shift went that day. [H.T. 232, 239]. She did not have to ask Condustrial for permission to take vacation, and they never forbid her from taking days off or from working concurrently at a different agency. [H.T. 220-21]. She agreed she could work for more than one agency at any given time period. [H.T. 154]. She understood that Condustrial was not taking out taxes and did not provide benefits such as overtime pay. [H.T. 155]. She testified that she supplied her own healthcare insurance. [H.T. 173, 230]. She admitted Condustrial did not provide dental insurance, transportation, mileage reimbursement, vacation pay, sick pay, uniforms,

appropriate footwear, nursing scrubs, or retirement plans. [H.T. 227-29]. She admitted that there was nothing on her SCDC badge that identified Condustrial. [H.T. 230]. She admitted that Condustrial did not provide business cards, cell phones, or laptops, nor did the company provide any formal training or pay her nursing license renewal fees. [H.T. 220-31].

Nurse Sidney is a similarly situated LPN who worked through Condustrial at SCDC. Her testimony proves there was no employment relationship between Condustrial and its contract nurses. [H.T. 25-26, November 6, 2017 Hearing]. Nurse Sidney testified that she signed the exact same independent contractor agreement with Condustrial that Claimant signed, and by signing, she understood that she was not eligible for any employment related ERISA benefits "like medical, dental, none of those kind of benefits." [H.T. 26-27, 31-32.] She knew she was not eligible for workers' compensation because "the contract stipulated that." [H.T. 27, 47]. She stated being an independent contractor gave her "a lot of flexibility" and that she was able to accept or decline shifts. [H.T. 27]. Over her thirty-two-year career in the nursing profession, she has worked as an employee and as an independent contractor. [H.T. 40-41]. Based on her experience, she explained the following advantages of working as an independent contractor: (1) flexibility to schedule shifts based on your own availability, (2) availability to work other jobs with other agencies, (3) receiving tax advantages, and (4) the ability to negotiate rates of pay and take different shifts if the rate was higher. [H.T. 41-45]. Contrary to the Panel's finding that "a flexible schedule is hardly inconsistent with an employee/employer relationship as many hourly jobs offer flexible schedules," Nurse Sidney testified that the flexibility as an independent contractor was not the same as other employee jobs she worked. [H.T. 52].

B. The furnishing equipment factor favors an independent contractor relationship.

The Panel erred in finding this factor to be "somewhat neutral." Sears, Durham, and Claimant's own testimony demonstrate that Condustrial did not provide any equipment to Claimant to perform her nursing duties at SCDC. Durham testified that the company did however provide some equipment to its direct employees. Moreover, Turner explained that SCDC provided medical equipment and she provided her own uniform and shoes. She stated she had her own stethoscope, but she did not take it into the facility because they were "limited on supplies [they] could bring in." [H.T. 166]. Regardless of any equipment SCDC supplied, Turner contends SCDC was not her direct employer. *See* Collins v. Charlotte, 400 S.C. 50, 732 S.E.2d 630 (Ct. App. 2012) (holding that whether an entity is a statutory employer requires a different analysis than the employee/independent contractor test). Again, Turner is essentially trying to impute SCDC's actions to Condustrial.

Even if SCDC's furnishing of equipment to Turner vicariously implicates Condustrial, the greater weight of the evidence demonstrates the minimal furnishing of equipment is not indicative of an employment relationship. Although Claimant testified regarding SCDC's uniform and grooming procedures, Gudvangen explained those policies applied to all nurses for safety reasons. Nurse Gudvangen testified that all nurses at SCDC were required to provide their own uniform and shoes. [H.T. 89, 99]. He explained that some nurses also brought in their own stethoscopes. [H.T. 76-77]. SCDC provided the other medical equipment because of safety concerns related to the potential for the equipment to be used as a weapon by inmate sin the facility. [H.T. 76-77, 108]. As such, the SCDC's provision of medical equipment under these circumstances mitigates an inherent risk of its mission to provide healthcare services to its inmates and is not an affirmative exercise of control over the nurses.

Further, the fact SCDC provided certain equipment to abide by certain regulatory controls does not change this analysis. *See* Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 676 S.E.2d 700 (2009) ("We agree with the Pennsylvania Supreme Court that requiring a worker to comply with the law is not evidence of control by the putative employer."); *Id.* ("[R]estrictions upon a workers' [sic] manner and means of performance that spring from government regulation (rather than company initiatives) do not necessarily support a conclusion of employment status. Indeed, employer efforts to ensure the workers' compliance with government regulations, even when those efforts restrict the manner and means of performance, do not weigh in favor of employee status") (quoting "Universal Am-Can, Ltd. v. Workers' Comp. Appeal Bd., 563 Pa. 480, 762 A.2d 328, 335 (2000)).

The he Court in Shatto rejected mere regulatory compliance as a basis to support a finding of an independent contractor under the provision of equipment prong. However, unlike Shatto SCDC did not provide "everything" Turner needed to perform her work. Shatto 406 S.C. at p. 480. McCleod provided Shatto medical equipment and supplies, including sterile clothing. In this case, Turner provided her own uniforms, nursing shoes and other miscellaneous nursing tools like a stethoscope. Furthermore, the furnishing of equipment in this case goes beyond simply having equipment available for mere regulatory compliance. Nurses, visitors, and other persons in an SCDC facility are not allowed to bring any non-approved items due safety concerns. In this respect, a prison infirmary is a fundamentally different setting than the hospital in Shatto. The health and safety for everyone, not just its nurses, is SCDC's paramount concern; thus, its requirements to further that end are clearly not just an exercise of control for employment purposes. This Court should therefore employ the same analysis of the furnishment of equipment factor as the Supreme Court previously endorsed in Wilkinson to find an independent contractor relationship.

C. The method of payment factor favors finding that Turner is an independent contractor.

The method of payment here is entirely consistent with Turner's independent contractor status. Sears and Durham testified Condustrial never guaranteed a set pay. Turner had the ability to negotiate rates of pay when placed at any facility for a shift and the direct employees did not have that option. They both explained Turner was not eligible for any pensions, bonuses, paid vacations, sick leave, or any other ERISA benefit through Condustrial. Moreover, the company did not deduct any social security or federal taxes from her pay. [Sears H.T. 207-08 Oct. 12, 2017 Hearing; October 13, 2017 hearing p. 236-39; Durham H.T. 40-43, 158, 182]. Turner further testified that she understood the difference between a 1099 self-employed earnings form and a W-2 employee. [H.T. 144]. She understood that under a 1099, no additional taxes were taken out of her paycheck. [H.T. 291]. At the same time, she enjoyed the benefits of an earned income credit and numerous business deductions via her classification as a 1099 self-employed person. [H.T. 293-99]. Condustrial furnished 1099 forms to Claimant, who in turn routinely filed tax returns as a sole proprietor, specifically an "LPN Nursing Contractor." [Condustrial's APA p. 71, 82, 86]. Claimant's tax returns include forms for her business expenses and self-employment taxes. As expressed in Wilkinson, "[t]he method of payment bears no indicia of an employment relationship." (finding that the method of payment did not support an employment relationship where the company provided the claimant with 1099 tax forms and the claimant filed tax returns as a sole proprietor, specifically an "over the road trucker," including deductions for his business expenses and self-employment taxes).

Further, Nurse Gudvangen testified that the contract nurses placed at SCDC received different pay than the SCDC employee nurses. SCDC employee nurses qualified for bonuses and raises and received ERISA benefits such as health and general benefits, but contract nurses such

as Claimant did not. [H.T. 91-92, 106-07, 119; *see also* Claimant's testimony H.T. 320-21] (Claimant's testimony confirming she was not paid by SCDC, and was not eligible for any raise, bonus, retirement benefits or leave from SCDC). Gudvangen recalled that when an employee position opened up at SCDC, he offered the position to Claimant, who responded "No, I can't do that 'cause y'all don't pay enough." [H.T. 116].

The Panel misinterpreted Shatto's holding on this issue. The Court held that the method of payment factor in that case pointed to an independent contractor relationship because, like the instant case, the alleged employer did not supply the claimant with insurance, vacation days, sick days, or a retirement plan—"benefits that are available to other employees directly employed by" the alleged employer. Shatto 406 S.C. 470 at p. 480. Here, Turner alleges Condustrial was her direct employer, but the overwhelming evidence in the record demonstrates Condustrial did nor provide insurance, vacation days, sick days, or a retirement plan—"benefits that are available to other employees directly employed by" Condustrial.

D. The evidence of the right to fire factor favors finding Claimant to be an independent contractor.

The Court in Wilkinson explained that this factor is the most difficult to evaluate for the following two reasons: (1) unlike the other three factors the parties may never need to confront this issue; and (2) a right of termination, in some form, exists in an independent contractor arrangement. 382 S.C. 295, 676 S.E.2d 700 (2009). "The critical inquiry is the term "fire," for it embraces the employment relationship." *Id.*

Durham testified Condustrial did not have the right to fire Claimant. [H.T. 130]. Moreover, the fact that two of Condustrial's documents provided the right to "termination," does not change the relationship status to that of an employee. *See id.* (noting that a right of termination, in some form, exists in an independent contractor arrangement). Nurse Gudvangen testified that although

he had the right to fire employee nurses at SCDC, he had *no right to fire* contract nurses such as Claimant. [H.T. 100, 105]. Gudvangen could reprimand employee nurses and those nurses were entitled to a corrective action review meeting in which they could provide supporting documentation. [H.T. 104-105]. The reprimanding authority would then determine the appropriate sanction and include the sanction in the employee's personnel file if the sanction was anything above an informal resolution. *Id.* By contrast, Gudvangen explained that SCDC did not maintain files for Claimant or contract nurses like her, and if he had any issues with Claimant's performance, "her being a contractor, there was no disciplinary measures [he] could take other than inform her agency that [they] had an issue . . . up to the point of [him] requesting her not to come back or that they not send her back . . . ." [H.T. 74, 88]. He explained that even if he put the contract nurse on a "do-not-use" list, the contract nurse could immediately go work at a different SCDC location. [H.T. 100-01]. Further, Gudvangen explained he had "no recourse" or reprimand authority if a contract nurse such as Claimant declined a shift. [H.T. 98].

In Wilkinson, the Court determined that the termination of the parties' relationship was controlled by their agreement. Viewing the agreement here in conjunction with Turner's and Condustrial's practical relationship leads to a finding of an independent contractor relationship. As previously explained, Claimant could simply decline shifts and Condustrial could choose to send another independent contractor for the job. *See id.*; *see also* Ferguson v. New Hampshire Ins. Co., 412 S.C. 203, 213, 771 S.E.2d 851, 857 (Ct. App. 2015) (holding the company did not have the right to fire where the company could choose to use someone other than the claimant for a job, the claimant could also decline or refuse to perform a job, there was no set schedule, and the claimant did not work on a consistent basis); Rhoney, 134 N.C. App. at 619, 518 S.E.2d at 540-41

(finding there was no employment relationship where the relationship could be terminated at will by either party at any time).

E. The Panel erred by totally dismissing the Independent Contractor Agreement between Turner and Condustrial.

The Supreme Court in Wilkinson specifically acknowledged the significance of an independent contractor agreement when analyzing employment relationship issues for coverage under the Act. Wilkinson 382 S.C. 295 at p. 300.[9] The Court stated, "[i]n evaluating the four factors we are guided initially by the parties' independent contractor agreement. But more importantly, *we are guided by the parties' conduct,* which mirrored the terms of the contract." *Id.* (emphasis added).

Here, Turner executed several documents representing that she agreed to be an independent contractor. The "Licensed Professional Independent Contract Agreement" that Turner signed in 2013 and again in 2014 stated "No other document, including any agreement between the broker and the client, shall be deemed to modify any terms of this agreement unless expressly stated in writing to do so and signed by both the broker and the independent contractor." (Claimant's APA p. 237). The contract further stated, "The independent contractor represents that the independent contractor has read and understands the terms of this agreement." (Claimant's APA p. 237.) The Licensed Professional Independent Contractor Agreement mentioned the term "independent contractor" *seventy-eight times in the four-page document.*

In addition to the independent contractor agreement itself, Turner also signed numerous other documents memorializing herself out as an independent contractor. The "Facilities Expectations" required signature of the "contractor." (APA tab 9, p. 313). Turner signed as a "contractor" to

[9] This Court recently recognized the primacy of an independent contractor agreement in workers compensation cases. Ramirez v. May River Roofing, Inc. Opinion No. 5827 (Ct. App. Filed June 23,2021). Although the Court found an employment relationship in that case, it acknowledged the outcome may have been different if there had been an independent contractor agreement in place.

permit the company to obtain her SLED report. (APA 10 for Countrywide p. 314). In February 2013 and October 2014, she signed the "Substance Abuse Policy Consent Form" on the line for "contractor name." [H.T. 208-09]. The body of that document referenced "contractor" on several occasions. Turner signed her own 2013 and 2014 federal income tax returns which named her as an "LPN Nursing Contractor." [H.T. 287; APA p. 333]. Sears also explained that Claimant consented as a "contractor" on several forms and the New Hire/Rehire Checklist classified her as an independent contractor. [H.T. 183-84, 186-87 Oct. 12, 2017 Hearing].

The Panel erroneously discounted the significance of the independent contractor agreement based on Turner's dubious contention that she never read the document. However, her plea of ignorance of her independent contractor arrangement is invalid. One who signs a written instrument has the duty to exercise reasonable care to protect herself. DeHart v. Dodge City of Spartanburg, 311 S.C. 135, 427 S.E.2d 720 (Ct App. 1993). It is well established that "a person is bound to read an agreement before signing it." Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2000) (footnote omitted). Thus, "[a] person who signs a contract or other written document cannot avoid the effect of the document by claiming he did not read it." Wachovia Bank v. Blackburn, 394 S.C. 579, 585, 716 S.E.2d 454, 458 (Ct. App. 2011); *See also* J.B. Colt Co. v. Britt, 129 S.C. 226, 123 S.E.2d 845, 847 (1924) ("[O]ne cannot avoid a written contract into which he has entered on the ground that he did not attend to its terms, that he did not read the document which he signed, that he supposed it was different in its terms, *or that it was a mere form.*")(emphasis added).

The only exception to this rule is that "if the party is ignorant and unwary, his failure to read the document may be excused." Regions Bank v. Schmauch, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003)(citing cases). However, South Carolina courts "very strictly construe his

exception." *Id.* "In determining whether a party can be classified as ignorant and unwary, an individual's education, business experience and intelligence are all considered." *Id.* Turner is a well-educated licensed professional. As such she is clearly not ignorant or unwary based on her education and experience. Therefore, the Panel's total dismissal of the independent contractor agreement based on her alleged failure to read it is patently erroneous as a matter of law.

In a stunning double standard, the Panel dismisses the significance of the independent contractor agreement between Turner and Condustrial as evidence of an independent contractor arrangement in one breath yet cites purported *pro forma* employment paperwork executed by Turner (Cl's Exhibits H-P pp. 261-274) as evidence favoring an employment relationship in another. First, the Panel points to an "Application Form Waiver" executed by Claimant and Condustrial on October 9, 2014 (Cl's Exhibit U p. 282) as evidence of an "at will employment relationship," but fails to recognize that Turner simultaneously executed the independent contractor agreement that very same day, wherein it is specifically memorialized that she is not an employee. The Panel cannot arbitrarily endorse documents favoring an employment relationship, and flippantly dismiss documents mitigating for an independent contractor arrangement, **especially *when Claimant acknowledged that she did not read or appreciate the significance of ANY of the documents she signed.*** She merely signed all the documents requested without actually reading them in order to obtain shifts. [7/24/17 H.T. p. 138 ll. 13-21; 190 ll. 11-25- p. 19 ll. 1-5; p. 192 l. 2; p. 198 ll. 23-24; p. 201 ll. 15-23; p. 209 ll. 20-21].

If Turner indeed failed to read the purported employment forms and independent contractor agreement, then what is good for the goose should be good for the gander and *neither set of documents should have any probative value*. If the competing documents are not probative because Turner failed to read them, then the Court must focus more on the actual real-life relationship

between the parties, which for the reasons noted earlier, clearly mitigate toward a finding that Turner is an independent contractor. *See* Wilkinson *supra* (holding that the court must be guided by the parties' conduct). Again, the Panel erred as a matter of law by arbitrarily endorsing one set of documents over the other. *See* S.C. Code §1-23-380 (5)(f) (the court may reverse a Commission's decision if it is "arbitrary or capricious).

Next, Turner erroneously contends Shatto *supra* stands for the proposition that execution of purported employment documents is outcome determinative of one's employment status. However, the Court's primary focus in Shatto was McCleod's *actual exercise* of control over claimant in that case, not just the *right of control* purportedly enabled by the paperwork she signed for McCleod. Shatto 406 S.C. at p. 479 ("McLeod Regional's exercise of control over virtually every facet of Shatto's duties as a nurse anesthetist was so pervasive that we conclude the factor of direct evidence of the right or exercise of control supports a finding of an employment relationship."). This focus on the practical real world relationship between the parties is in accordance with the holding of Wilkinson *supra*.

Here, Turner signed routine *pro forma* paperwork for Condustrial, including an employment application, federal I-9 citizenship verification form, a W-4 tax withholding form, a Fair Credit Reporting Act release, a Second Injury Fund knowledge statement, terms of employment from, none of which memorialize any right of control by Condustrial. (Cl's Exhibits H-P pp. 261-274). Turner also signed a "Facility Expectation" acknowledgement, which was a requirement for SCDC not Condustrial. (Countrywide/GIC APA # 9 p. 313). Claimant executed additional documents, including an attendance policy acknowledgement, another client facility requirement form, another I-9 form, a new-hire checklist, and an Application Form Waiver confirming an "at will employment relationship." [Cl's Exhibit U p. 28]. However, none of these documents evidence an

actual right of control by Condustrial over Turner regarding the performance of her job duties. Perhaps most significantly, Claimant's acknowledged lack of understanding of these *pro forma* employment documents lessens their importance when compared with the paperwork the claimant in Shatto knowingly signed in that case.

Moreover, several other factors present in the in this case belie the practical significance of these purported *pro forma* employment documents to the real-world relationship between Turner and Condustrial. The W-4 is completely irrelevant because it is undisputed that payroll taxes were never withheld from Claimant's payments. Moreover, a W-4 does not otherwise evidence any right of control Condustrial may have over Turner. The same is true of the I-9 immigration status form, FCRA release, an employment application, the new hire checklist, the SIF Knowledge Statement, and the facility and client requirement acknowledgement.

The only paperwork from 2013 arguably impacting the right of control inquiry is the "Terms of Employment." However, upon closer inspection, this document does not comport with how Turner in fact performed her work. For example, the form addresses a host of issues that are indisputably not applicable to Claimant's arrangement with Condustrial, including provisions regarding unemployment benefits, sick and vacation pay and policies, and a prohibition against side or dual employment. As such, this form proves nothing and is not germane to the real work relationship between Turner and Condustrial.

The employment contract waiver and at will employment acknowledgement (Cl's Exhibit U. p. 82) is another proverbial red herring. This document is merely a *pro forma* document renouncing the creation of an employment contract for liability purposes. It is clearly not an employment contract or an earnest manifestation of either party's intent to create an employment relationship. The Shatto Court apparently relied on a similar at will employment document as evidence of

McCleod's right to control and fire the claimant in that case. **However, the instant case is further distinguishable from Shatto because Turner executed an independent contractor agreement with Condustrial specifically disavowing any employment relationship on the very same day (October 9, 2014) that she signed this purported employment document.** The simultaneous execution of these wholly incongruent documents neutralizes their mutual relevance to the right of control test. This elevates to primacy whether Turner's and Condustrial's conduct mirrors the terms of the independent contractor agreement, which for reasons previously discussed was clear the situation.

In sum, the purported *pro forma* employment paperwork Turner signed is immaterial to that right of control issue because: a) Turner and Condustrial specifically rejected an employment relationship via the simultaneous execution of a valid independent contractor agreement in 2014 that is wholly incongruent with those documents; b) the terms of that independent contractor agreement closely mirror the practical real world relationship of the parties per Wilkinson *supra;* c) Claimant testified that she never read, appreciated, or understood ANY of the documents she was presented; she merely signed them as requested in order to be assigned work; and d) if none of the documents are probative because Turner never read them, then the analysis defaults to the practical real world relationship of the parties as applied to the four-prong employment test discussed earlier.

For all these aforementioned reasons, the Panel's finding that Turner was Condustrial's employee must be **REVERSED**. The Court should enter its own finding that Turner was an independent contractor based on the preponderance of the evidence in the case. Her claim for compensation and medical benefits under the Act should be **DENIED** accordingly.

II. THE PANEL ERRED IN FINDING THAT CONDUSTRIAL WAS "UNINSURED" RELATIVE TO TURNER'S EMPLOYMENT WHEN HER WORK FALLS UNDER CODUSTRIAL'S CONTRACT WITH COUNTRYWIDE.

If the Court determines that Condustrial was indeed Turner's employer, then Condustrial's service agreement ("Contract") with Countrywide secures its liability for Turner's claim under the Act via Countrywide's policy with GIC as a matter of law.[10] [CI's Exhibit F.]. The Contract states that Countrywide is a "contract labor service (CLS) entity" that will "outsource" certain "Selected Staffing/Employees"[11] for Condustrial's "normal business operations." Further, the Contract provides that Countrywide *shall* "provide unemployment insurance and worker's compensation benefits; and handle unemployment and worker's compensation claims involving Selected Staffing/Employees." Selected Staffing Employees are supposed to be described and designated under "Exhibit B" to the agreement; however, there is no "Exhibit B" attached.

The Contract also states that "all labor and/or employment performed by the Selected/Staffing Employees under this agreement *shall be performed under the mutual direction and control of both parties as* ***co-employers*** *.....:* (emphasis added). The Contract clearly envisions the addition of employees intended to be covered under its terms on a continuing or rolling basis. Specifically, Section 2 c. of the Contract requires Condustrial to "submit timely, complete, and accurate payroll information (including gross wages earned, any deductions, time worked, leave time/off status, workers' classification code, and overtime exempt status) for each Assigned

[10] The agreement contains a choice of law provision designating Florida law as governing the agreement; however, Countrywide is noted to be a Tennessee corporation and Condustrial is incorporated and principally located in South Carolina. The contract was executed in South Carolina. Therefore, Condustrial submit that the choice of law designation is invalid because if its lack of substantial relationship with Florida. South Carolina law applies to the interpretation of the agreement. *See* Russell v. Wachovia Bank, 353 S.C. 208(2003)(a settlor may designate the law governing his trust absent a violation of public policy or lack of substantial relationship to the trust.).

[11] The agreement between Countrywide and Condustrial interchangeably refers to persons subject to that agreement as a "Selected Staffing/Employee," a "leased employee," and an "Assigned Employee."

Employee for each applicable payroll period." (emphasis added). Finally, there is a list of employee classification codes for Condustrial's South Carolina nursing operations attached to the agreement for Countrywide's pricing purposes. This list of class codes includes two medical/nurse staffing codes substantially similar to Turner's LPN job class– 8829 and 8833.

The Panel found that Turner was not a "Selected Staffing/Employee" within the meaning of the Contract because Condustrial never reported her as such to Countrywide; therefore, GIC as Countrywide's carrier is not responsible for providing benefits under the Act. This rationale is erroneous because Condustrial never considered Tuner to be its employee prior to the Commissioner's ruling in this case. For the reasons stated previously, Condustrial reasonably deemed Turner to be an independent contractor. The reasonableness of this belief is underscored by determinations from LLR and DEW that Condustrial's contract nurses were properly classified as independent contractors. It is therefore understandable why Turner was never reported to Countrywide as an "employee" to be covered under the service agreement from the outset.

The crux of the matter, therefore, becomes how does the agreement between Countrywide and Condustrial apply when an injured worker, who was previously classified as an independent contractor, is subsequently adjudicated by the Commission to be Condustrial's "employee" under the Act? Countrywide and GIC contend there is no basis under the Contract to account for this scenario. This interpretation, of course, leaves a huge potential gap in Condustrial's coverage.[12] The Commissioner found this gap is precisely what Condustrial, as a sophisticated business, bargained for in its agreement with Countrywide. However, the Contract itself, the law, and usual and customary insurance/business practices tell a different tale.

[12] Condustrial engaged over 180 contract nurses at some point or another in 2014 and 2015.

From the outset, Condustrial stresses that the Contract applies to its "normal business operations," which included engagement of over 180 contract nurses. Countrywide was certainly aware of Condustrial's nursing operations. Tony Durham's testimony that he disclosed this aspect of Condustrial's business model to Countrywide during their negotiations is unrefuted. [H.T. p.]. In addition, Countrywide clearly knew of this exposure since nursing class codes were attached to the Contract for pricing purposes. [Cl's Exhibit F]. The Contract clearly contemplates a fluid arrangement whereby Condustrial may submit additional "Selected Staffing/Employees" to Countrywide for processing on a weekly basis. Contrary to Countrywide's and GIC's assertions, this Contract was never intended to apply only to Condustrial's payroll and circumstances existing at the time of its inception in March of 2015. It is the Contract's inherent flexibility that provides the mechanism whereby an unreported or misclassified employee can be brought under the umbrella of the Contract at <u>any time</u>, as long as Condustrial complies with the submission of "timely, complete, and accurate payroll information (including gross wages earned, any deductions, time worked, leave time/off status, workers' classification code, and overtime exempt status) for each *Assigned Employee for each applicable payroll period.*" Because there is no "Exhibit B" attached to the Contract specifically limiting in advance who can be considered "Selected Staffing/Employees," that designation is reserved exclusively to Condustrial under Section 2 c. of the agreement. In sum, the Contract provides that "Selected Staffing/Employees" are essentially whomever Condustrial designates as such via submission to Countrywide under Section 2 c. of the agreement.

Condustrial submits this flexibility extends to the addition of anyone subsequently adjudicated to be an employee by the Commission during the term of the Contract. Presumably, Countrywide and GIC would not contest the assertion that any employee submitted by Condustrial

in accordance with the Contract, regardless of the reason for any previous failure to do so, would at least be prospectively covered under the Contract going forward. Indeed, there is no logical or practical distinction between the submission of an employee that is new, previously misclassified or unclassified, and one adjudicated to be an employee by the Commission. The issue in this case then becomes how does the Contract apply retroactively to cover a possible claim under the Act?

Testimony from Countrywide's own representatives is enlightening on this topic. George Kaspars, Countrywide's VP for business development, first confirmed that Countrywide knew Condustrial was going to submit employee nursing professionals to be covered under the agreement based on nursing class codes submitted for pricing purposes. (Kaspars Depo. p. 11-12). Mr. Kaspars further confirmed that Condustrial's engagement of independent contractor nurses would not have changed Countrywide's desire to enter the agreement. (Kaspars Depo. p. 19). Mr. Kaspars testified generally about the audit process and assessment of additional premium for misclassified or unclassified employees. He specifically acknowledged his understanding of Countrywide's and its carrier's ability to do so. (Kaspars Depo. p. 28).

The owner and president of Countrywide, Zach Collier, testified that it is primarily the carrier's decision how to cover previously unreported and/or misclassified employees, but also added **"I would think that they would have to cover the business of ours if it was an employee, whether approved or unapproved."** (Collier Depo. p. 30). Collier, therefore, specifically acknowledges that the Contract accounts for possible coverage of a previously unreported and subsequently adjudicated employee. Whether or not that person would then be covered for worker's compensation purposes is not Countrywide's concern; it's a matter for the carrier according to Collier.

Condustrial argues that Turner became a "Selected Staffing/Employee" *ab initio* (from the outset) within the meaning of the Contract via operation of law pursuant to the Panel's Order finding that she was an employee of Condustrial on her date of accident. This finding should apply retroactively because Condustrial would have submitted Turner to Countrywide for coverage per the Contract but for its belief that Turner was an independent contractor. Condustrial intended for all of its employees to fall under its Contract with Countrywide, including Countrywide's provision of comprehensive worker's compensation coverage.

The Panel's finding that Tuner was Condustrial's employee as of September 5, 2015 is a remedial measure. Its retroactivity must include interpretation and application of the law to find coverage under the Act to further its beneficent purposes. *See* James v. Anne's Inc. *supra.* It is said that the common law is not merely a pronouncement of what exists now and going forward, as it is the discovery or revelation of what has always been the case. *See* Cash v. Califano, 621 F.2d 626, 628 (4th Cir. 1980) (the concept that judicial decisions are to be applied retroactively "stems from the Blackstonian view, that judges do not make law; they find law. Judicial declaration of law is merely a statement of what the law has always been."). Therefore, Turner is covered under the Contract by operation of law.

In addition, the Contract, specifically, the definition of "Selected Staffing/Employee," is vague and ambiguous on its face. Condustrial points to the following ambiguities: a) referring interchangeably to employees subject to the Contract as "Selected Staffing Employee," "Assigned Employee," "recruited employee," and "leased employee;" b) specifically stating that "Selected Staffing/Employees" will be described on "Exhibit B" to the agreement when no such exhibit is attached; and c) stating in section 1. a. that the "Selected Staffing/Employee" will work under the "Client's supervision" (Condustrial is designated as "Client" in the agreement). However, the

Contract states in a separate section specifically governing "Selected Staffing/Employees" that duties of the employee "shall be performed under the *mutual direction and control of both parties as co-employers*." (emphasis added). Because the contractual term "Selected Staffing/Employee" is vague and ambiguous, extrinsic evidence of the intentions of the parties is admissible.[13] Condustrial representatives testified their intention was for the service agreement with Countrywide to provide comprehensive workers compensation coverage, which would obviously include previously unclassified, misclassified, and/or subsequently adjudicated employees in its definition. (10/13/2017 HT p. 72 ll. 11-17 and p. 122 ll. 8-18); (11/3/2017 HT p. 211 ll. 3-18). As discussed previously, Condustrial's understanding of how coverage should apply to Turner is essentially on point with the testimony of Countrywide's representatives.

As such, Countrywide's contention that it had no knowledge of the risks of Turner's potential employment is not supported by the evidentiary record. In fact, unrefuted testimony from Condustrial and other documentary evidence proves Condustrial expected and bargained for full coverage of liability under the Act. Specifically, Tony Durham, Condustrial's owner and president who negotiated and executed the agreement with Countrywide, testified that nursing class codes 8829 and 8833 corresponding with approximately $1.4 million dollars in payroll was presented to Countrywide during the contract negotiations. (11/3/2017 HT p. 127 ll. 5-20). Mr. Durham clarified that those payroll figures and class codes included both Condustrial's employee nurses AND their independent contractor payments. When questioned why independent contractor

[13] The general rule is that parol evidence is admissible to show the true meaning of an ambiguous written contract. An ambiguous contract is one capable of being understood in more ways than just one, or an agreement unclear in meaning because it expresses its purpose in an indefinite manner. The purpose of all rules of contract construction is to determine the parties' intention. The courts, in attempting to ascertain this intention, will endeavor to determine the situation of the parties, as well as their purposes, at the time the contract was entered into. Bruce v. Blalock, 241 S.C. 155, 127 S.E. (2d) 439 (1962). The court should put itself, as best it can, in the same position occupied by the parties when they made the contract. In doing so, the court is able to avail itself of the same light which the parties possessed when the agreement was entered into so that it may judge the meaning of the words and the correct application of the language. 17 Am. Jur. (2d), Contracts § 272 (1964).

payments were presented to Countrywide even though they were not initially considered to be part of the agreement, Mr. Durham explained, "I wanted to show him the exposure of all of our people that worked there." [H.T. p.]In a nutshell, even though both Countrywide and Condustrial never intended for independent contractors to be "employees" under their Contract from the outset, Countrywide was definitely aware of Condustrial's contract nursing operations and the risks associated with it. Since Countrywide agreed in the Contract to cover Condustrial's "normal business operations" it cannot now claim surprise.

For these reasons, Turner is a covered employee under the terms of the Contract between Condustrial and Countrywide via operation of law, which furthers the beneficent purposes of the Act to liberally provide coverage for injured workers. Countrywide in turn secured its liability under the Act via its policy with GIC. Therefore, the Commissioner's finding that Condustrial failed to secure its liability under the Act relative to Turner's employment must be REVERSED.

III. Countrywide is liable for this claim because a) it was acting as a *de facto* Professional Employer Organization("PEO") under its agreement with Condustrial despite the fact it was purportedly not licensed to do so; and b) it is liable for Condustrial's "entire work force" pursuant to S.C. Code §40-68-10 *et seq.*; and c) it is estopped via its conduct and misrepresentations.

The Panel concluded that the d/b/a entity in the Contract between Condustrial and Countrywide was not a professional employer organization ("PEO") because it was not licensed in South Carolina. However, S.C. Code §40-68-10 defines words and phrases under the ensuing PEO statutes. Subsection (10) defines a PEO as "professional employer organization means individua business entity that *offers* professional employer services." (emphasis added).

The Panel likewise declined to hold Countrywide accountable as a PEO based on testimony from Condustrial's representatives that Condustrial did not desire a "full spectrum" of PEO services from Countrywide- the "full spectrum of PEO services" presumably meaning all services

a PEO may offer under the statutes- S.C. Code §40-68-10 *et seq.* However, there is no authority holding that all PEO services permitted by statute must be utilized by a client compnay in order for the PEO statutes to apply to the arrangement. Condustrial's general counsel testified consistently as to his belief that Countrywide was acting as a PEO. (11/13/2017 HT p. 106). The Panel's finding also runs counter to the usual and customary business practices of staffing companies and PEOs. Condustrial's owner and president, Tony Durham, explained how the PEO industry works in providing tiered level of services to their clients, ranging from a "Cadillac" full service plan to essentially a cafeteria or "a la carte" plan where the parties bargain for including and excluding various PEO services. (11/13/2017 p. 212 ll. 4-25- p. 213 ll. 1-5).

Moreover, the Panel erred in implying that the alleged *quid pro quo* for the unique payroll arrangement between Condustrial and Countrywide was leaving a huge potential gap in Condustrial's workers compensation for presumed independent contractors who may subsequently be adjudicated to be employees. The former proposition clearly has absolutely nothing to do with the latter. Any purported cost savings from the payroll arrangement between Condustrial and Countrywide does not offset the coverage risk Condustrial would be assuming. Rather, the record is clear that Condustrial still intended for Countrywide to provide it with a "comprehensive workers compensation program," despite the payroll arrangement between the two. As a sophisticated business who had previously engaged PEOs, Condustrial undoubtedly knew that the PEO statutes would provide a coverage "catch all" for any of its employees not otherwise falling under the four corners of its agreement with Countrywide.

A. Countrywide is a PEO for purposes of its Contract with Condustrial.

Countrywide contends that it is not a "licensed" PEO in South Carolina. Therefore, since the PEO statutes refer to "licensees," Countrywide argues those statutes do not apply. Condustrial

initially retorts that the Countrywide entity with which it negotiated the contract at issue (Countrywide Payroll & HR Solutions) was indeed a PEO. Representatives from Condustrial testified that Scott Hanson, Countrywide's president who initially approached Condustrial and negotiated the deal, represented that "Countrywide" was a PEO during the negotiations of the agreement. [11/13/2017 HT p. 106]. The only evidence in the Record that Countrywide can point to defeat its status as a PEO is Condustrial's mere assertion that it did not wish to engage Countrywide for a full spectrum of PEO services. The implication here is that an entity can only be a PEO for purposes of the statutes if it provides *every* PEO service permitted by the statutes. However, there is no provision in the PEO statutes intimating that a client company must utilize all of a PEO's permissible services in order to constitute a PEO relationship.

Condustrial's president, Tony Durham, who has been in the contract staffing business for 30 years, confirmed that he used only *selected* services with licensed PEOs in his past business dealings. (11/3/2017 HT p. 212 ll. 4-25- p. 213 ll. 1-7; p. 240 ll. 12-25; p. 246 ll. 1-10; p. 280 ll. 11-25- p. 281 ll. 1-12). Mr. Durham testified that Condustrial is a sophisticated staffing company that does not typically require all available PEO services. He mainly prefers utilization of a PEO specifically for workers compensation purposes. (11/3/2017 HT p. 222). Countrywide did not present any PEO industry expert testimony to counter Mr. Durham's assertions regarding the usual and customary business practices and relationships between PEOs and staffing companies. It is also significant to note that, Countrywide's own representatives never disavowed the notion that Countrywide was operating as a PEO in its dealings with Condustrial. There is simply no evidence in this record proving that Countrywide is not a *de facto* PEO subject to all conditions and responsibilities imposed by S.C. Code §40-68-10 *et seq.*

Even if Countrywide did not possess a license to operate as a PEO in South Carolina, it is still a *de facto* PEO and is not immune from the terms, conditions, responsibilities, and liabilities imposed by the PEO statutes. Generally, words and conduct of the parties to a business transaction best define the true nature of their association, including the formation of *de facto* legal relationships that carry legal consequences. *See* Bankers Trust of S.C. v. Bruce, 283 S.C. 408, 323 S.E.2d 523 (1979) (in the case of agency relationships a written agreement, or lack of a written agreement, is not as compelling as the words and conduct of the parties and circumstances of the particular case); *See also* Beasley v. Kerr-McGee Chemical Corp., 273 S.C. 523, 257 S.E.2d 726 (1979) (it is well-established that the terms of a contractual agreement are not conclusive in determining the association between the two parties where this evidence of an agency relationship outside the contract); Harris v. Stephens Wholesale Bldg. Supply Co., 309 So.2d 115, 54 Ala. App. 405 (1975)(a corporation by estoppel come about when the parties to a contract are estopped to deny corporate existence by their words, agreements and/or conduct). In this case, the evidence establishes that Countrywide and Condustrial clearly behaved as if they were engaged in a PEO relationship- Countrywide offered and conducted substantial services of a PEO for Condustrial under their Contract and Condustrial paid Countrywide at the rates bargained for in that agreement.

In addition, the statutory scheme clearly confirms that PEOs are not merely creatures of statute. As such, PEOs can exist in fact outside the contemplation of the statutes. First, Chapter 68 of Tile 40 is titled "*Regulation* of Professional Employer Organizations." (emphasis added). The ensuing statutes clearly envision operation of unlicensed PEOs. For example, §40-68-150 is titled, in part, "Prohibited acts; ***operation without a license***; wrongful use of title or representation of being licensed.... ." (emphasis added). It states "A person may not: (1) engage in professional employer services without holding a license under this chapter as a professional employer

organization or a professional employer organization group; (2) use the name or title "staff leasing services company", "licensed staff leasing services company", "licensed staff leasing services group", or "professional employer organization", "licensed professional employer organization", "licensed professional employer organization group", "professional employer organization group", "staff leasing services group", or otherwise represent that it is licensed under this chapter, unless the entity holds a license issued under this chapter..." (emphasis added). This statute ultimately provides criminal penalties on an organization holding itself out as a PEO and essentially operating as a PEO under various monikers.[14] Finally, §40-68-160 (B) states that the Department of Consumer Affairs may take disciplinary action against a "licensee, *or a person engaging in professional employer services without a license*." (emphasis added). For these reasons, Countrywide's failure to obtain a license as a PEO in South Carolina does not insulate it from accountability under the statutes.

In addition to the d/b/a designation of "Countrywide Staffing Solutions Group" sounding like a statutorily recognized PEO entity referred to as a "staff leasing services group," Countrywide is a *de facto* PEO via its actions, representations, and obligations under its Contract with Condustrial. **Specifically, Section 3 items (a) through (e) of the Contract regarding Countrywide's obligations to Condustrial mirrors the exact language and requirements of S.C. Code §40-68-70 (A) items 1-5.** These statutory items enumerate the fundamental benchmarks of a PEO arrangement, which tracks nearly identically with the terms and responsibilities imposed by the Contract.

Condustrial submits that its desire to pay employees under its own FEIN as reflected in the "Procedural Amendment to CONTRACT SERVICE AGREEMENT" is immaterial, because such

[14] In this case, "Countrywide Staffing Solutions Group" sounds uncannily similar to the prohibition against operating as a "staff leasing services group."

amendment does not relieve Countrywide from its ultimate responsibility for the payment of wages to assigned employees under Section 3 (b) of the Contract in the event Condustrial did not pay those employees for some reason. Specifically, the Contract states Countrywide "**assumes responsibility for the payment of wages to the leased employees** without regard to payments by Client to the leasing company." Again, the Contract and statutory language of and §40-68-70 (A)(2) are identical. In sum, Countrywide's obligations under its Contract with Condustrial are essentially that of a PEO in every meaningful sense including: establishment the co-employment relationship for assigned employees, guarantee for the payment of wages, responsibility for remitting payroll taxes, maintaining personnel and employment files, the provision of workers compensation coverage and unemployment insurance, handling of claims, and the performance of "all other administrative functions customarily performed by an employer for its employees." (See Section 1. f. of Contract between Condustrial and Countrywide).

Because the PEO statutes clearly contemplate the existence and operation of unlicensed PEOs, it is illogical to claim that an unlicensed business entity engaging in professional employer services is immune from the substantive provisions of the PEO statutes. That would be akin to claiming that an unlicensed driver is immune from violation of the highway and traffic laws, or that an unlicensed physician cannot be held accountable for the results of his malpractice. Such a contention offends every notion of justice and common sense.

The Panel's ruling to this effect also invites fraud and chicanery to the workers compensation system. A shadowy third-party employment service could simply come into South Carolina with promises to a prospective client of full coverage of its liabilities under the Act and then leave that client "holding the bag" for a claim via contractual sleights of hand and claims of immunity because it is "unlicensed." Condustrial argues that this is precisely the unacceptable

scenario the Legislature envisioned when enacting S.C. Code § 40-68-70 (C) and/or S.C. Code § 40-69-120 (A)(7). The Court must not let Countrywide off the hook.

B. If Claimant is not an "assigned employee" under Condustrial's agreement with Countrywide, then coverage would still fall on Countrywide via operation of S.C. Code § 40-68-70 (C) and/or S.C. Code § 40-69-120 (A)(7).

As noted in the previous discussion, Countrywide was clearly acting as a PEO via the Contract with Condustrial. The Contract uses the terms "Selected Staffing employee," "leased employee," and "assigned employee" interchangeably throughout. An "assigned employee is defined by the South Carolina PEO statutes "as a "person performing services for a client company *as affected by a contract* between a licensee and a client company in which employment responsibilities are shared." S.C. Code §40-68-10 (12). Conversely, it logically follows that a "nonassigned" is one who is not deemed a co-employee of the PEO. As such, Turner becomes a "nonassigned employee" if she is not otherwise covered as an "assigned employee" a/k/a "Selected Staffing/Employee under the Contract.

The law places the burden on a PEO and its carrier for providing coverage under the Act when a client company it is engaged with fails to cover its own nonassigned employees. S.C. Code § 40-68-70 (C) states "[u]pon the failure or neglect of a client company to secure and maintain workers' compensation insurance, the licensee and its workers' compensation carrier agree and are liable to pay to a worker employed in the work of the client company compensation under Title 42 which the licensee would have been liable to pay if the worker had been employed by the licensee as provided in Section 40-68-120."(emphasis added). Further, S.C. Code §40-68-120 (A)(7) provides the following:

> (7) When a person referred to as a licensee undertakes to provide assigned employees to a client company, the licensee is liable to pay a worker employed by the client company compensation under Title 42 which the licensee would have been liable to pay if the worker had been immediately employed by the licensee. When the licensee is liable to pay

compensation under this section, it is entitled to indemnity from a client company who would have been liable to pay compensation to the worker independently of this section and have a cause of action for indemnity. **This section must be construed to require that a licensee's workers' compensation carrier is liable to pay compensation to the client company's entire work force with the licensee and carrier's right to indemnity from the client company.** (emphasis added).

Further, "entire work force" is defined as "all persons engaged by a client company as defined in Title 42." S.C. Code §40-68-10 (13). Since Claimant has been adjudicated to be an employee under Title 42, she is obviously a member of Condustrial's "entire work force."

Again, if Turner is not deemed an "assigned employee" as defined by the PEO statutes via construction of the four corners of the Contract between Countrywide and Condustrial, then the Panel's finding that Condustrial is uninsured relative to Turner's employment could perhaps stand. However, coverage of Condustrial's "entire work force," including Turner, would still default to Countrywide and GIC via operation of the aforementioned statutes' provision of coverage for nonassigned employees. The Panel's finding that there is no "indirect" method to impose coverage on GIC via statute is therefore patently erroneous in light of the PEO statutes.

C. **Countrywide is estopped from denying that it is a PEO subject to all responsibilities and liabilities imposed by law based on its representations and actions prior to this claim.**

If Countrywide is not deemed a *de facto* PEO for imposition of the PEO statues as a matter of law, then equity should step in to estop Countrywide from escaping liability. The essential elements of equitable estoppel as it relates to the party estopped are 1) representations or conduct which are calculated to convey an impression of facts; 2) that are different than those which the party subsequently attempts to assert; 3) the intention or expectation that an opposing party will act upon such representations or conduct; and 4) knowledge of the actual facts. *See* Langdale v. Harris Carpets, 395 S.C. 194, 717 S.E.2d 80 (Ct. App. 2011). The party asserting estoppel must

show 1) a lack of knowledge and the means of knowledge of the truth of the facts in question; 2) reliance on the representations and/or conduct of the party to be estopped; and 3) a prejudicial change in its position based on such reliance. *Id.*

In this case, the elements of estoppel against Countrywide are established via the following undisputed facts: 1) Countrywide represented that it was a PEO to Condustrial during contract negotiations and actually provided all essential services of a PEO to Condustrial following the execution of the service agreement [HT p. 81 ll. 7-23; Trial Exhibit # 6 HT p. 83 ll. 5-20]; 2) Countrywide now asserts the contrary position that it is not a PEO for purposes of the statutes governing same because it failed to obtain a license from the state; 3) Countrywide clearly intended for Condustrial to rely on the representation of its PEO status as an inducement for Countrywide to do business with them when Condustrial's previously declined to do business with them because they were not a PEO; and 4) Countrywide obviously knew it did not possess a license to provide PEO services.

Likewise, Condustrial can satisfy all elements of estoppel regarding its reliance on Countrywide's representations, including: 1) Condustrial did not know that Countrywide was not a licensed PEO in South Carolina and had no reason to doubt Countrywide's representations to that effect in its marketing materials and solicitations for Condustrial's business, especially when the contract itself and their subsequent course of dealing confirmed a PEO arrangement;[15] 2) Condustrial undoubtedly relied on the belief that Countrywide was a PEO because it knew that, if all else failed, any gaps in its worker's compensation coverage under the service agreement would

[15] Tony Durham testified that Countrywide initially approached them about Condustrial's business in 2014 but further investigation confirmed that Countrywide was not a licensed PEO, so he declined to do business with them. (11/13/2017 H.T. p. 79 ll. 1-15). Countrywide later emailed Mr. Durham again in 2015 stating, "Hi Tony I hope this finds you well. About a year ago we were working through quoting Condustrial but the timing was not great. **The reason I am reaching out to you now is that Countrywide H.R. is now set up as a PEO in the states you operate in." (HT p. 81 ll. 7-23).** Attached to the email is a marketing brochure reflecting "Who we are- Countrywide is full service professional employment organization. (Trial Exhibit # 6 HT p. 83 ll. 5-20).

still default to Countrywide via operation of the PEO statues; and 3) believing that coverage of its entire work force should still default to Countrywide under the PEO statutes, Condustrial, to its detriment, did not think it was necessary to secure alternative means of coverage for potential exposures stemming from its contract nurses.

All elements of estoppel applied to Countrywide and Condustrial are satisfied. Since Countrywide is estopped from denying it is a PEO, then Countrywide and GIC are liable for Turner's claim via operation of S.C. Code § 40-68-70 (C) and/or S.C. Code § 40-69-120 (A)(7). *See* Langdale *supra* (Court of Appeals held that a staffing company was estopped to deny coverage for Claimant's accident based on its client company's actions/representations and carrier for staffing company was ultimately liable for the claim).

IV. GIC IS ULTIMATELY LIABLE FOR THIS CLAIM AS COUNTRYWIDE'S WORKERS COMPENSATION CARRIER PURSUSANT TO ANY THEORY BECAUSE COVERAGE MUST FOLLOW THE LAW.

The Panel found that that GIC's policy for Countrywide does not cover Turner's accident and claim for benefits even if Countrywide is otherwise implicated this matter. Specifically, the Order states that GIC/s policy for Countrywide does not cover employees via the Contract between Countrywide and Condustrial UNLESS Countrywide "properly reported" same to GIC and GIC approved it for coverage. [Panel's Order] This finding is contrary to well-established South Carolina law regarding worker's compensation coverage.

First, workers compensation coverage in South Carolina is largely dictated statute. A carrier has very little, if any, discretion to modify or limit coverage required by the Act via the policy itself. S.C. Code §42-5-70 states, in pertinent part, that " [a]ll policies insuring the payment of compensation under this title must contain a clause to the effect that,... *the insurer shall be in all things shall be bound by and subject to the awards, judgements, or decrees rendered against*

insured employer...." (emphasis added). In addition, S.C. Code §42-5-80 (A) also provides, in pertinent part, that "[n]o policy of insurance against liability arising under this title may be issued unless it contains the agreement of the insurer that it will promptly pay to the person entitled thereto all benefits conferred by this title... ." Subsection B of that statute states "[s]uch agreement must be construed to be a direct promise by the insurer to the person entitled to compensation enforceable in his name." The worker's compensation law expressly incorporates its terms into all employment agreements and insurance contracts entered into thereunder. *See* Tedars v. Savannah River Veneer Co., 202 S.C. 363, 25 S.E.2d 235 (1943). Collectively, these authorities confirm that an insurance carrier is bound by statute to cover whatever the Commission lawfully deems its insured is liable for under the Act.

In this case, GIC argues that it is only required to cover risks it agrees to cover at the inception of its policy with its insured, Countrywide. Countrywide did not report nursing services for a prison on its policy application to GIC; therefore, GIC is not liable for claims involving employees falling within that class code. In addition to flouting the aforementioned statutory principles binding a carrier to assume all risks lawfully deemed to be part of their insured's business, GIC cannot point to any provision in the Countrywide policy to support this contention. Part One B of the policy states that GIC will "pay promptly when due the benefits required of you by the workers compensation law." (GIC APA # 24 p. 409). The term "workers compensation law" is defined under the policy as "the workers compensation and occupational disease law of each state" endorsed by the policy. Contrary to GIC's arguments, its own policy language clearly defers coverage to the "workers compensation law."

Next, to whatever extent GIC relies on Countrywide's argument that coverage of Turner does not attach because Condustrial failed to report her to Countrywide, such defense is specifically

barred by § 40-68-120 (2), which states in pertinent part, "An insurer issuing a policy of workers compensation insurance to a licensee may not plead as a defense: (c) breach of contract by the licensee or client company. The insurer is not entitled to plead as a defense to an employer's claim for benefits any defects in the performance of the contract between the licensee and client company."

Regarding GIC's argument that it cannot be compelled to cover risks for which it is not aware, the policy specifically provides a mechanism to remedy that quandary. Part Five C of the policy states the following:

> Premium for each work classification is determined by multiplying a rate times a premium basis. Remuneration is the most common premium basis. This premium basis includes payroll and all other remuneration paid or payable during the policy period for the services of: 1) all your officers and employees engaged in work covered by this policy; and 2) all other persons engaged in work that ***COULD*** **MAKE US LIABLE** under Part One (Workers Compensation Insurance) of this policy. (EMPHASIS added). [GIC policy].

This policy language expressly contradicts GIC's position that it is only required to cover risks it agrees to take on at the inception of the policy. The policy clearly recognizes that its insured's circumstances may change, which is the basis for the "could make us liable" policy language" and reference back to the workers compensation law in Part One of the policy. The policy, therefore, contemplates and takes into account the risk posed by workers who *could be* held to be employees under the Act. In this case, Turner clearly falls under the "all other persons engaged in work" policy language that "could make us [GIC] liable" under the workers compensation law.

Moreover, Part Five E of the policy provides GIC with the right to conduct a premium audit of Countrywide's policy and assess additional premium for risks it is required to assume under the workers compensation law that were unknown or not in existence at the inception of the policy. The policy states, " [t]the final premium will be determined after this policy ends by using the

actual, not the estimated, premium basis and the proper classifications and rates that lawfully apply to the business and work covered by this policy." (emphasis added). Again, the provision for the premium audit and reassessment defers to the workers compensation law as to what proper class codes "lawfully apply." This includes unclassified employees at the time of the policy inception that have been subsequently adjudicated to be covered under the workers compensation law like the Turner. The testimony of Albert Hyndshaw, Condustrial's former agent with decades of experience in the insurance industry, confirms that a premium audit and reassessment of premium against the insured is the usual and customary method for an insurer to cover risks after the fact. [11/2/17 H.T. pp. 137-158; p. 183; pp. 227-238].

Interestingly, GCI audited and reassessed premium on a separate Countrywide policy with an audit period between 6/30/2015 and 4/22/2016 (GCI APA # 26 pp. 568-591). That audit found 77 workers that needed to be reclassified, including 21 workers that were previously unknown to GCI. The audit also references the same nursing class codes- 8829 and 8833- that Condustrial submitted to Countrywide for pricing purposes at the time the Contract was being negotiated. (Condustrial APA p. 285). This audit resulted in the assessment of additional premium against Countrywide. It is curious why GCI contends it cannot employ the same process to the instant case to remedy its issues with having to cover a previously misclassified or unknown risk.

Finally, the Panel's reliance on the testimony of GIC's underwriting auditor, especially her self-serving testimony that GIC never would have insured Claimant's class code as being too risky had it been disclosed by Countrywide, was an error of law. This contention is irrelevant and immaterial since the workers compensation law governs coverage, not the non-legal opinion of an insurance underwriter.[16]

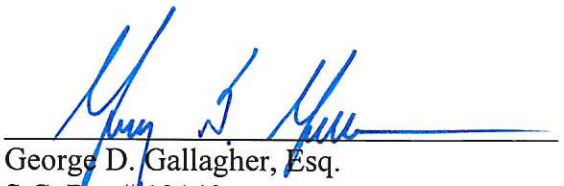
[16] It should also be noted again that GIC never moved to cancel or rescind the Countrywide policy based on alleged fraud or material misrepresentation in its application and inducement. *See* S.C. Code §38-75-730 (a)(2) (governing

In sum, GIC cannot pick and choose which risks implicated by its policy with Countrywide that it will cover. As a corollary, an employer's liability under the Act is entirely insured or it is totally uninsured. An employer cannot purchase a single policy that insures some of its employees but not others. Simply put, GIC is the carrier for Countrywide and is bound to cover all risks incurred by Countrywide under the Act as determined by the workers compensation law of South Carolina, including contractors subsequently adjudicated to be employees under the Act.

CONCLUSION

Condustrial prays that the Court REVERSE the Panel and find that Turner was an independent contractor not subject or entitled to benefits under the Act. This disposition will render all other issues moot. In the alternative, the Court should impose liability for Turner's claim on Countrywide pursuant to its contract with Condustrial and/or by operation of law under pursuant to S.C. Code § 40-68-70 (C) and/or S.C. Code § 40-69-120 (A)(7). GIC's policy for Countrywide should then cover all benefits due under the workers compensation laws of South Carolina.

Respectfully submitted,



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cancellation of policy due to material misrepresentation of fact, which if known by insurer would have caused the insurer not to write the policy); *See also* Bessinger v. R-N-M Builders, 421 S.C. 349, 806 S.E.2d 731 (Ct. App. 2017) (addressing rescission of an insurance contract based on fraud but did not address cancellation voiding policy *ab initio*).

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STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2021-000633

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.

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I certify that I have served the Respondent-Appellant Condustrial, Inc.'s Initial Brief and Designation of Matter by electronic mail and/or by depositing a copy of it in the United States Mail, postage prepaid, on January 7, 2022, addressed to all attorneys of record at the addresses below:

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January 7, 2022

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January 7, 2022

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 Respondent-Appellant Condustrial's Initial Brief and Designation of Matter in the above-referenced matter with the corrections required by the Court.

By copy of this letter to all counsel of the involved parties, I am serving them with this Initial Brief and the Designation of Matter.

Sincerely,

George D. Gallagher

GDG/kgl

Enclosures
cc: The Hon. Amy Bracy
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