THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

WCC File No. 1514359

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.

INITIAL APPELLANT'S REPLY BRIEF OF APPELLANT-RESPONDENT

Stephen B. Samuels
SAMUELS REYNOLDS LAW FIRM, LLC
1320 Richland Street
Columbia, SC 29201
(803) 779-4000
Stephen@SamuelsReynolds.com

COUNSEL FOR THE APPELLANT-RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

ARGUMENT

1. Turner proved she is entitled to temporary disability compensation from the date she was assaulted and continuing on a running award].

A. Turner has not been able to work in any capacity since the assault [In Reply to Respondent Condustrial's argument at pages 13-18].

Condustrial argues that "[s]ince [Turner's] alleged disability resulting from her psychological and physical injuries is not self-evident, the Commission's deferral to medical evidence on the issue of temporary total was proper." [Brief of Respondent-Appellant, page 14]. In the instant case, Turner's disability is evident from both the lay testimony and the medical evidence.

Condustrial cites North Carolina law for the proposition that the employee can meet his burden of proving "that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment" by "the production of medical evidence that he is physically or *mentally*, as a consequence of the work related injury, incapable of work in any employment." Knight v. Wal-Mart Stores, Inc., 562 S.E.2d 434, 440 (N.C. App. 2002)(emphasis added).

Knight provides no support for Condustrial's position. The Knight court held "the Commission must consider *not only the plaintiff's physical limitations*, but *also his testimony* as to his pain in determining the extent of incapacity to work and earn wages such pain might cause." Id at 440-441. In the instant case, Turner does not have significant disabling pain; she is *mentally* disabled. Since the presence and severity of her mental disability is not in dispute, the Commission was required to consider her testimony about her mental state in determining her incapacity for work.

The Appellate Panel not only failed to consider Turner's testimony; they affirmatively held they were barred from considering it under Burnette v. City of Greenville, 401 S.C. 417, 737 S.E.2d 200 (Ct. App. 2013). This is a patent error of law. See, e.g., Grayson v. Carter Rhoad Furniture, 317

S.C. 306, 454 S.E.2d 320 (1995)(reversing commission's denial of compensation because there was "no evidence that Grayson's period of temporary total disability ended"); Cranford v. Hutchinson Constr., 399 S.C. 65, 731 S.E.2d 303 (Ct. App. 2012)(temporary total disability compensation should have awarded because employee was not at MMI and had never been released to work without restrictions); Knight.

In the instant case, Turner's testimony compels a finding that she is disabled due to her PTSD. She testified "My doctor is not letting me back to work because I have PTSD." [Tr. I, page 311, lines 5-6]. "And my doctor has not written me back work yet." [Tr I, page 178, lines 1-6]. Turner testified she was not able to work in any job in her current condition "according to [her] doctors . . ." [Turner Tr. 1, page 173, lines 18-20].

Under Knight, "medical evidence that a [claimant] suffers from genuine pain as a result of a physical injury, combined with the [claimant's] own credible testimony that his pain is so severe he is unable to work, may be sufficient to support a conclusion of total disability by the Commission." Knight v. Wal-Mart Stores, Inc., 562 S.E.2d 434, 440 (N.C. App. 2002). By the same token, when the disabling condition is *mental* rather than physical, the Commission must consider the testimony about the disabling mental condition, particularly when, as here, the testimony is supported by the contemporaneous medical records. The Appellate Panel erred in arbitrarily refusing to consider the ongoing evidence of mental disability in Turner's testimony and medical records.

After the assault, Turner enrolled in the 5-week intensive mental health program at Palmetto Behavioral Day Treatment from October 21 through November 20, 2015. On October 21, 2015, Turner's social worker wrote "LMSW told Pt that program therapist could provide a note signed by the doctor [excusing her from work]." [Claimant's APA page 38]. Absurdly, the Appellate Panel

disregarded this statement because "The record in this case does not contain such note."[1] The Appellate Panel also found "[i]t would be speculation as to whether one was refused, issued, or if issued, what it might have contained." [FC Order, page 30, Finding of Fact G 15]. With all due respect to the Appellate Panel, a medical report stating the "therapist could provide a note signed by the doctor [excusing her from work]" is plain and unambiguous.

Additionally, the records from the Day Treatment program contain three statements from Dr. Berg that "Due to incident 9/5/15, patient has not worked since that date." [Claimant's APA pages 57, 69, 75]. This is also a clear unambiguous statement from the actual mental health provided that the patient has not worked "Due to incident 9/5/15." As the only incident we know of occurring on September 5, 2015 is the kidnapping and assault, it is equally absurd for the Commission to state "the undersigned cannot extrapolate a reporting of symptoms to be the actual opinion of the provider or physician with regard to ability or disability *to work related to the injury.*" [FC Order, page 30, Finding of Fact G 15]. The exercise of fact finding requires the trier of fact to draw inferences from evidence. As Dr. Berg plainly related the inability to work to the "incident 9/5/15," the only reasonable inference to be drawn is that Dr. Berg opined Turner is out of work due to the mental disability caused by the assault. Moreover, the Commission compounded this error by misquoting Dr. Berg to the effect that Turner was psychiatrically sound when Dr. Berg actually wrote "Psychiatrically *stable*." [Claimant's APA page 54]. In other words, still disabled when Dr. Berg transferred care to Lexington County Community Mental Health.

Condustrial argues these are not medical opinions; that they are "merely recitations of her

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[1] The note in question actually does exist, although a copy was not obtained until after the hearing. The note is provided as an exhibit to Turner's Motion to Submit Additional and Newly Discovered Evidence. The note itself was signed by Dr. Berg and sent to SOVA in support of Turner's request for victim's assistance. Dr. Berg wrote Turner completely out of work for the duration of the Day Treatment Program. [Exhibit to Motion].

post-accident history and self-serving complaints of her diminished mental capacity." [Brief of Respondent-Appellant, page 14]. This argument mirrors that made in Clark, where this Court observed:

> The Panel concluded the doctors' opinions were based upon "self-serving assertions of the claimant," but no doctor has said this. What people say when seeking medical help is usually self-serving and sometimes unreliable. Doctors are trained to detect such things, and we are confident that if the doctors believed they were duped into their opinions they would have said so.

Clark v. Philips Electronics/Shakespeare, 433 S.C. 186, 194-195, 857 S.E.2d 378, 381 (Ct.App. 2021).

Clark has other parallels to the instant case, to wit:

> the objective medical evidence of the existence, causation, and degree of Clark's depression and anxiety is uncontradicted. The record details the chronic pain, sleeplessness, and sense of helplessness and hopelessness Clark has experienced because of his 2011 injury. He has been examined or treated by at least ten medical doctors, several of whom are mental-health experts. Not one of them suggests Clark is malingering or faking. The Panel's conclusion that his concealment of a supposed pre-existing condition undermines this objective medical evidence is another misuse of the credibility metric.

Id. at 195, 857 S.E.2d at 382.

This Court reversed the Commission's findings in Clark because the Commission "disregarded not just a party's testimony but their entire array of proof." Id. In the instant case, the Court has authority to reverse the Commission's finding that Turner was no longer disabled as of September 30, 2015 as it "wholly unsupported by the evidence." Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1994)("Where the evidence is susceptible of but one reasonable inference, the question is one of law for the court rather than one of fact for the Commission.").

Condustrial also argues that the statutory presumption that "disability continues until the defense proves otherwise . . . is based on an erroneous interpretation."[2] [Brief of Respondent-

[2] This paraphrase mischaracterizes the statutory presumption. The regulation in its entirety states "Disability is presumed to continue until the employee returns to work or compensation is stopped or terminated according to Section 42-9-260." S.C. Code Reg. 67-502 B (2)(2007).

Appellant, page 14]. Respondents argue the presumption "only applies when compensation benefits have been already commenced such as in an admittedly covered and compensable claim." [Brief of Respondent-Appellant, page 14]. However, the Commission has already found this to be "covered and compensable." Given that ruling, the Commission and Condustrial must follow the law governing payment of compensation. The employer should not reap a windfall because they refused to pay what they owed until compelled to do so by an order. The law does not reward a party "for turning a blind eye to the obvious." Hopper v. Terry Hunt Const., 646 S.E.2d 162, 373 S.C. 475 (Ct. App. 2007). See, also, e.g. Ranucci v. Crain, 409 S.C. 493, 763 S.E.2d 189 (2014)("This Court will not construe a statute in a way which leads to an absurd result or renders it meaningless.").

The Commission found Turner was disabled from September 5-30, 2015. Respondents are required to pay temporary compensation for that period. However, they should also be required to continue paying compensation so long as Turner has not returned to work, or if the conditions to stop compensation under § 42-9-260 are met. None of the stated conditions are met in this case. Turner has not returned to work; has not agreed she is able to work; has not been released to work without restriction; and has not been released to limited duty work. S.C. Code Ann. § 42-9-260 (B) (2007).

Respondents object that "Turner's burden shifting argument flouts well-established South Carolina law." [Brief of Respondent-Appellant, page 18]. Respondents are simply wrong. "A presumption shifts the burden of production or persuasion to the opposing party, who can then attempt to overcome the presumption." State Accident Fund v. S.C. Second Injury Fund, 409 S.C. 240, 246, 762 S.E.2d 19, 22 (2014). Once Turner proved she was disabled, the presumption relieved her of continuing to prove her ongoing disability (although as noted, infra, she in fact did prove her ongoing disability).

The rationale behind this rule is two-fold. First, "workers' compensation benefits accrue

along a time continuum: temporary total disability benefits are available from the date of injury through the date of maximum medical improvement (MMI) and post-MMI benefits may be awarded either as a permanent total or partial disability, or as a percentage of impairment to a scheduled member." Hendricks v. Pickens County, 335 S.C. 405, 414 n. 2, 517 S.E.2d 698, 703 n. 2 (Ct.App.1999). Second,

> For sound policy reasons, the workers' compensation system encourages an injured employee who is still able to perform light-duty work to continue working for his current employer until he reaches maximum medical improvement and then, if possible, to return to his previous position.[3] Therefore, while a claimant must prove disability, he is not required to prove he could not find employment with another employer in order to receive temporary disability benefits.

Lee v. Bondex, Inc., 406 S.C. 97, 749 S.E.2d 155 (Ct.App. 2013).

The duty fell to the employer to provide treatment to get her well, or if treatment was unavailing, to then compensate her for her permanent disability upon reaching MMI. As the treatment she has obtained on her own has not yet ended her mental incapacity or brought her to MMI, she remains disabled and must be awarded temporary compensation on a running award

Respondents also argue that Turner "does not cite any support in the Record for this wholly self-serving proclamation [that] Dr. Hess 'gave her restrictions which precluded her from working as a nurse due to her physical injuries.'" [Brief of Respondent-Appellant, page 18]. Again, Condustrial is simply wrong. The Commission found as a fact that "Turner is unable to physically work as a nurse. The restrictions from Drs. Hess and Westerkam prevent her from working as a

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[3] Lee is also similar to the instant case in that Lee attempted to do light duty work but was unable to do so. As discussed later in this brief, the issue of whether Condustrial made a bona fide offer of light duty and whether Turner was able to accept such work is a wholly separate issue. The Court should note that the goal of light duty is to "return [an employee] to his previous position." Lee. It is not to be used as a shield to evade paying compensation through the subterfuge of making a bogus offer of noncomparable employment to someone who cannot accept it due to her disability.

nurse. She testified she is unable to work as a nurse due to her physical injuries."[4] Dr. Hess saw Turner one time on October 20, 2015. On that date, he wrote an order stating: "Please allow Ms. Turner to return to work with no lifting greater than 10-20 pounds." [Claimant's APA page 28].

An important aspect of this work note is the fact that it is the *first* time a medical doctor provided any work restrictions for Turner's physical injuries. She was explicitly written out of work for her PTSD from September 16, 2015 through September 30, 2015 by her family doctor. [Claimant's APA, page 291]. The alleged offer of light duty employment was made on September 24, 2015. This is a critical fact because the alleged offer was made when her only documented disability was the mental injury. As such, even if Turner's mental disability had ended on September 30, 2015, she did not have formal physical restrictions until October 20, 2015. Indeed, Tom Sears testified that at the time they delivered the letter to Turner, Sears "was not award of any medical restrictions of her working at all." [TR, page 155, lines 1-3].

The timing of the physical restrictions is akin to the scenario presented in Johnson v. Rent–A–Ctr., Inc., 398 S.C. 595, 730 S.E.2d 857 (2012). Johnson refused an offer of employment and resigned from Rent-A-Center at a time when she was under no physical restrictions. When she was later placed on restrictions from the same injury which her new employer could not accommodate, she sought temporary total disability compensation. Rent-A-Center argued that she was barred from receiving TTD because she had constructively refused light duty work by voluntarily resigning without giving Rent-A-Center the opportunity to offer her such work. Our

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[4] The Court should note that as to Turner's physical injuries, the Commission considered both the lay testimony and medical evidence as required by Knight. Yet, as to the mental disability, the Commission refused to consider the testimony or the medical evidence of psychological disability, instead concluding that it was barred from doing so under Burnette. The Commission erroneously concluded that it must have a separate work note explicitly "excusing her from work." [FC Order, pages 29-30, Finding of Fact G 15].

Supreme Court disagreed, finding at the time she resigned the question of light duty work was not even an issue, and that it was "highly speculative" that they would have offered light duty work had she remained their employee. Id. In the instant case, Condustrial made a one-time offer of allegedly suitable employment on September 24, 2015. From that point forward, Turner "tried contacting them and they refuse to talk to me. When I applied for food stamps, they refused to say I was ever employed with them. When I applied for different assistance that required employment confirmation, they refused to give it." [Tr I, page 340, lines 1-9]. It is equally highly speculative to say that Condustrial would have offered genuine work within the *new* 10-20 pound lifting restriction assigned by Dr. Hess on October 20, 2015.

Therefore, the Court should reverse the Appellate Panel and hold Turner is entitled to receive temporary total disability compensation from September 30, 2015 and continuing until she returns to work or reaches MMI.

B. The Commission erred in holding Turner refused employment suitable to her capacity [In Reply to Respondent Condustrial's argument at pages 19-24].

Respondents argue that Turner's "contemptible actions do not reasonably reflect the attitude of a person 'desirous of employment . . .'" They state "It is clear from the Record that Turner simply had no desire to return to work in any capacity under any circumstances; she simply 'wanted comp,' which is anathema to South Carolina's public policy of encouraging injured workers to return to work suitable to their capacity."[5] [Brief of Respondent-Appellant, pages 19, 23].

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[5] Lee, cited by Defendants for this statement, actually states the policy is for the employee to "if possible, return to his previous position." Lee v. Bondex, Inc., 406 S.C. 97, 749 S.E.2d 155 (Ct.App. 2013). Lee arose in the context of an employer arguing that an employee had to affirmatively look for another job if his employer could not or would provide comparable employment. This Court held the public policy is to pay TTD rather than require a job search, as putting another unreasonable burden on an employee would discourage employers from rehabilitating injured workers and returning them to their previous positions. It by no means sanctioned bogus job offers meant to game the system.

Putting aside the unwarranted character attack on Rachel Turner, the evidence is overwhelming that Turner's primary goal was to "stop being afraid and then to go back to work, to be the nurse I was." [Claimant's APA page 35]. She stated this on her very first visit with Dr. Berg. On every other visit, the therapist wrote "Treatment Goal: 'I want to be able to go back to work. I've always been independent.'" [Claimant's APA page 40].

Her desire to return to work continued when her treatment was transfered to Lexington Community Health. On December 11, 2015:

> Rachel became upset, yelling and crying, when asked if she 'just didn't feel like going back to work'. She felt that the representative was being insensitive and she felt like she was being belittled. Rachel listened as MHP encouraged her to keep fighting. Rachel stated 'I know that once I can get my financial situation resolved I can focus on treatment.' **She explained that she wants to feel better so she can get back to work.** She feels her life has been turned upside down. [Claimant's APA page 94 (emphasis added)].

On January 5, 2016, her therapist wrote

> that although she struggles with depression, and things she requires medication, **she wants to go back to work**. In order to do so, she'll have to be able to desensitize herself from her panic when around white males. . . . Stated **she wants to be a travel nurse again** and feels if she can gain back her concentration again, she will be able to 'not mess up at the med cart' so rebuilding her concentration is a focus. [Claimant's APA page 94 (emphasis added)].

This theme of returning to work in some capacity continues throughout her treatment records. On one of the last sessions in the record – shortly before the hearing – "she continued to state her goal was to follow up with voc. rehab this week and start on the track to earning an income at a home base job." [Claimant's APA page 195 (emphasis added)].

The other pervasive theme in this treatment records is that Turner is severely disabled. Not merely unable to work, but unable to function in general. For example, on January 26, 2016, she was "challenged . . . to be in a public setting with allowing the door to be closed in a rest room . . ." After several attempts, she "was able to choose to stay alone for 85 seconds without opening the door. was

crying and shaking. was able to de-escalate with help of therapist." [Claimant's APA page 113]. On May 16, 2016, she is "worse now" and "reports cont[uing] nightmares." [Claimant's APA page 143].

Turner even attempted to obtain assistance returning to work from the South Carolina Department of Vocational Rehabilitation. She "was told that she needed to continue with her mental health therapy first before they could work with her. Client stated she was told that her anxiety is too high and that she would have to go into place that causes anxiety."[Claimant's APA page 151].

This is not a picture of a person who doesn't want to work; this is a person seeking help so she can get better and get back to work. Even if Condustrial's offer had been made in good faith, Turner was simply incapable of accepting any work and remained so up through the date of the hearing.

Condustrial never disputes Turner's testimony that, after the letter was delivered on September 24, 2015, she "tried contacting them and they refuse to talk to me." [Tr I, page 340, lines 1-9]. Condustrial argues this is of no import as "there is no South Carolina authority holding that the validity of suitable employment offer is dependent on it being renewed periodically even after it is initially refused." [Brief of Respondent-Appellant, page 23].

It is black letter law that "The necessary elements of a contract are an offer, acceptance, and valuable consideration." Sauner v. Public Serv. Auth., 354 S.C. 397, 581 S.E.2d 161 (2003). "An offer that had been refused is no longer the basis of a contract between the original parties. No subsequent acceptance of it, *unless the offer is renewed*, will create any obligation." Mcaulay v. Mcaulay, 96 S.C. 86, 79 S.E. 785, 788 (1913)(emphasis added).

It is undisputed that Turner refused – indeed was incapable of accepting – the purported offer of employment. For it to still be in effect after September 30, 3015, it would have to be renewed.

As we know, Condustrial cut off all contact after September 24th, so the offere was never renewed the offer.

Condustrial has the temerity to say it "went above and beyond to accommodate/assist Turner" only to be "caustically snubbed" by her (legitimate) request for workers' compensation. [Brief of Respondent-Appellant, page 23]. To be clear, Condustrial has not paid a dime in money or medical treatment to Turner since she was assaulted. Turner did not "snub" Condustrial. She requested help from her employer – and not only workers' compensation benefits. She testified:

> They haven't contacted me since they told me I was not their employee. I've tried contacting them and they refuse to talk to me. When I applied for food stamps, they refused to say I was ever employed with them. When I applied for different assistance that required employment confirmation, they refused to give it.

[Tr I, page 340, lines 1-9].

The record is abundantly clear as to who snubbed whom. The Court should hold that there was no bona fide offer of suitable employment nor, had there been, could Turner have been able to accept any employment as she had no capacity for work. The Court should further hold that to be effective after September 30, 2015, the offer would need to be renewed. Condustrial's wilful decision to refuse to talk to Turner after September 24, 2015 should estop them from asserting that they had an ongoing offer of employment suitable to her capacity.

* * *

We all need to put aside the legal wrangling for a moment and simply look at what happened here. Rachel Turner is a nurse. She was a hard working single mother. She devoted her life to caring for sick and injured people, even so far as choosing the thankless job of ministering to convicted criminals. Despite the best intentions of SCDC to provide a safe environment and through no fault of her own, Rachel was kidnapped, threatened, beaten, stabbed and held hostage for over five hours in the medication room. Since then, she has not worked despite her strong desire to get

better. She is afraid to be in closed rooms and in public or crowded spaces. Her only source of income is charity and state victim's assistance. Our state has a workers' compensation system created for the express purpose of helping injured workers and their families, to put the cost of injury on employers, and prevent injured workers from becoming charges on society. We have failed her. We should be ashamed that no one stood up to lift up this woman and bring her back into society. I, as her attorney, understand why and how she has to go through this legal quagmire. I also understand that this case must be decided by the law and evidence. Nonetheless, I do not want the Court to forget that we are dealing with tangible harm to a real person here.

I suspect that the Commission may have, as our Supreme Court noted in Bentley, "a lack of understanding about mental-mental injuries fuel[ing] the negative reaction toward allowing recovery." Bentley v. Spartanburg Cnty., 398 S.C. 418, 730 S.E.2d 296 (2012). While this is a compensable physical-mental case, it shares many of the same elements of injustice that shocked the court's conscience in Bentley. We know the result here was simply wrong.

2. The average weekly wage of an employee must be based on wages paid by the employer [In Reply to Respondent Condustrial's argument at pages 24-26].

The Appellate Panel erred by treating Turner as a business owner or independent contractor for average weekly wage purposes rather than as an employee. This punitive approach is not only legally unsupportable, but rewards Condustrial for misclassifying Turner's employment status.

Condustrial's entire argument – and the Commission's analysis – begins with this false premise. The cases relied on all deal with business owners who elected to be covered under the Act.[6] See, e.g., Stephen v. Avins Const. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996)(determining

[6] S.C. Code Ann. § 42-1-130 (2007) provides "Any sole proprietor or partner of a business whose employees are eligible for benefits under this title may elect to be included as employees [sic] under the worker's compensation coverage of the business."

"whether a subcontractor's compensation rate should be computed based on his net, as opposed to gross, earnings."); Wright v. Wright, 306 S.C. 331, 411 S.E.2d 829 (Ct. App. 1991)("Danny Joe Wright is a self-employed heating and air conditioning contractor."); Baldwin v. Piedmont Woodyards, Inc., 293 S.E.2d 814, (N.C. App. 1982)("the decedent in this case operated his own business . . .").

Condustrial argues that whether the injured worker is a business owner or an employee "is a distinction without a difference for purposes of determining earnings for a fair and equitable wage calculation." [Brief of Respondent-Appellant, page 26]. There is zero support for this proposition anywhere in the compensation laws of South Carolina or any other state. Stephen and Wright exist *because* business owners are treated fundamentally differently than employees.

A business owner necessarily invests in his business. Every business has gross revenue, based on payments made to it by its customers. A business has expenses which are necessary to run the business. Expenses run the gamut from wages paid to employees, materials, vehicles, equipment, rent, insurance, taxes, licensing fees, etc. The net profit is determined by deducting these expenses from gross revenue. A partner or sole proprietor does not receive wages; his income is the profit from the business. See Stephen v. Avins Const. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996) (Stephen received payments for each job out of which "came the costs of materials, wages paid to other individuals; and other expenses related thereto."). The rationale for treating a business owner differently is because a subcontractor's gross earnings "included wages paid to other employees and various business deductions." Id. This concept may be obvious yet it seems not to have been understood by the Appellate Panel or Condustrial.

Condustrial tries to muddy the waters by noting that the single Commissioner in Stephen held "[t]he claimant. William Stephen, was self-employed as a subcontractor, however, Avins

Construction Company deducted a percentage for workers' compensation insurance and, therefore, he was their statutory employee." Id. The legal significance of Stephen being a statutory employee has to do with coverage; not average weekly wage. Stephen did not purchase workers' compensation directly. He paid to be a covered subcontractor under the general contractors' insurance. For average weekly wage purposes, the Court treated him as a subcontractor whose compensation rate should be based on his net taxable income. Id.

As to Turner, she was deemed to be the direct employee of Condustrial; not a subcontractor. The reason she was also deemed to be a statutory employee of SCDC is because Condustrial failed to obtain workers' compensation insurance. See Adams v. Davison-Paxon Co., 230 S.C. 532, 96 S.E.2d 566 (1957)(the statutory employee doctrine "is a protection of the employees of irresponsible contractors who do not provide workmen's compensation coverage for their employees, and prevents employers from escaping liability by doing through independent contractors what they would otherwise do through their own employees."). An injured employee has the right to proceed against his direct employer and, if his direct employer is uninsured, against his statutory employer.[7] Nonetheless, she is still and always has been a mere employee working for an hourly wage.

Condustrial argues that using net taxable income "would be the same for any claimant regardless of their pre-accident status and how they came to be covered under the Act." [Brief of Respondent-Appellant, page 26]. Respectfully, this is an insane idea, contrary to the statute and case law.

The statute states: "'Average weekly wage' **must** be calculated by taking the **total wages paid** for the last four quarters immediately preceding the quarter in which the injury occurred . . .

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[7] An unfortunate consequence of Condustrial's misclassification of its nurses is that, because Condustrial is uninsured, liability has been transferred to the Department of Corrections and State Accident Fund.

divided by fifty-two or by the actual number of weeks for which wages were paid, which ever is less." S.C. Code Ann. § 42-1-40 (2007)(emphasis added). Nowhere does the statute allow, let alone mandate, using net taxable income.

The case law similarly holds that it would be unjust and unfair to treat an employee as a subcontractor. See, e.g., Paschal v. Price, 670 S.E.2d 374, 380 S.C. 4, 19 (Ct.App. 2008)(rejecting employer's attempt to use net taxable income to determine average weekly wage of employee who had been misclassified as independent contractor); Mozie v. Frazier Pulpwood, 37 8 S.E.2d 61, 298 S.C. 34 (Ct. App. 1989)(rejecting employer's attempt to use tax deductions to show a lower annual income for average weekly wage purposes); Craft v. Bill Clark Const. Co, 474 S.E.2d 808 (N.C. App. 1996)("[It] would be unjust and unfair to treat plaintiff employee as a subcontractor.").

The Court should appreciate just how far this case departs from the norm. Workers' compensation is supposed to be fair and just; straightforward and streamlined. The vast majority of claimants are hourly workers, along with some paid on piecework, by the mile, or on salary. The Commission *never* looks at their tax returns. Sometimes it is hard to ascertain someone's wages because they are paid in cash, there are no payroll records, or no wages were reported to SCDEW. Sometimes pay records or a W2 or 1099 may be used as evidence when a Form 20 is inaccurate or questioned. In all these cases, the Commission follows the statute and uses "total wages" to set the average weekly wage. It has *never* resorted to using net taxable income for an *employee* until this case.

Should this result stand, not only will it result in hardship for nearly every employee in this state, it will spawn endless litigation over the average weekly wage. The legislature set a simple straightforward formula to determine the compensation rate based on total wages. They did this because it was the most accurate and fair outcome for all parties. The Commission can depart from

this simple formula only "[w]hen for exceptional reasons the foregoing would be unfair . . ."[8] S.C. Code Ann. § 42-1-40 (2007).

The Court should hold that the Appellate Panel committed legal error when it employed net taxable income to determine the wages of an employee nurse paid hourly. The Court should reverse the Appellate Panel and hold that the Single Commissioner's determination of the average weekly wage and compensation rate was correct as a matter of law.

3. The Full Commission erred in denying Turner's Motion to Submit Additional and After Discovered Evidence [In Reply to Respondent Condustrial's argument at pages 27-29].

On remand, the Commission summarily denied Turners' Motion to Submit Additional and After Discovered Evidence in a Form Order. [order]. As the order contains no details or analysis, the Court and parties are forced to speculate as to the basis for the denial.

Condustrial argues that the Motion was procedurally defective because it was filed after the Appellate Panel heard arguments and issued an order on the merits. Condustrial states there is no relief available to an aggrieved party before the Commission *after* the panel has already issued its final ruling other than a motion to Reconsider pursuant to WCC Regulation 67-214 (B)." [Brief of

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[8] Condustrial argues that "in making her case for entitlement to benefits as an employee, Claimant stresses that she is essentially no different than SCDC's employee nurses. This argument is incongruent with her claims for entitlement to a premium AWW and compensation rate substantially greater than her nursing peers." [Brief of Respondent-Appellant, page 26]. This argument misses the mark. Turner is an employee because her employer paid her by the hour and had the requisite control for her to be an employee. In terms of how she worked, her duties and responsibilities, she is indeed no different than SCDC's staff nurses. In terms of pay and benefits, her situation is not comparable. SCDC staff nurses receive health insurance along with a state sponsored retirement plan. [Tr 1, page 63, lines 9-19, page 107, pages11-14]. Turner testified that none of the agencies she worked for provided health insurance, paid vacations or other benefits, regardless of whether they did or did not withhold taxes from her paycheck. [TR1, page 132, lines 10-16]. Turner elected to work for a private company with no benefits because the pay was higher. The SCDC nurses elected lower pay in return for better benefits. For SCDC, the cost per employee for an agency nurse versus direct employment was likely comparable.

Respondent-Appellant, page 27]. This argument would have merit had the Appellate Panel issued a *final* ruling. However, the motion was filed on May 4, 2021. At that point, the Order was not final due to the pending motion for rehearing. It only became final when the Panel denied the motion for rehearing on May 17, 2021. The Commission's regulations allow a party to file a motion to submit "additional evidence necessary for the completion of the record in a case *on review*." S.C. Code Ann. § Reg. 67-707 A. (2007)(emphasis added).

As the case was still *on review*, the Appellate Panel was required to rule on the merits of the motion – both as to the grounds for admitting the additional evidence and as to the evidence itself. In so doing, the Commission should be guided by the principle that justice is served when cases are decided on their merits. See Brown v. LaFrance Indus., 286 S.C. 319, 333 S.E.2d 348 (Ct.App.1985) (when the claimant in a workers' compensation case inadvertently omits proof of causation, the case should be reopened and an opportunity should be afforded the claimant to supply such proof in the interest of justice).

As to the merits, Condustrial argues that the newly discovered evidence would not have produced a different result "because the Commission did not base its denial of additional periods of TTD solely in the absence of supporting disability notes from medical providers . . . [it] also found that Claimant refused a suitable employment offer which affirmatively bars her entitlement to TTD . . ."[9] [Brief of Respondent-Appellant, page 27]. This argument fails. The letter was delivered on September 24, 2015. The Commission awarded compensation from September 5-30, 2015. The letter did not bar TTD for this period because Turner was written completely out of work for this

[9] Tom Sears testified that the letter was not actually an offer of "employment" as Condustrial would not have become an employee at that time. [Tr. Page 153, line 22-page 154, line 11].

period. Even the Commission admitted she could not have accepted any offer of employment on September 24th.

The newly discovered evidence states "Patient will be totally unable to work from 10/21/15 through 11/2015." [Exhibit page 4]. The Commission denied compensation for any period after September 30, 2015 explicitly because "The record in this case does not contain such note [and] It would be speculation as to whether one was refused, issued, or if issued, what it might have contained." [FC Order, page 30, Finding of Fact G 15]. This note completely changes that ruling.

Condustrial argues that the note was known to Turner at the time of the hearing. Turner testified "My doctor is not letting me back to work because I have PTSD." [Tr. I, page 311, lines 5-6]. She also testified that there were other notes but that she had lost her records when she was evicted. [Tr.]. Whether she knew of the existence of this particular note is unlikely as it was provided directly to SOVA rather than to her.

As to due diligence, Turner and her counsel reasonably believed SOVA had provided their entire file to her attorney. Turner only learned of the existence of the note when an assistant attorney general forwarded it to her. Her attorney did not receive it until much later because the AG misspelled his email address.

Lastly, Condustrial protests that the additional evidence was secured to counter the Commission's adverse ruling. Well, yes, that is self-evident. The courts allow additional and newly discovered evidence specifically to change an adverse ruling – or, more precisely, to correct an incorrect ruling and prevent a miscarriage of justice.

The Court should find the Commission erred in summarily denying Turner's Motion. The Court should accept the evidence, hold that it changes the result, and reverse the denial of a running award of TTD for the period after September 30, 2015.

CONCLUSION

For the foregoing reasons, the Court should affirm in part and reverse in part. The Court should affirm the findings of the Appellate Panel that Rachel Turner is an employee rather than an independent contractor. The Court should reverse the Appellate Panel on the issue of average weekly wage by reinstating the Single Commissioner's finding that Turner's average weekly wage must be based on wages paid to her by her employer resulting in an average weekly wage of $1,130.86. The Court should also reverse the Appellate Panel and hold Turner should be paid temporary total disability compensation from September 6, 2015 and continuing on a running award. The Court should also hold the Appellate Panel erred in denying Turner's motion to submit additional evidence.

Respectfully Submitted

Stephen B. Samuels
SAMUELS REYNOLDS LAW FIRM, LLC
1320 Richland Street
Columbia, SC 29201
(803) 779-4000
Stephen@SamuelsReynolds.com

COUNSEL FOR THE APPELLANT-RESPONDENT

February 11, 2022
Columbia, South Carolina

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Feb 14 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Commissioners T. Scott Beck, R. Michael Campbell, II, and Gene McCaskill

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WCC File No. 1514359
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.

PROOF OF SERVICE

I certify that I, Stephen B. Samuels, Attorney for the Appellant, have caused the **Initial Reply Brief** to be served on the parties below clearly marked on the date indicated below, addressed as follows

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

Gregory M. Alford, Esquire
PO Drawer 8008
Hilton Head Island, SC 29938
gregg@alfordlawsc.com

Lisa C. Glover, Esquire
SC Uninsured Employers' Fund
PO Box 1815
Lexington, SC 29071
lglover@saf.sc.gov

T. Jeff Goodwyn, Esquire
2309 Devine Street
Columbia, SC 29205
Jgoodwyn@Goodwynlaw.com

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

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

James P. Newman, Jr., Esquire
Howser, Newman, Besley, LLC
PO Box 12009
Columbia, SC 29211
jnewman@hnblaw.com

George D. Gallagher, Esquire
Speed, Seta, Martin, Trivett & Stubley
PO Box 11669
Columbia, SC 29211
ggallagher@speed-seta.com

Stephen B. Samuels

February 11, 2022

SAMUELS REYNOLDS LAW FIRM

STEPHEN B. SAMUELS
P. JASON REYNOLDS
ATTORNEYS AT LAW

RECEIVED
Feb 14 2022
SC Court of Appeals

February 11, 2022

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

RE: Rachel J. Turner v. Medustrial Healthcare Staffing Service and Condustrial, Inc.
Appellate Case No.: 2021-000633

Dear Ms. Kitchings:

Enclosed for filing please find a copy of our **Initial Reply Brief** and **Proof of Service** in the above case.

Please have your staff file the **Initial Reply Brief** and **Proof of Service** and return to us a clocked copy. Feel free to contact us with any questions or if further information is needed from our office.

Sincerely,

Stephen B. Samuels

SBS
Enclosure(s) as stated
cc w/encl.: Erin Farthing, Esquire
Gregory M. Alford, Esquire
Lisa C. Glover, Esquire
T. Jeff Goodwyn, Esquire
Beth Richardson, Esquire
Grady L. Beard, Esquire
James P. Newman, Jr., Esquire
George D. Gallagher, Esquire