THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
APPELLATE PANEL, WORKERS' COMPENSATION COMMISSION

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

Mildred H. Shatto ..... Petitioner,

v.

McLeod Regional Medical Center ..... Respondent,

and

Staff Care, Inc., and
Travelers Insurance ..... Defendant.

BRIEF OF PETITIONER

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QUESTION PRESENTED

Did the Court of Appeals err when it held that Mildred Shatto, a contract nurse who was injured while working at a hospital, was an independent contractor and was not entitled to benefits under the Workers' Compensation Act?

STATEMENT OF THE CASE

Mildred Shatto is a certified registered nurse anesthetist who received significant injuries when she fell on the operating room floor at McLeod Regional Medical Center in December of 2007. The immediate diagnosis of her injury was minor—a contusion to the right eye[1]—but it led to problems on the right side of Ms. Shatto's body which gradually worsened to the point that by March of 2008, Ms. Shatto was unable to use her right arm. See (App.pp.172-173) (from the hearing commissioner's order). The commission found Ms. Shatto injured her spine, spinal cord, right shoulder, both arms, both hands, her hip, and both legs, see (App.pp.150, 206), and these findings are not at issue in these proceedings.

When Ms. Shatto fell, she was working at McLeod as a contract nurse. This job had been brokered by Staff Care, a Texas company that markets itself as matching medical workers with healthcare providers and medical facilities on a temporary basis. See, e.g., (App.p.437) (from Staff Care's website). Ms. Shatto did not have a written contract with McLeod; instead, she had a contract with Staff Care, see (App.pp.413-417), and Staff Care had a contract with McLeod. See (App.pp.560-561). Ms. Shatto executed at least three documents which professed that her relationship to Staff Care was that of an independent

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[1]See (App.pp.434-435) (initial diagnosis); see also (App.p.391, line 25 - p.393, line 17) (description of the accident and immediate treatment).

contractor. See (App.pp.416, ¶3.05; 418; 622). She did not have a written agreement with the hospital, but McLeod had her execute documents that refer to her as a "temporary employee" or simply an "employee." See (App.pp.578-587).

Ms. Shatto had been working at the hospital for a little over a month when she fell, see (App.p.262, lines 7-12), and the term of her assignment at McLeod was scheduled to run to the first of the following February; roughly two months away. (App.p.431).

This case began as two workers' compensation claims—one against McLeod, the other against Staff Care—that Ms. Shatto initiated in April of 2008. See (App.p.165) (referencing two claims); see also (App.p.220) (the initial filing against McLeod). Staff Care answered Ms. Shatto's claim with a general denial, (App.p.219), and although McLeod initially admitted that Ms. Shatto was a hospital employee, see (App.p.218), it filed an amended answer shortly thereafter denying the existence of an employment relationship. (App.p.217). The two claims were consolidated for a hearing, see (App.p.165), and a single hearing commissioner heard the case in August of 2008. See (App.p.256).

The parties presented two disputes to the hearing commissioner. The first dispute involved Ms. Shatto's employment status, as both McLeod and Staff Care denied any employment relationship with Ms. Shatto. The second dispute involved whether the fall itself was a compensable accident; both McLeod and Staff Care argued that Ms. Shatto's fall was unexplained or "idiopathic" in nature. See (App.pp.165-166) (the hearing commissioner's summary); see also (App.p.302, line 13 - p.303, line 19).[2]

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[2]A fall that is the result of a worker's personal condition, also called an "idiopathic" fall, is generally not compensable under the Workers' Compensation Act. See, e.g., *Crosby v. Wal-Mart Store, Inc.*, 330 S.C. 489, 492-496, 499 S.E.2d 253, 255-257 (Ct. App. 1998)

In a lengthy order dated and filed in December of 2008, the hearing commissioner held in favor of Ms. Shatto and ordered McLeod to pay Ms. Shatto's benefits. See (App.pp.161-216). The hearing commissioner found McLeod liable for Ms. Shatto's benefits through two avenues. First, he found Ms. Shatto was a "borrowed servant" under S.C. Code Ann. § 42-1-400 (1985) and *Cooke v. Palmetto Health Alliance*, 367 S.C. 167, 624 S.E.2d 439 (Ct. App. 2005). See (App.pp.207-209; 212-13). Second, he found that an examination of the four factor common law test for employment yielded the conclusion that Ms. Shatto was an employee and not an independent contractor. See (App.pp.209-210; 214). As for whether the fall itself was compensable, the hearing commissioner found that Ms. Shatto had tripped as she moved around her patient's bed. (App.p.206).

McLeod asked the full commission to review the hearing commissioner's decision, see (App.p.222), and an appellate panel of the commission heard oral arguments in March of 2009. See (App.p.232). In May of 2009, the panel issued an order affirming the hearing commissioner's decision in its entirety. See (App.pp.133-160).

McLeod filed a notice of appeal of the commission's decision in June of 2009, and because Ms. Shatto's injury occurred after July 1, 2007, the Court of Appeals heard the appeal.[3] Like its argument to the commission, McLeod's argument to the Court of Appeals

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(explaining this principle). This principle is subject to exceptions. See, e.g., *Bagwell v. Burwell*, 227 S.C. 444, 452-53, 88 S.E.2d 611, 614-15 (1955) (an idiopathic fall is compensable when it has consequences that would not have occurred except for the injured worker's employment).

[3]See *Pee Dee Reg'l Transp. v. South Carolina Second Injury Fund*, 375 S.C. 60, 61-62, 650 S.E.2d 464, 465 (2007) (noting the 2007 amendment to the Workers' Compensation Act that moved appeals to the court of appeals for injuries occurring on or after July 1, 2007).

was two-pronged. First, McLeod argued Ms. Shatto was not an employee. See (App.pp.39-59). Second, it argued that the fall itself was not compensable. See (App.pp.60-61). McLeod's argument on whether Ms. Shatto was an employee drew heavily from this Court's decision in *Wilkinson ex rel. Wilkinson v. Palmetto State Transportation Co.*, 382 S.C. 295, 676 S.E.2d 700 (2009), which this Court published subsequent to the appellate panel's decision. See (App.pp.39-41) (from McLeod's brief). In *Wilkinson*, this Court addressed the common law employment test and modified how the four factors of that test are weighed against each other. See 382 S.C. at 300, 676 S.E.2d at 702.

The Court of Appeals did not conduct oral argument, and it reversed the commission's decision in a published opinion issued in August of 2011. See (App.p.1). The court relied heavily on this Court's *Wilkinson* decision, and where the commission found that each factor of the common law employment test weighed in favor of a finding of employment, the Court of Appeals disagreed on every count. See (App.pp.5-15). The court reached the conclusion that McLeod did not have the "right to control" Ms. Shatto, and this conclusion compelled the finding that she was also not a "borrowed servant." (App.p.15). The court declined to address whether Ms. Shatto's fall was a compensable accident because its resolution of the employment question was dispositive. (App.p.15).

ARGUMENT

This Court should reverse the decision of the Court of Appeals for two reasons.

First, the Court should reinstate the commission's finding that the greater weight of the evidence suggests that McLeod had the right to tell Ms. Shatto how to do her job. This is supported by a faithful application of the common law employment test, as well as the rule

of reason. It is one thing to hold, as this Court did in *Wilkinson*, that a trucking company does not have the ability to control the conduct of an independent truck driver. It is quite another thing to hold that a hospital does not have the ability to control the work-related conduct of a nurse. Because the evidence shows that the hospital had the right to control how Ms. Shatto went about her work, the law deems Ms. Shatto to be a hospital employee.

Alternatively, the Court should hold that Ms. Shatto is nothing if she is not McLeod's statutory employee or borrowed servant. These labels describe the same doctrine, and the doctrine provides that a business may not avoid its obligations under the Workers' Compensation Act by hiring someone labeled as an "independent contractor" to perform work that is a core part of the business's trade. For 40 hours a week, Ms. Shatto performed the same work that McLeod's staff nurse anaesthetists were performing. The statutory employee doctrine serves the same purpose that underlies the Workers' Compensation Act; this system is designed to channel the cost of workplace accidents into the cost of a business's goods or services. The decision of the workers' compensation commission honors these principles and this purpose, but the decision of the Court of Appeals does not.

I. The Court Should Hold That the Court of Appeals Erred in Reversing the Decision That Ms. Shatto Was a McLeod "Employee."

Because workers' compensation laws only apply to workers engaged in "employment," the existence of the employer/employee relationship is a jurisdictional question, and whether someone is an "employee" is a jurisdictional fact. *Wilson v. Georgetown County*, 316 S.C. 92, 93-94, 447 S.E.2d 841, 842 (1994). An appellate court may take may take its own view of the preponderance of the evidence with respect to

jurisdictional facts, and it is South Carolina's policy to resolve doubts about jurisdiction in favor of including employees in the Workers' Compensation Act. *Id.* at 93-94, 447 S.E.2d at 843; *Wilkinson*, 382 S.C. at 299-301, 676 S.E.2d at 702. This last principle does not make a finding of employment a foregone conclusion; it simply means that the parties will only be excluded from the Workers' Compensation Act if the case for exclusion is clear.

A. When Properly Applied, Each Prong of the Employment Test Is Aimed at Determining Who Controls the Details and the Manner of Working.

The defining characteristic of employment is the boss's right to control the details of the worker's work—not just the result of the work, the *manner* of the work's performance. This differs from an independent contract relationship. An independent contractor is a person that is engaged in his or her own independent business and who "contracts to do a piece of work according to his own methods, without being subject to the control of his employer except as to the result of his work." *Chavis v. Watkins*, 256 S.C. 30, 32, 180 S.E.2d 648, 649 (1971) (quoting *Bates v. Legette*, 239 S.C. 25, 34-35, 121 S.E.2d 289, 293 (1961)). Since at least this Court's decision in *South Carolina Industrial Commission v. Progressive Life Insurance Co.*, the court has judged the existence of the "right to control the details" by examining four factors: (1) direct evidence of the right to exercise control; (2) method of payment; (3) furnishing of equipment, and (4) the right to fire. 242 S.C. 547, 550, 131 S.E.2d 694, 695 (1963).

There are reasons behind each of these factors. *Larson's Workers' Compensation Law*, which this Court has cited when listing the four factor test,[4] explains that the "direct

[4]See *South Carolina Indus. Comm'n*, 242 S.C. at 695, 131 S.E.2d at 550.

evidence of control" factor looks to the degree of control actually exercised over the worker and the degree of control contemplated in the employment contract. 3 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law*, § 61.05 (2004). Describing that it can be difficult to distinguish someone who is controlling the details of the work from someone who is merely making sure that he or she gets the end result he or she desires, the treatise takes the position that it is best to state this principle of the test in the negative: An owner who wants to get the work done without becoming an employer may exercise only as much control "as is necessary to ensure that he gets the result from the contractor that he bargained for." *Id.* at § 61.03[1]. Exercising more control than this will tend to show employment.

The Larsons' treatise also explains the rationales behind the other three factors of the test. "Method of payment" is a factor because "[p]ayment on a time basis is a strong indication of the status of employment." *Id.* at § 61.06. Conversely, "[p]ayment on a completed job basis is indicative of independent contractor status." *Id.* "Furnishing of equipment" is a factor because an owner that has invested resources in procuring equipment is "naturally going to dictate [the] details . . . to protect his or her investment." *Id.* at § 61.07[2]. "Right to fire" is a factor because "[t]he power to fire . . . is the power to control." *Id.* at § 61.08[1]. The treatise explains "[t]he absolute right to terminate the relationship without liability is not consistent with the concept of independent contract, under which the contractor should have the legal right to complete the project contracted for and to treat any attempt to prevent completion as a breach of contract." *Id.*

This Court has instructed that these four factors—direct evidence of the right to control, method of payment, furnishing of equipment, and the right to fire—are to be

evaluated "with equal force in both directions." That was the holding in *Wilkinson*, in which this Court abrogated the principle that having one factor which tended to show employment was virtually proof that a worker was an employee, and in the contrary direction, any factor tending to show that a worker was not an employee was "only mildly persuasive" that a worker was an independent contractor. 382 S.C. at 299-301, 676 S.E.2d at 702. The Court perceived this analysis as tending to "pre-ordain the result." *Id.* at 301, 676 S.E.2d at 702.

Each of these factors are based on underlying assumptions about how the presence or absence of certain characteristics illustrate which party—the boss or the worker—has the power to direct the worker in how he or she goes about their daily activities. A faithful application of these factors would thus do more than list each of them, it would explain the rationales behind the factors and apply those rationales to the circumstances of the individual case.

B. A Faithful Application of the Employment Test Illustrates That McLeod Had the Right to Control the Details of Ms. Shatto's Work.

The Court of Appeals listed the four factors of the common law employment test, but it did not explain the rationales behind those factors or apply those rationales to the circumstances of Ms. Shatto's job.

i. McLeod Exercised More Control than the Circumstances Required.

For "direct evidence of control," the Court of Appeals focused on the fact that statutory law required McLeod to give Ms. Shatto a job description, hold her conduct to the anesthesia department's standards, issue her an identification badge, give her an orientation,

and ascertain her health history. (App.pp.6-7). The court wrote that "a substantial part" of McLeod's control over Ms. Shatto was "derived by law." (App.p.6). While these observations were certainly fair, they should not have controlled the outcome.

If McLeod had not given Ms. Shatto things like a job description, an ID badge, or an employee orientation, McLeod would not have received its bargained-for result: a legal, working nurse. But McLeod controlled Ms. Shatto in other ways—ways not required by law. The commission found it important that Ms. Shatto began work each morning by reporting to a *supervisor* who directed her activities throughout the day. (App.pp.151-52); see also (App.pp.282-283; p.317) (evidence supporting this finding). The commission also noted that McLeod required Ms. Shatto to provide instruction and education for McLeod's student nurse anesthetists. (App.p.152) (citing App.p.602). This was in Ms. Shatto's job description; a job description that does not look like it was different for Ms. Shatto than it was for McLeod's staff nurses. (App.pp.600-604). Ms. Shatto testified that she had definite work hours (she was required to be at work by 9:00 a.m.), see (App.p.274), and she was subject to a dress code that, by McLeod's admission, went beyond the legal requirement that she wear sterile clothing. (App.p.332, line 9 - p.333, line 18).

The written contracts contemplate McLeod having control over Ms. Shatto's activities; McLeod's contract with Staff Care gave McLeod the "sole discretion" to determine whether Ms. Shatto's work was reasonably appropriate. (App.p.561, ¶C.3). The testimony of Ms. Shatto's supervisor is similarly favorable, he said Ms. Shatto called him her supervisor because he was "the responsible entity at McLeod for the practice of the [nurse anesthetists]." (App.p.346, lines 9-15).

It should not matter that the law required the hospital to control some of the details; the fact remains that McLeod exercised more control than the law required. And though the written contracts governed McLeod's field of control over Ms. Shatto's activities, the guidepost should be the character of the relationship described in those contracts. Here, the contracts contemplated a level of control that is consistent with employment—not independent contract. This was a detailed employment arrangement with a definite term.

ii. McLeod Paid an Hourly Rate for Ms. Shatto's Work.

On "method of payment," the Court of Appeals focused on the facts that Ms. Shatto did not receive "employee benefits" and treated the money she earned as non-employee compensation on her tax return. (App.pp.10-11). It also focused on the fact that Ms. Shatto's wages were paid according to the written contracts—Ms. Shatto's contract with Staff Care and Staff Care's contract with McLeod. (App.p.10).

The problem with this analysis is that it does not account for the principle that hourly wages are a strong indicator of an employer-employee relationship. As the Larsons' treatise explains, when an owner pays a worker by the hour, the law presumes that the owner has reserved the right to dictate the worker's activities over the course of that hour. Larson & Larson, *supra* p. 7, at § 61.06. While some decisions from this Court and the Court of Appeals have looked at how someone reports their earnings for tax purposes,[5] that approach

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[5]See, e.g., *Wilkinson*, 382 S.C. at 303, 676 S.E.2d at 704; *Pikaart v. A & A Taxi, Inc.*, 393 S.C. 312, 322-23, 713 S.E.2d 267, 272-73 (2011); and *Paschal v. Price*, 380 S.C. 419, 433, 670 S.E.2d 374, 382 (Ct. App. 2008). *Paschal* notes that the provision of a form 1099 rather than a W-2 is "not necessarily determinative" of whether a worker is an employee. 380 S.C. at 433, 670 S.E.2d at 382. This Court overruled *Paschal* on other grounds in *Wilkinson*.

is not fully faithful to the reasons why "method of payment" is a factor of the test. The test focuses on whether the worker is paid based on units of time or based on completing a job.

Ms. Shatto was not paid by the completed job. The written contracts required her to submit bi-monthly time sheets—time sheets that had to be approved by her McLeod supervisor—to Staff Care. Staff Care then deposited Ms. Shatto's earnings into her bank account, and Staff Care billed McLeod for Ms. Shatto's time as well as her housing, rental car, meal allowance, and malpractice insurance. See (App.p.431) (Ms. Shatto's instructions from Staff Care) and (App.p.560, ¶¶B.5 and B.8) (McLeod's agreement with Staff Care). Staff Care was the party who physically paid Ms. Shatto, but McLeod was the party bearing the cost, and it paid for Ms. Shatto's work based on the number of hours she worked.

The Court of Appeals also did not consider the fact that, as the commission put it, Ms. Shatto "assumed almost none of the expense [of working at McLeod]." (App.p.155) (from the appellate panel's order). That observation should carry some weight. An independent contractor—someone engaged in his or her own independent business enterprise —usually does not have *zero* overhead.

iii. Ms. Shatto Used McLeod's Equipment and McLeod Could Immediately Terminate Her.

For "furnishing equipment," the Court of Appeals focused on the fact that McLeod was required to provide the anesthesia machines for Ms. Shatto to use. This requirement was a function of two facts: the fact that the law requires a hospital to keep its equipment maintained in proper working condition, and the fact that it would be impossible for Ms. Shatto to supply her own 500-pound anesthesia machine. (App.pp.8-9).

These are fair observations, just as it was fair for the court to point out that McLeod was required to give Ms. Shatto a job description. Nobody has argued that the determinative fact should be that McLeod owned all the medical equipment, but at the same time, the fact that Ms. Shatto used McLeod's equipment does say *something*. Ownership of equipment carries with it the implication that the owner has reserved the right to control how the worker *uses* the equipment, and McLeod provided Ms. Shatto with more equipment than an anesthesia machine — it provided her everything she needed to perform her job. See (App.pp.153-154). This was required by the written agreements, see (App.p.560, ¶B.1), and the most appropriate way to account for that fact is to recognize that these agreements are describing characteristics of an employment relationship. The implication is that McLeod could direct Ms. Shatto's activities if it did not condone the way she used hospital supplies.

The same is true for "right to fire." The written agreements provide that they may be terminated by any party on 30 days written notice, but they also gave McLeod the sole discretion to immediately terminate Ms. Shatto's assignment if her services were not "appropriate." (App.p.415) (Ms. Shatto's agreement with Staff Care); (App.p.561, ¶C.3) (McLeod's agreement with Staff Care). This is the right to immediately terminate the relationship without further liability, and as the Larsons' treatise describes, that right is a marker of an employment relationship, not independent contract.

II. Alternatively, the Court Should Hold That Ms. Shatto Is a Statutory Employee and That a Worker Who Qualifies as an Employee Cannot Contract Themselves out of the Act.

A business may not avoid its obligations under the Workers' Compensation Act by hiring someone labeled as an "independent contractor" to perform work that is a core part

of the business's trade. *Marchbanks v. Duke Power Co.*, 190 S.C. 336, 343-44, 2 S.E.2d 825, 828 (1939); *Cooke v. Palmetto Health Alliance*, 367 S.C. at 174, 624 S.E.2d at 442. This is known as the statutory employee doctrine and is codified in section 42-1-400 of the Code (1985). The statute instructs that the worker must be providing work that is part of the owner's "trade, business or occupation," and this court has construed the statute "to include activities that: (1) are an important part of the trade or business of the employer, (2) are a necessary, essential, and integral part of the business of the employer, or (3) have been previously performed by employees of the employer." *Glass v. Dow Chem. Co.*, 325 S.C. 198, 201, 482 S.E.2d 49, 50 (1997).

The decision of the Court of Appeals in *Cooke* describes this and the "borrowed servant" doctrine separately, but the doctrines are not materially distinguishable. The borrowed servant test relies on whether there is an express or implied contract of hire between the worker and the putative employer, whether the work being done by the worker is essentially that of the putative employer, and whether the putative employer has the right to control the details of the work. *Cooke*, 367 S.C. at 176, 624 S.E.2d at 442-43. This mirrors the statutory employee test—it relies on the work being a necessary part of the business—and it also resembles the common law employment test: if the boss has the right to control the manner of the work, the worker is, by definition, an "employee." These tests describe the same concept. The court examines whether the true character of the relationship is that of employment because the worker is furthering the putative employer's business.

Ms. Shatto was supposed to give McLeod 40 hours of work per week, for roughly 2 1/2 months, doing the same work as McLeod's staff nurse anesthetists. She was engaged in

a core part of McLeod's business, using McLeod's supplies, and working with (and training) McLeod's staff nurses. She was, as McLeod's documents describe, a "temporary *employee*." See, e.g., (App.p.586) (emphasis added).

The underlying appeal of the result reached by the Court of Appeals is to take the view that Ms. Shatto got what she bargained for. Ms. Shatto explained that she sought out this kind of work—the parties call it *locum tenens* work—because it pays a higher wage, and she also said that as a locum tenens worker, "you are not an employee under [the hospital's] rules." (App.p.403).

A reasonable reading suggests that a similar sentiment was part of this Court's decision in *Wilkinson*. Mr. Wilkinson worked as a truck driver, and although his relationship with Palmetto State Transportation Company began as that of employer/employee, the relationship changed character when the parties entered into a contract that called for Mr. Wilkinson to earn an increased rate of pay per mile. This contract also specified that Mr. Wilkinson assumed complete responsibility for maintaining his own equipment, had total responsibility for the methods of the performance of his work, conspicuously advised that the relationship between Mr. Wilkinson and Palmetto Transportation was that of carrier and independent contractor, and contained a promise by Mr. Wilkinson to carry workers' compensation coverage. 382 S.C. at 298-99, 676 S.E.2d at 701.

There are differences between Ms. Shatto's case and the *Wilkinson* case, and the Court should hold that those differences are material. For example, where Mr. Wilkinson and the trucking company had a written agreement specifying that the relationship was that of carrier and contractor, Ms. Shatto had no such agreement with McLeod, and the

documents the hospital gave her labeled her as some form of "employee." (App.pp.578-587). Similarly, where Mr. Wilkinson's contract called for him to carry workers' compensation coverage, none of Ms. Shatto's documents from McLeod reference the workers' compensation system in any way. The record suggests that her understanding of what it meant to "not be an employee under the hospital's rules" was having the right to leave the job without giving McLeod advance notice. (App.p.403, lines 14-17). That is a description of at-will employment.

The workers' compensation system "was adopted to protect industrial workers against the hazards of their employment[] and to cast upon the industry in which they are employed a share of the burden resulting from industrial accidents." *Marchbanks*, 190 S.C. at 362, 2 S.E.2d at 836. This Court has observed that the system contains positive aspects for all parties. *Parker v. Williams and Madjanik, Inc.*, 275 S.C. 65, 70, 267 S.E.2d 524, 526 (1980) ("The employee receives the right to swift and sure compensation; the employer receives immunity from tort actions by the employee. This quid pro quo approach . . . has worked to the advantage of society as well as the employee and employer."). When parties are forced into the system, the true costs of workplace injuries are built in to the costs of a business's goods and services. Larson & Larson, *supra* p. 7, at § 60.05[1]. The cost of workplace injuries is thus lifted off of the individual worker, who is not likely to have insured himself or herself against the cost of suffering a disabling injury, and treated as a cost of production.

Giving workers and businesses the power to take a job that is a necessary part of a business and remove it from the scheme violates the statutory purpose of including everyone that qualifies as an employee, see S.C. Code Ann. § 42-1-130 (Supp. 2012) (definition of

employee), but by logical extension, the decision to deny coverage in this case would allow that very thing. Injured workers will still get necessary medical treatment, but they may do so at the general public's expense. See *Cokeley v. Robert Lee, Inc.*, 197 S.C. 157, 168, 14 S.E.2d 889, 894 (1941) (part of the purpose of compensation legislation is to prevent the burden of injured workers becoming "charges on society"). Businesses will face liability in tort for workplace injuries. The cost of goods and services will not reflect the human components of the costs of production. This is not the legislative design.

CONCLUSION

What drove the commission's decision was that the day-to-day operation of this relationship looks a lot more like employment than independent contract. The Court should hold that the law deems Ms. Shatto to be an "employee" because the evidence shows that McLeod had the right to control how Ms. Shatto went about her work. Alternatively, the Court should hold that Ms. Shatto is the hospital's "statutory employee."

Respectfully submitted,

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondent with a copy of the *Brief of Petitioner* and *Appendix* by depositing a copy in the United States Mail, postage prepaid to the following address:

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