THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
MAR 11 2013
S.C. Supreme Court

---

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

---

Appellate Case No. 2011-201186

---

Mildred H. Shatto, ..... Petitioner,

v.

McLeod Regional Medical Center and
Key Risk Management Services, Inc., ..... Respondents,

and

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

---

# BRIEF OF RESPONDENTS

---

Walter H. Barefoot (SC Bar No. 64261)
TURNER PADGET GRAHAM & LANEY P.A.
Post Office Box 5478
Florence, SC 29502
Phone: (843) 662-9008
Fax: (843) 667-0828

Carmelo B. Sammataro (SC Bar No. 69746)
TURNER PADGET GRAHAM & LANEY P.A.
Post Office Box 1473
Columbia, SC 29202
Phone: (803) 254-2200
Fax: (803) 799-3957

ATTORNEYS FOR RESPONDENTS

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### State Cases



### Federal Cases



### Other Authorities

## STATEMENT OF ISSUES ON APPEAL

I. DID THE COURT OF APPEALS CORRECTLY HOLD THAT SHATTO WAS AN INDEPENDENT CONTRACTOR AND NOT MCLEOD'S EMPLOYEE ON THE DATE OF THE ALLEGED INCIDENT?

II. CAN SHATTO ESTABLISH THAT SHE WAS MCLEOD'S BORROWED SERVANT?

III. DID THE COMMISSION ERR AS A MATTER OF LAW IN HOLDING SHATTO'S IDIOPATHIC FALL CONSTITUTES A COMPENSABLE INJURY BY ACCIDENT ARISING OUT OF AND IN THE COURSE AND SCOPE OF HER EMPLOYMENT?

## STATEMENT OF THE CASE

Petitioner Mildred Shatto (hereinafter "Shatto") claims entitlement to benefits resulting from an incident that occurred when she fell to the floor of McLeod's operating room on December 21, 2007, allegedly resulting in injury to multiple body parts, numbness in her face and right hand, and general left-sided weakness. She filed her Form 50, Request for Hearing, on April 30, 2008, seeking additional medical treatment and temporary total disability benefits. McLeod filed its Form 51, Employer's Answer, on May 29, 2008, in which it admitted Shatto's fall but denied that she sustained an injury by accident arising out of and in the course and scope of her employment or that she sustained impairment, disability, or disfigurement.

Shatto filed an amended Form 50 on June 2, 2008, clarifying the date she provided notice of her claim to McLeod. McLeod filed a timely Form 51 on June 12, 2008, in which it denied an employer/employee relationship given Shatto's status as a temporary contract worker hired by Defendant Staff Care, Inc. (hereinafter "Staff Care"). Following a hearing on August 21, 2008, the single commissioner issued his December 3, 2008, order finding Shatto's injury compensable and holding McLeod solely responsible for payment of temporary total disability benefits. (App. pp. 161-216) Thereafter, McLeod filed a timely Form 30, Request for Commission Review, on December 16, 2008. Following a March 24, 2009 hearing, the Appellate Panel affirmed the single commissioner in a decision and order dated May 19, 2009. (App. pp. 133-160) McLeod filed a timely notice of appeal in the South Carolina Court of Appeals, and that court

unanimously reversed the Appellate Panel in a published opinion[1] filed August 10, 2011. (App. pp. 1-15) The court of appeals denied rehearing via order filed September 22, 2011. (App. pp. 28-29) This Court granted Shatto's Petition for a Writ of *Certiorari* via its January 9, 2013 Order.

## STATEMENT OF THE FACTS

At the time of her fall, Shatto was a sixty-five year old Caucasian female. (App. p. 367) She received a diploma in 1974 from the Pennsylvania Hospital School of Nursing and completed anesthesia school at the Carlyle Hospital School of Anesthesia in Pennsylvania. (App. pp. 368-369) She is credentialed by the American Association of Nurse Anesthetists to work as a certified nurse anesthetist ("C.R.N.A."). (App. pp. 259, 265-266, 369) Shatto is divorced and has no dependents. (App. pp. 261-262) Her medical history prior to the alleged incident includes two open surgeries to her left shoulder, a coccygectomy, and three lower spine surgeries. (App. pp. 398-399, 412)

Shatto has worked in the nursing profession her entire career, including twenty-one years at the Carlyle Hospital. (App. pp. 370, 423-427) Following her divorce, she worked in short-term nursing jobs in Hawaii and the Marshall Islands. (App. pp. 370-373) Thereafter, she moved to the Lake Wylie, South Carolina, area to care for an ailing sister and continued to work short-term nursing jobs, including "a couple of freelances" with staffing agencies. (App. pp. 373-375, 423-427) Her longest engagement was a six year position with Pain Management and Anesthesia in Charlotte, North Carolina;

[1] *Shatto v. McLeod Regional Medical Center*, 394 S.C. 552, 716 S.E.2d 446 (Ct. App. 2011), *reh'g denied* 2011 S.C. App. LEXIS 284 (Sept. 22, 2011).

however, she left that post after approximately five years because of "stress" and "burnout." (App. pp. 375-376)

After leaving Pain Management and Anesthesia, Shatto began a "relationship" with Staff Care. (App. p. 376, lines 14-20) Staff Care is an agency that places temporary, or *locum tenens*, employees with medical facilities like McLeod. (App. pp. 403, 437-450) Shatto expressed her preference for *locum tenens* work because it pays "a lot better" and provides "a little bit of autonomy [because] [y]ou're not the hospital employee under their rules." (App. p. 403, lines 10-15) Shatto found Staff Care on the internet and began a "dialogue" with Staff Care employees relating to what they needed from her in the way of paperwork. (App. p. 377, lines 7-15; pp. 533-547)

Shatto communicated with Staff Care employees extensively via phone, electronic mail, and facsimile transmission and provided them with her résumé, copies of her licenses and certifications, health care records, and references. (App. p. 378) She did not request placement at McLeod; rather, she "simply asked [Staff Care] for a position that would allow [her] to be home on the weekends." (App. p. 379, lines 1-5) In fact, the on-line job postings she reviewed did not disclose the name of the facility at which she would ultimately be placed. (App. p. 379) Staff Care placed Shatto at McLeod in November 2007. (App. p. 404)

Staff Care guaranteed Shatto's wages based on a 40 hour work week. (App. p. 405) Staff Care paid those wages via direct deposit into Shatto's checking account. (App. pp. 406, 451-494) Information regarding when she was to work and how many hours per week she would work came from Staff Care, and she communicated her work schedule preferences directly to Staff Care personnel. (App. pp. 379-381) Staff Care

provided Shatto with a rental car and a $25 daily stipend. (App. pp. 385-386) Staff Care also provided malpractice insurance, overtime pay, and arranged for Shatto's out-of-town lodgings. (App. pp. 293, 296, 522-525)

Because McLeod was required to provide Shatto and Staff Care with thirty days notice prior to termination of the *locum tenens* service, McLeod informed Shatto and Staff Care in November that it had hired four full-time C.R.N.A.s and that Shatto's services at McLeod would not be necessary after the holidays. (App. pp. 396, 404-405, 429, 560-561). On December 21, 2007, the date of the alleged incident, Shatto assisted in anesthetizing a patient and placing him on the operating table for surgery. (App. p. 407) Shatto fell as she began moving from the head of the patient's bed around to the left hand side, and she does not recall anything else until she found herself on the floor of the operating room. (*Id.*) Shatto was uninsured on the date of the accident, but was immediately treated in the McLeod emergency room, where she was diagnosed with a contusion to the right orbit. (App. pp. 390-391, 397, 434-435) She was discharged home with instructions to use Tylenol and follow up with her physician as needed. (*Id.*)

Shatto returned to work at McLeod on the Wednesday after the accident and worked the following Thursday and Friday, at which point she was released. (App. pp. 395-396)

## SUMMARY OF ARGUMENT

Shatto's primary argument, both in her Petition and in her Brief, is that the court of appeals overlooked evidence of control by McLeod over her work and misapprehended the inclusiveness of the workers' compensation scheme. Going further, she urges the Court to disregard the clear holdings of *Kilgore Group, Inc. v. South*

*Carolina Employment Security Commission*, 313 S.C. 65, 437 S.E.2d 48 (1993), and *Wilkinson v. Palmetto State Transportation Company*, 382 S.C. 295, 676 S.E.2d 700 (2009), *reh'g denied* (May 29, 2009). Shatto's efforts to circumvent the clear holdings in these cases fail, however, because "[u]nder South Carolina law, it is clear that workers for a temporary service agency [like Staff Care] are considered its employees." *Williams v. Grimes Aerospace Company*, 988 F.Supp. 925, 937 (D.S.C. 1997) (*citing Kilgore*, 313 S.C. at 68-69, 437 S.E.2d at 50 (noting that "in determining the nature of (the parties') relationship," the contract has "considerable weight" but recognizing that "language in the contract merely declaring the relationship is that of an employer/independent contractor is not dispositive.")).

In this case, the court of appeals examined substantial record evidence and correctly concluded that the commission erred in determining Shatto sustained a work-related injury arising out of and in the course and scope of her employment because she was not employed by McLeod on the date of the alleged incident. McLeod did not recruit, screen, or select Shatto, and it had no contract for hire, either oral or written, with her. McLeod did not pay Shatto's wages or provide her with any of the benefits conferred upon its regular employees. Rather, it was Staff Care that screened and interviewed Shatto, reviewed her credentials, arranged the logistics of her assignment at McLeod, including her lodgings and transportation, and paid her salary by depositing her wages directly into her bank account.

Staff Care required Shatto to keep it informed of her availability to accept assignments and to submit timely verification of her hours in order to receive payment. Shatto understood that she could be penalized if she accepted a direct employment

position from a Staff Care client like McLeod within two years of accepting a *locum tenens* assignment at the client's facility. Moreover, Shatto claimed her income as "business income," further emphasizing that she was an independent contractor and not a McLeod employee. Even if this Court determines Shatto enjoyed an implied employment contract with McLeod, which she admittedly did not, Shatto was, at most, McLeod's statutory employee. Accordingly, this Court should affirm the holding below that Shatto was not McLeod's employee.

## ARGUMENT

### I. COURT OF APPEALS CORRECTLY HELD SHATTO WAS AN INDEPENDENT CONTRACTOR AND NOT MCLEOD'S EMPLOYEE ON THE DATE OF THE ALLEGED INCIDENT.

#### A. The Commission's Claimant-Friendly Analysis Has Been Rejected And Expressly Overruled.

The court of appeals correctly overruled the commission's decision and order, which pre-dates publication this Court's decision in *Wilkinson v. Palmetto State Transportation Company*, 382 S.C. 295, 676 S.E.2d 700 (2009), *reh'g denied* (May 29, 2009). The *Wilkinson* Court rejected the unduly claimant-friendly approach to employee versus independent contractor analysis announced and applied in the line of cases beginning with *Dawkins v. Jordan*, 341 S.C. 434, 534 S.E.2d 700 (2000). *Wilkinson* also signals a return to a more even-handed approach to that analysis in which evidence of any one factor is not necessarily unequivocal proof of employment status. Without the benefit of the court's opinion in *Wilkinson*, the commission's order improperly relied upon the claimant-friendly (and now overruled) proposition that "for the most part, any single factor (regarding status as an employee versus an independent contractor) is not

merely indicative of, but, in practice, virtually proof of, the employment relation, while in the opposite direction, contrary evidence is as to any one factor at best only mildly persuasive evidence of contractorship, and sometimes is of almost no such force at all." (App. pp. 158-159) (citing *Nelson v. Yellow Cab Company*, 349 S.C. 589, 564 S.E.2d 110 (2002); *Dawkins*, 341 S.C. at 439, 534 S.E.2d at 703; 2 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law*, § 61.04 (2000)).

In *Wilkinson*, this Court explicitly rejected the "framework for weighing the standard factors in a manner that favored, unduly . . ., a finding of employment." 382 S.C. at 301, 676 S.E.2d at 702. The Court also addressed the very concern Shatto raises on appeal; to wit, the Act is to be construed liberally in favor of coverage of the injured worker. Nevertheless, "[t]hat principle . . . does not go so far as to justify an analytical framework that preordains the result." *Id.* at 300-301; 676 S.E.2d at 702. Most importantly, however, the Court recognized that a finding of employment status should never be pre-ordained where, as here, there is "an unchallenged independent contractor arrangement where the parties' conduct follows the agreement in every material respect." *Id.* at 301, 676 S.E.2d at 702.

In light of *Wilkinson*, it no longer is the case that any single factor is virtually proof of an employment relationship, and the court of appeals was correct to overrule the Commission's Decision and Order relying upon this rejected analysis. Rather, "our jurisprudence . . . evaluates the four factors with equal force in both directions." *Id.* Turning to the facts, the Court rightly observed that, in evaluating the relevant factors, the analysis is initially guided by the parties' independent contractor agreement. "But more importantly, [the analysis is] guided by the parties' conduct. . . ." 382 S.C. at 300, 676

S.E.2d at 702, citing *Kilgore Group, supra*, 313 S.C. at 68-69, 437 S.E.2d at 50 ("in determining the nature of [the parties'] relationship," the contract has "considerable weight" but recognizing that "language in the contract merely declaring the relationship is that of an employer/independent contractor is not dispositive."). Here, the parties' conduct is entirely consistent with the holding below finding that Shatto was an independent contractor. This Court should affirm.

### B. Shatto Was Not McLeod's Employee Pursuant To South Carolina Law.

McLeod contends, and the court of appeals agreed, that the commission lacked jurisdiction because McLeod had no contract of hire or employment with Shatto, either express or implied, as required by S.C. Code Ann. § 42-1-130. As there was no contract between McLeod and Shatto, a fact Shatto readily concedes, it is unnecessary to engage in further analysis. It is black letter law in this State that "[u]nless an employment relationship existed between the parties at the time of the alleged injury, an award cannot be granted." *Alewine v. Tobin Quaries*, 206 S.C. 103, 109, 33 S.E.2d 81, 83 (1945). Alternatively, and to the extent an employment relationship is deemed to exist, the only reasonable conclusion is that Shatto was acting as an employee of Staff Care. [2]

The existence of an employer-employee relationship is a jurisdictional question, and this Court may take its own view of the preponderance of the evidence. *Paschal v. Price*, 392 S.C. 128, 708 S.E.2d 771 (2011) (relying on the well-reasoned decision by the

[2] The court of appeals remanded "for further proceedings on the issue of whether Shatto was an employee of Staff Care." *Shatto*, 394 S.C. at 567, 716 S.E.2d at 454 (App. p. 15) Staff Care has not appealed any portion of the ruling by the court of appeals.

court of appeals, as well as the Court's own independent review of the record evidence); *Porter v. Labor Depot*, 372 S.C. 560, 567, 643 S.E.2d 96, 100 (Ct. App. 2007); *Lake v. Reeder Constr. Co.*, 330 S.C. 242, 247, 498 S.E.2d 650, 653 (Ct. App. 1998); *S.C. Workers' Comp. Comm. v. Ray Realtors, Inc.*, 318 S.C. 546, 547, 459 S.E.2d 302, 303 (1995) (the existence of an employer-employee relationship is a jurisdictional question; an injured worker's employment status, as it affects jurisdiction, is matter of law for decision by the court and includes findings of fact that relate to jurisdiction) (additional citations omitted). Thus, the reviewing court may reverse the jurisdictional analysis of the lower tribunal where the decision is infected with an error of law. *Porter, supra.*

As reiterated by the *Wilkinson* Court, the general test of whether or not an employment relationship exists is measured by an even-handed analysis of the extent of control the employer exercised over the putative employee. *Wilkinson*, 382 S.C. 295, 296, 676 S.E.2d 700, 702, citing *Ray Covington Realtors*, 318 S.C. at 547, 459 S.E.2d at 303; *Chavis v. Watkins*, 256 S.C. 30, 32, 180 S.E.2d 648, 649 (1971). The four elements that are determinative of the control question are: "(1) direct evidence of the right or exercise of control; (2) furnishing of equipment; (3) right to fire; and (4) method of payment." *Id.* (additional citations omitted).

An examination of the right to exercise control is fact-intensive, and, in this case, most analogous to the facts in *Kilgore*, 313 S.C. 65, 437 S.E.2d 48 (1993). Kilgore Group, Inc., much like Staff Care, was in the business of providing temporary workers. Kilgore brought suit challenging the South Carolina Employment Security Commission's determination that its temporary workers were employees rather than independent

contractors, thus triggering Kilgore's obligation to pay additional employment taxes. *Id.* at 67, 437 S.E.2d at 49. Citing the applicable standard of review (substantial evidence) and test (exercise of control, method of payment, provision of equipment, and right to fire), the court affirmed the commission's finding that the temporary employer's (*e.g.*, Kilgore's clients) ability to control employees was derived solely from their contracts with Kilgore. *Id.* at 69, 437 S.E.2d at 50. Further, the court inferred that Kilgore possessed the right to control the workers' performance and the manner in which the work was done, which it in turn delegated to its clients. *Id.* Kilgore paid the workers, Kilgore's clients provided them with equipment, and the clients believed that Kilgore could terminate the employees if Kilgore's clients were dissatisfied with the workers' job performance. *Id.* at 67, 437 S.E.2d at 49.

When clients contacted Kilgore with their specific employment needs, Kilgore negotiated with the client a fee for providing a worker or workers to meet the client's demands. *Id.* Kilgore then contracted with individual workers to fill the positions required by the client. *Id.* According to Kilgore's president, the contract could be based on an hourly wage or on a fixed amount for the job. *Id.* However, all workers were required to turn their hours in to Kilgore. *Id.* Hourly workers were permitted to take "draws" on the amount they had worked. *Id.* Kilgore's president testified that the contracts expressly provided that the relationship was one of an independent contractor. *Id.* The court went on to note that Kilgore's clients "controlled the day-to-day" activities of workers and that Kilgore provided workers' compensation coverage but did not withhold taxes from their wages. *Id.* In the event a client had a problem with the worker

provided to them, the client "went through the agency and did not deal directly with the worker." *Id.*

Using the same analysis applicable in a workers' compensation case, the court assessed whether Kilgore's temporary workers qualified as its employees versus independent contractors, noting:

> The contract entered into by the parties must be considered in determining the nature of their relationship and has considerable weight. However, neither party controls the legal effect of the contract. The primary test of its character is the intention of the parties, which is to be gathered from the whole scope of the language used. Accordingly, language in the contract merely declaring the relationship is that of an employer/independent contractor is not dispositive.

*Id.* at 68, 437 S.E.2d at 50.

While the workers' performance and the manner in which the work was done was controlled by Kilgore's clients, the clients had no contracts with the temporary workers. In fact, "[t]heir ability to exercise control over the workers' activities was derived *solely from their contracts with Kilgore* and Kilgore's contract with the workers. Therefore, it can be inferred *Kilgore possessed the right to control the workers' performance and the manner in which it was done and delegated that authority to its clients.*" *Id.* at 69, 437 S.E.2d at 50 (emphasis added) (citations omitted). The court also found persuasive the facts that the workers were paid by the hour, received compensation prior to completion of the job, and that equipment was provided by the client rather than the temporary workers. *Id.* Additionally, "[t]he clients believed the workers could be terminated at any time based upon their dissatisfaction of the workers' performance." *Id.* On this record, the court had no difficulty concluding the workers were Kilgore's employees and not merely independent contractors.

Analyzing the facts of this case in light of the analytical framework set out in *Wilkinson*, and guided by the *Kilgore* Court's application of those factors to temporary, contract laborers like Shatto in this case, it becomes abundantly clear that Shatto was an independent contractor and not McLeod's employee on the date of her accident. Rather, if she qualifies as anyone's employee, she is an employee of Staff Care and not merely its independent contractor.

**1. Right To Or Exercise Of Control.**

The **only** relevant employment contract in this case is the contract Shatto signed with Staff Care on October 11, 2007.[3] (App. pp. 414-418) Pursuant to the terms of that contract, of which each page is initialed by Shatto, Staff Care agreed to arrange Shatto's temporary housing, covered her under its malpractice insurance policy, and informed Shatto that it would conduct screenings, including drug screenings, to ensure the accuracy of her credentials. (*Id.*) In that contract, Shatto acknowledges that she is an independent contractor and that "Staff Care lacked" the right to direct or control the manner in which [she] practice[s] my profession." (App. pp. 416, 418) Most importantly, her agreement with Staff Care clearly establishes that Shatto was not McLeod's employee because it contains a penalty provision, including a substantial fee, in the event Shatto went to work as a direct employee of a Staff Care client. (*Id.*) The contract also required Shatto to notify Staff Care "immediately" in the event she was unable to take an assignment. (*Id.*) Shatto also completed a Staff Care application, as well as a Release and Authorization for

[3] This included the "Independent Contractor Declaration," in which Shatto agreed, among other things, that she would be "solely responsible for [her] professional actions in providing services to patients at the contracted healthcare facilities or elsewhere." (App. p. 418)

the release of her credentials and other relevant information to Staff Care. (App. pp. 419-422)

Shatto never pursued direct employment with McLeod and, as explained in the preceding paragraph, was effectively prohibited from doing so pursuant to her contract with Staff Care. Rather, she found the temporary Staff Care position on the internet and initiated contact with Staff Care. (App. p. 289) Shatto dealt exclusively with Staff Care in setting up the temporary work assignment at McLeod. (App. p. 281) While she never travelled to Staff Care's offices in Texas, she communicated extensively with Staff Care's employees via phone, electronic mail, and facsimile. (App. pp. 281-282, 533-547) In order to accept the assignment at McLeod, Shatto had to complete voluminous paperwork and return it to Staff Care before it could place her in the field. (App. p. 282) Shatto forwarded copies of her résumé, along with copies of her licenses and certifications to Staff Care, not McLeod. (App. pp. 289-290, 322) She did not specifically request to be sent to McLeod in Florence; in fact, Staff Care's posting did not initially identify the name of the facility. (App. pp. 290-291) To complete the transaction, Shatto was required to sign a contract with Staff Care and, going further, was required to initial every page. (App. pp. 291, 413-417) Shatto's contract with Staff Care does not mention McLeod. (App. pp. 292, 413-417) Most importantly, Shatto concedes she did not have any sort of contractual relationship with McLeod. (App. p. 292)

Various items of correspondence also confirm Shatto's status as an independent contractor or, alternatively, as an employee of Staff Care rather than of McLeod. For example, in a confirmation letter from Staff Care to Shatto dated October 24, 2007, the writer confirmed the parties' verbal agreement, provided Shatto with contact information

for her Staff Care "logistics coordinator," and set her rates. (App. pp. 428-429) In an email dated November 13, 2007, a Staff Care logistics coordinator provided Shatto with hotel accommodations and instructions regarding check-in and check-out. (App. p. 430) In a letter also dated November 13, 2007, Staff Care provided Shatto with "required forms" to use while "on assignment **for Staff Care**." (App. p. 431) (emphasis added) This same packet included instructions for submitting provider invoices, expense repayment requests, a precautionary notice form used to "report any unanticipated patient outcome that could lead to a malpractice suit," information regarding her rental car (including specific instructions about declining insurance, signing an extended rental agreement, upgrades, additional drivers, and responsibility for fuel). (App. pp. 432, 529, 531)

Staff Care provided Shatto with after-hours emergency contact information. (App. p. 433) Staff Care further instructed Shatto to "contact [Staff Care's Risk Manager] immediately if you are noticed for peer review, a deposition, etc., **so that Staff Care** may provide you with legal counsel if necessary." (App. p. 522) (emphasis added) The record also contains correspondence from a Staff Care employee to Shatto discussing the benefits of establishing herself as an L.L.C. for tax purposes, as well as from a Staff Care employee offering Shatto a choice of shift options. (App. pp. 534, 538) The complete record of contract documents and correspondence between Shatto and Staff Care highlights the level of screening Staff Care engaged in before sending its employees, including Shatto, into the field, as well as the degree of control it exercised over her daily activities thereafter.

At the same time, Shatto readily concedes that she was not a hospital employee and that she was not paid by McLeod. (App. p. 295, lines 13-14; p. 302, lines 5-7; pp. 451-494) Rather, "Staff Care advertised the job, and I called for information about it." (App. p. 309, lines 15-18) Staff Care arranged the details of the job and explained to Shatto when the job would begin. (App. p. 310) McLeod's Director of Anesthesia further clarified that Staff Care presented Shatto to work at McLeod pursuant to separate contract for temporary staffing services between McLeod and Staff Care entered into in November 2007. (App. pp. 337, 560-561). As confirmed by Shatto herself, she never had any contractual relationship with McLeod. (App. p. 337, lines 17-20) In fact, Shatto acknowledged that if she became a direct McLeod employee within two years of her first *locum tenens* placement at the hospital, either she or McLeod would have been required to pay a substantial penalty to Staff Care. (App. pp. 163, 337-338, 413-417) The contractual provision allowing Staff Care to penalize its clients and limit Shatto's prospective employment is yet another clear indication that Staff Care, and not McLeod, had the ability to exercise control over Shatto even long after her assignment at McLeod ended.

It was clear that Shatto felt it necessary to report to Staff Care and not McLeod. For example, she called Staff Care to report a minor fender bender involving the rental car Staff Care provided because she thought someone at Staff Care (and not McLeod) "should know" about the accident. (App. p. 279, lines 13-21; p. 388, line 20 - p. 389, line 2) She did not purchase additional insurance on the rental vehicle because Staff Care, and not McLeod, already had coverage and specifically instructed her not to. (App. pp. 279-280, 296, 526-528) Staff Care's insurance company contacted Shatto after the

accident, and she did not receive any car repair bills. (App. p. 280) Additionally, Staff Care personnel called Shatto "once[,] perhaps twice just to ask how the job was going." (App. p. 314, lines 14-19)

Regarding her daily work activities, Shatto selected which shifts she would work, and Staff Care (not McLeod) guaranteed her salary based upon forty work hours per week. (App. pp. 291-292) Staff Care, and not McLeod, required Shatto to submit verification of the number of hours she worked and required that one of McLeod's C.R.N.A.s verify the invoices prior to their submission to Staff Care by Shatto. (App. pp. 313-314) If she got her invoice to Staff Care after 5 p.m. on Friday, her paycheck from Staff Care would be delayed. (App. pp. 323-324, 431, 529-532)

Like claimant in *Wilkinson*, it is immaterial that Shatto reported to McLeod personnel for assignments. She retained the right to refuse any assignment and exercised near complete control over the provision of anesthesia to McLeod patients. 382 S.C. 301-02, 676 S.E.2d at 703. Shatto reported to McLeod's Chief C.R.N.A. Keith Tergersen on her first day of work because he was in the operating room that day, and that was where she was to report for duty. (App. p. 273) He gave her an abbreviated orientation as to "the layout of the O.R. and supply room." (App. p. 274) In accordance with her preference, Shatto's typical day began at 9:00 a.m., when she would get her assignment either from the C.R.N.A. in charge that day or from a board posted near the operating room. (*Id.*) The head C.R.N.A. on duty or whoever made out the assignment board would tell Shatto where to report for duty. Other than that, the only person she would answer to would be the anesthesiologist directing the case. (App. pp. 283-284, 297) Additionally, Shatto readily concedes that South Carolina law, and not McLeod policy,

requires that an anesthesiologist be in the room while drugs are administered. (App. pp. 285-286) *See also* S.C. Code Ann. § 40-33-34. Shatto also agreed that her job required the exercise of her own independent judgment. (App. p. 297) At the end of the day, it was up to Shatto to follow the rules and guidelines so that she would not jeopardize her nursing or C.R.N.A. credentials. (*Id.*)

Further distinguishing Shatto from McLeod's employees, she was never "on call" for work. (App. p. 343) Unlike McLeod's staff C.R.N.A.s, Shatto was only permitted to work in the operating room. (App. p. 344) Given safety concerns and the complexity of the number of treatments available at McLeod, Shatto was not entitled to the level of access afforded regular, full-time McLeod employees, and she was not permitted to work in the emergency room, the cath lab, or to administer life support like McLeod's regularly employed C.R.N.A.s. (App. pp. 343-344) Shatto was required to participate in an abbreviated orientation program not because she was considered a McLeod employee, but because the Joint Commission on Hospital Accreditation ("J.C.H.A.") guidelines mandated that she receive an orientation to McLeod's mission and fire safety.[4] (App. pp. 344-345)

---

[4] "The Joint Commission has accredited hospitals for more than 60 years and today it accredits approximately 4,168 general, children's, long term acute, psychiatric, rehabilitation and specialty hospitals, and 378 critical access hospitals, through a separate accreditation program. Approximately 82 percent of the nation's hospitals are currently accredited by The Joint Commission." *See http://www.jointcommission.org/accreditation /hospital_seeking_accreditation. aspx* . The J.C.H.A. also publishes hospital accreditation requirements, which mandate, among other things, that facilities orient staff members and document such orientation; that a qualified doctor of medicine oversee the provision of anesthesia services; and that organizations collect information regarding each practitioner's current license status, training, experience, competence, and ability to perform the requested privilege. *See, e.g.,* The Joint Commission Revised 2009 Accreditation Requirements as of March 26, 2009, available at

While McLeod provided her with several documents, including an employee health validation form, urine drug screen, dress code, and job description, McLeod's Director of Occupational Health, Octavia Williams-Blake, clarified that any paperwork McLeod required to be completed is mandated by law, either by the J.C.H.A. or Medicare. (App. pp. 316-317, 326-327) This would include the physical examination and drug screening. (App. p. 327) Williams-Blake also testified that in order to operate and to receive federal Medicaid funds, McLeod is required to be accredited and to meet federal requirements, which include providing a job description and doing a drug screen. (App. pp. 327-328)

It is beyond argument that hospitals are one of the most regulated entities in modern American society. For example, the Centers for Medicare and Medicaid Services ("C.M.S.") require, as a condition of participation, that hospitals like McLeod "must be in compliance with applicable Federal laws related the health and safety of patients . . . [and to] assure that personnel are licensed or meet other applicable standards that are required by State or local laws." 42 C.F.R. § 482.11. Further, statutory provisions regarding C.M.S. specifically contemplate accreditation by the J.C.H.A. *See, e.g.,* 42 U.S.C. § 1395bb(a) (Effect of accreditation). Moreover, C.M.S. also requires that non-employee licensed nurses who are working in a hospital facility "must adhere to the policies and procedures of the hospital." 42 C.F.R. § 482.23(b)(6). Thus, McLeod's accreditation by

---

*http://www.jointcommission.org/NR/rdonlyres/C9298DD0-6726-4105-A007-FE2C65 F7 7075/0/CMS_New_Revised_HAP_FINAL_withScoring.pdf. See also* S.C. Code Reg. § 61-16(C) ("All new personnel shall be oriented to acquaint them with the organization and environment of the facility, the employees' specific duties and responsibilities, and patients' needs. . . . (and) 'shall be familiar with the facilities' emergency/disaster plans.)."

the J.C.H.A. signifies that the facility complies with applicable rules and regulations relating to patient health and safety, thereby enabling it to participate in the C.M.S. programs and necessitating the requirement that even temporary contract staff like Shatto abide by policies and procedures.

Taken as a whole, it is clear that McLeod did not enjoy any sort of contractual relationship with Shatto and had little, if any, right to exercise control over her daily activities. Like the clients in *Kilgore*, and *Wilkinson*, *supra*, any degree of control McLeod could have exercised over Shatto derived exclusively from McLeod's contract with Staff Care or, alternately, from regulatory controls imposed by state and federal law. In comparison, Staff Care retained abundant control over several key aspects of her employment, including scheduling accommodations and payment, insurance, assumption of legal defense in the case of malpractice proceedings, and the right to bar her employment with Staff Care's clients for a period of up to two years. Thus, the right of control factor of the *Wilkinson* analysis militates in favor of a finding in McLeod's favor.

**2. Provision Of Equipment.**

Turning to the second factor, provision of equipment, it is at best neutral and in fact tips the scale against a finding that Shatto was a McLeod employee. This is particularly true given the fact that Shatto treated her income from Staff Care as business income and specifically claimed income tax deductions for, among other things, her uniforms. (App. pp. 436, 499-500) Of the equipment McLeod did provide, the equipment either was so large as to make it impossible for Shatto to own and transport, required by federal law or hospital accreditation standards, or had not been biomedically

checked and therefore rendered potentially unsafe for patient use.[5] In addition, McLeod was contractually bound pursuant to Section B.1 of its Agreement for Locum Tenens Coverage with Staff Care to provide "reasonably maintained, usual and customary equipment and supplies" to Staff Care's "Providers" and to "[c]omply with AMA, Federal, State and local standards relating to patient care, the practice of medicine and related activities. . . ." (App. p. 560) It also is clear that Shatto understood McLeod did not have "the right to direct or control the manner in which [she] practice[d her] profession." (App. p. 622)

Shatto testified that while she had some of her own equipment, McLeod personnel informed her that it would not be necessary for her to bring it to the job site. (App. p. 299) McLeod provided Shatto with scrub suits and made disposable paper hats and boots available if needed. (App. pp. 275-276) McLeod owned the remainder of the equipment she used in the operating room. (App. p. 276) McLeod also provided her with a name tag with her name, picture, department name, and the hospital's name on it. (*Id.*) McLeod required everyone entering one of its sterile environments, including Shatto, to wear sterile scrubs. (App. p. 294) She was also required to have a McLeod name tag in order to access portions of the hospital that were off limits to members of the general public. (App. p. 295) She used McLeod's fax machine to submit the required payment invoices to Staff Care not because anyone at McLeod required her to, but because it was the closest and most convenient. (*Id.*)

[5] In addition to the C.M.S. rules and regulations discussed *infra*, South Carolina law specifically provides for the cleaning and use of equipment. *See, e.g.,* S.C. Code Reg. § 404.5 ("All equipment coming into contact with patients shall be adequately disinfected or sterilized after each use to maintain such equipment in a clean and sanitary condition . . . .").

With regard to Shatto's name tag, Occupational Health Director Williams-Blake testified that the Lewis Blackman Act[6] dictates that a patient must be able to identify care givers by name, title, and by a photograph. (App. p. 328) Non-employee physicians with privileges at McLeod also are required by the Lewis Blackman Act to wear ID badges in order to identify themselves to patients and to gain access to restricted areas. (App. p. 329) The J.C.H.A. also sets forth specific dress requirements for sterile areas. (App. p. 332) As noted by Mr. Tergersen, the operating room has its own dress code because sterile scrubs are a non-negotiable requirement. (App. p. 351, lines 1-11) Thus, operating room personnel could report to work in shorts and flip-flops if they desired, but they are required to change into sterile scrubs upon reporting to work. (*Id.*) Shatto's badge was simply similar to that required by law for anyone working within the hospital confines, except that hers actually read "contract staff," thereby further distinguishing Shatto as contract staff versus a hospital employee. (App. p. 342)

Turning to McLeod's heavy fixed equipment, Shatto estimated that McLeod's anesthesia machines weigh approximately 500 pounds or more and cost "much more" than tens of thousands of dollars. (App. p. 297, line 24 - p. 298, lines 5, 17-18) She has never owned an anesthesia machine and acknowledged that such a machine is not the kind equipment a C.R.N.A., even a *locum tenens* one, would take with them to a job.

---

[6] *See* the Lewis Blackman Hospital Patient Safety Act, codified at S.C. Code Ann. § 44-7-3410, *et. seq.* Section 44-7-3430, Identification Badges, provides that "(a)ll clinical staff, clinical trainees, medical students, interns, and resident physicians of a hospital shall wear badges clearly stating their names, using at a minimum either first or last names with appropriate initials, their departments, and their job or trainee titles. All clinical trainees, medical students, interns, and resident physicians must be explicitly identified as such on their badges. This information must be clearly visible and must be stated in terms or abbreviations reasonably understandable to the average person, as recognized by the Department of Health and Environmental Control."

(App. p. 298) Additionally, any medications she would have administered would have to be dispensed by a pharmacy, making it impossible for her to bring them with her to the job site. (*Id.*) As Mr. Tergersen's testimony makes clear, the anesthesia machines like the one Shatto used were quite large. (App. p. 341) Moreover, even if she could, McLeod could not permit Shatto to bring her own anesthesia machine because the hospital is, by law, ultimately responsible for the anesthesia machines. (*Id.*) Similarly, Shatto would not be allowed to bring in any equipment that was not biomedically checked by McLeod. (App. p. 354)

It is unreasonable to expect temporary workers to provide their own equipment when such equipment is as big as a desk, costs as much or more than a car, and is potentially unsafe for patients because it is not biomedically tested. Moreover, the smaller "equipment" provided to Shatto, chiefly sterile scrubs and a name tag, were required by accreditation guidelines and/or applicable provisions of state or federal law, as well as by McLeod's agreement with Staff Care. (App. p. 560) (requiring McLeod to provide "equipment and supplies") In any event, "requiring a worker to comply with the law is not evidence of control by the putative employer." *Wilkinson*, 382 S.C. at 302, 676 S.E.2d at 703, quoting *Universal Am-Can, Ltd. v. Workers' Comp. Appeal Bd.*, 563 Pa. 480, 762 A.2d 328, 335 (2000) ("employer efforts to ensure the workers' compliance with government regulations, even when those efforts restrict the manner and means of performance, do not weigh in favor of employee status."). Stated differently, a strong regulatory presence equates with control by the government, not the putative employer. *Id.* Moreover, the provision of equipment has been weighed in favor of a finding that

temporary workers are employees of staffing agencies under South Carolina law. *Kilgore*, *supra.*

### 3. Method Of Payment.

The third factor addressed by the *Wilkinson* court also weighs in McLeod's favor. Shatto clarified that she was paid by Staff Care, not McLeod. (App. pp. 295, 451-494, 529-532) Staff Care deposited Shatto's salary into her account via direct deposit and required her to submit timely invoices for payment directly to Staff Care. (App. pp. 277, 295) Staff Care paid Shatto $95 per hour, plus a $25 daily allowance. (App. p. 296) Her pay stubs were mailed by Staff Care. (App. p. 312) Staff Care also paid Shatto's overtime wages, provided her with a rental car, and arranged for her out-of-town housing. (App. pp. 277-278) In contrast, McLeod does not pay a per diem to its employees or provide them with transportation. (App. p. 342) Staff Care also provided Shatto's medical malpractice insurance. (App. pp. 284, 522-525) In contrast, Shatto concedes that McLeod never paid any of her wages. (App. p. 295)

Shatto agreed that McLeod did not provide her with group health insurance, vacation days, sick days, or access to its 401K retirement plan. (App. p. 300) Further, McLeod's Director of Payroll testified that she searched for payroll records using Shatto's name and Social Security number and found no records of any payments from McLeod. (App. pp. 334-335) There is simply no indication that McLeod paid any wages or other benefits to Shatto. (App. p. 335) Mr. Tergersen also testified that as a McLeod employee, he receives benefits such as vacation time, group health insurance, access to McLeod's 401K retirement savings program, payment of continuing education requirements, and medical malpractice insurance coverage. (App. p. 338, line 25 - p.

340, line 7) In contrast, Shatto did not receive any of these employee benefits from McLeod.

McLeod's payroll records clearly reflect that McLeod made payments directly to Staff Care, and not to Shatto, for the hours she worked. (App. pp. 451-494) McLeod's check requests for payment to Staff Care also indicate the payments were for "contract labor." (App. pp. 364, 466) Moreover, Mr. Tergersen testified that these check requests merely reflect the contract price McLeod agreed to pay Staff Care, and that those amounts actually exceeded Shatto's wages. (App. pp. 363, 365) Thus, any argument that McLeod's payments reflect "reimbursement" for Shatto's wages is incorrect and misleading. McLeod was paying a negotiated contract price to Staff Care for the provision of temporary labor. Shatto's hourly wage was an expense separately negotiated between Shatto and Staff Care.

Interestingly, Shatto's $13,916 in earnings from Staff Care in 2007 were reported to the Internal Revenue Service as business income. (App. pp. 305, 436, 499) She claimed deductions for uniforms, licenses and permits, registration fees, dues and subscriptions, education, and 6,572 miles in business travel. (App. pp. 306, 499) These deductions further highlight Shatto's role as a "freelance" and "completely independent" *locum tenens* provider and seriously undercut any argument that she was McLeod's employee. (App. p. 301, line 2 - p. 302, line 1) Like the claimant in *Wilkinson*, Shatto filed tax returns as a sole proprietorship, and her returns included deductions for business expenses and self-employment taxes. Shatto simply cannot establish herself as a McLeod employee while simultaneously holding herself out as a business for tax purposes. Instead, this record establishes that Shatto and Staff Care paid the costs associated with

Shatto's temporary staffing services, such as lodging, meals, transportation, and uniforms. Consistent with *Wilkinson*, the method of payment in this case bears "no indicia" of an employment relationship between McLeod and Shatto. 382 S.C. at 303, 676 S.E.2d at 704 (claimant's method of payment bore "no indicia of an employment relationship" where he filed tax returns as a sole proprietor and where those returns included "forms for his business expenses and self-employment taxes.").

**4. Right To Fire.**

The "right to fire" is the fourth prong of the analysis regarding the right or exercise of control over a putative employee. As noted by this Court in *Wilkinson*, an important consideration regarding the "right to fire" is "the recognition that a right of termination, in some form, exists in an independent contractor arrangement. The critical inquiry is the term 'fire,' for it embraces the employment relationship." 382 S.C. at 304, 676 S.E.2d at 704. Ultimately, this Court concluded where termination was controlled by the terms of their agreement, and the putative employer did not retain the "right to fire," a finding of an independent contractor arrangement was warranted. *Id.* The same result necessarily follows in this case because McLeod could not "fire" Shatto. Instead, the termination of her temporary staffing services was governed entirely by the contractual arrangement between McLeod and Staff Care, an arrangement McLeod followed to the letter.

McLeod's Chief C.R.N.A. testified that McLeod's contract with Staff Care required him to contact Staff Care if he was unhappy with Shatto's job performance. (App. pp. 348-349) If she had repeatedly shown up late for work, Mr. Tergersen would have called Staff Care. (App. p. 348) If her job performance was "suboptimal," he

would have called Staff Care. (*Id.*) In the final analysis, Mr. Tergersen elected to terminate Shatto's *locum tenens* services at McLeod, prior to her injury and as permitted by McLeod's contract with Staff Care, because he had full-time McLeod employees joining the organization, thereby obviating the need for contract temporary labor. (App. p. 356) Thus, Shatto was never terminated for performance-related issues. Rather, McLeod hired full-time employees and elected to terminate the provision of temporary staffing services as permitted by its contract with Staff Care prior to Shatto's injury and consistent with its obligation to provide at least 30 days notice.

This comports fully with Shatto's understanding that pursuant to McLeod's agreement with Staff Care, McLeod was free to release her if they no longer required temporary staffing services. (App. pp. 383, 560-561) In fact, she recalled Mr. Tergersen informing her and Staff Care as early as November 2007 that McLeod had hired four new C.R.N.A.s who would be starting at the beginning of calendar year 2008. (App. pp. 346, 404-405) Staff Care also advised Shatto that her contract work at McLeod would end and inquired into her availability for future temporary assignments elsewhere. (App. p. 405)

While McLeod had the right to notify Staff Care that it would like to terminate Shatto's assignment early, Staff Care imposed certain limitations, including prior notice of the client's intention, to end the assignment. (App. pp. 560-561) Notably, however, early termination would not result in termination of the relationship between a worker and Staff Care, as exemplified by the fact that while Shatto's assignment at McLeod ended early, Staff Care continued to contact her about future staffing opportunities. (App. pp. 319, 405) In fact, McLeod had no ability to alter the relationship between

Shatto and Staff Care, and its contract with Staff Care expressly required 30 days notice for the termination of an assignment by either McLeod or Shatto. (App. pp. 418, 560-561)

This record demonstrates the temporary employer's belief that it should go through the agency if it had a problem with the worker's performance or if it elected to end the relationship. Such a finding has been construed to weigh in favor of a finding that the temporary workers were employees of the temporary agency rather than independent contractors. *Kilgore*, 313 S.C. at 67, 437 S.E.2d at 49. For all of these reasons, the four factors weigh in favor of the court of appeals' finding that Shatto was an independent contractor. Accordingly, this Court should affirm.

## II. SHATTO CANNOT ESTABLISH THAT SHE WAS MCLEOD'S BORROWED SERVANT.

Shatto relies on the decision in *Cooke v. Palmetto Health Alliance*, 367 S.C. 167, 624 S.E.2d 439 (Ct. App. 2005), *reh'g denied* (Jan. 19, 2006), to support her claim that she was McLeod's borrowed servant. (Appellant's Br. pp. 12-15) A closer reading of *Cooke*, however, actually supports McLeod's contention that Shatto was never McLeod's employee, borrowed or otherwise. In *Cooke*, claimant was employed as a pilot for a helicopter transport company that, much like Staff Care, "contracted with the Hospital" to provide workers who performed a very small task in relation to the hospital's overall business – transporting injured patients to the emergency room via helicopter. *Id.* at 170-171, 624 S.E.2d at 440. Claimant was injured when he tripped over a metal rod on the hospital's premises. *Id.* In addition to a workers' compensation action against his employer, claimant and his spouse also filed tort claims against the hospital. Thus, the

issue raised on appeal was whether claimant was either a statutory employee or borrowed servant of the hospital and therefore bound by the exclusive remedy provision of the Workers' Compensation Act. *Id.* at 172-173, 624 S.E.2d at 441.

Turning to the question of whether the claimant in *Cooke* was the hospital's borrowed servant, the court reiterated the applicable test:

> Under the borrowed servant doctrine, when a general employer lends an employee to a special employer, that special employer is liable for workers' compensation if: (1) there is a contract of hire between the employee and the special employer; (2) the work being done by the employee is essentially that of the special employer; and (3) the special employer has the right to control the details of the employee's work.

*Id.* at 175, 624 S.E.2d at 443, citing *Eaddy v. A.J. Metler Hauling & Rigging Co.*, 284 S.C. 270, 272, 325 S.E.2d 581, 582-83 (Ct. App. 1985).

Addressing the control prong of the test,[7] the court cited the well-known factors used to gauge the employer's right to control the details of an employee's work: "(1) direct evidence of the right to, or exercise of, control; (2) method of payment; (3) furnishings [sic] of equipment; and (4) right to fire." *Cooke* at 443, 624 S.E.2d at 175. Noting that "[a]lthough the hospital provided [claimant] with a helicopter," claimant was paid by the helicopter transport service. Thus, provision of equipment, specifically a very large, expensive piece of equipment like a helicopter, was not conclusive of claimant's employment status. Additionally, the helicopter transport service (and not the hospital) was, just like Staff Care in the present case, "charged with hiring (and presumably

[7] It is important to note the procedural posture in which the borrowed servant analysis was framed in *Cooke*. Specifically, the lower court determined that while claimant met the first two prongs of the borrowed servant test, he could not satisfy the third prong of the test inasmuch as the hospital did not control the details of his work. *Cooke*, 367 S.C. at 175, 624 S.E.2d at 443. Thus, in order to qualify as McLeod's borrowed servant, it is clear that Shatto must satisfy all three elements of this test.

firing)" its employees. *Id.* Finally, and perhaps most importantly, "'the methods and details' of each flight were not left up to the Hospital." *Id.* at 176, 624 S.E.2d at 443 (internal quotation omitted).

Like the claimant in *Cooke*, Shatto simply cannot establish all of the required elements necessary to attain borrowed employee status. The denial of her compensation claim was, therefore, correct. The court of appeals should be affirmed on this basis.

**A. Contract Of Hire.**

Shatto places great reliance upon the third element – exercise of control – but fails to address the two remaining elements. Her omission is telling as both of these elements militate against the conclusion that she was McLeod's borrowed servant. Addressing the employer-employee relationship, the touchstone of compensability under the Act, the court in *Alewine* opined as follows:

> No award under the Act is authorized unless the employer-employee relationship existed at the time of the alleged injury for which claim is made. ***This relation is contractual in character*** and to constitute one an employee [sic] ***it is essential that there shall be a contract of service***. However, no formality is required. The contract may be oral or written. It may be accomplished with a few words. ***It is sufficient if the circumstances show unequivocally that the parties recognize each other as employer and employee***. 'A contract will arise even where the employer does not intend to enter into one, if his conduct is such as to lead claimant, acting as a reasonable man, or in good faith, to believe that he is being employed.

*Alewine*, 206 S.C. ___, 33 S.E.2d at 83 (emphasis added). Of critical importance in *Alewine* was the court's analysis of "[w]hen did the minds of the parties meet and the contract become complete?" *Id.* The ultimately controlling facts on this question were that the injured worker was in the employer's office prior to the vaccination and that there were no further negotiations between employee and employer thereafter.

Unlike the claimant in *Alewine*, there are no facts at play in this case that evince a "meeting of the minds" between Shatto and McLeod. The only documentary evidence of a contract between Shatto and any other party is the written contract that she signed with Staff Care on October 11, 2007. (App. pp. 413-417) Shatto initiated contact with Staff Care after finding them on the internet, Staff Care saw to all of the details of her initial engagement, and McLeod was never identified to Shatto at the time she accepted the assignment from her *in locum tenens* staffing agency employer, Staff Care.

In addition to the dearth of direct evidence establishing a contractual relationship between Shatto and McLeod, Shatto cannot point to any circumstantial evidence supporting a meeting of the minds. To the contrary, Shatto readily concedes that she was not a hospital employee and that she was not paid by McLeod. According to Shatto, "Staff Care advertised the job, and I called for information about it." (R. p. 309, lines 15-18) Once Shatto secured a position with Staff Care, Staff Care paid her salary and provided additional perks such as a rental car, malpractice insurance, and a daily stipend. Shatto treated her income from Staff Care as small business income and deducted expenses for travel and equipment. Most tellingly, Shatto testified that she prefers *locum tenans* work because it pays "a lot better" and provides "a little bit of autonomy [because] ***[y]ou're not the hospital employee*** under their rules." (App. 403, lines 10-15) (emphasis added) At the same time, she cannot establish that McLeod exercised sufficient control over her such that she was prevented from exercising independent professional judgment.

Shatto is a well-educated, intelligent professional who clearly understood (and testified) that she had no contractual relationship with McLeod as of the date of her alleged injuries. On this record, it is clear that Shatto was not McLeod's employee or

borrowed servant and, therefore, the decision below should be affirmed on this basis.

**B. The Work Being Done.**

The second prong of the borrowed employee analysis focuses on the nature of the work being done by the putative employee and whether that work is typical of the work performed by the putative employer's other employees. While it is true that McLeod contracted with Staff Care to provide a temporary nurse anesthetist and that it had other nurse anesthetists on staff, the contract work Shatto performed was different in several critical respects. First, and most importantly, Shatto, unlike C.R.N.A.s employed by McLeod, only was permitted to work in the operating room. (App. p. 343, lines 1-4) Shatto was not entitled to the same level of access to hospital facilities provided to McLeod employees. In fact, she was not permitted to work in the hospital's emergency room, cath lab, or to administer life support. (App. p. 243, line 5 - p. 244, line 4) Moreover, the only individuals who supervised Shatto's work were contract anesthesiologists who, like Shatto herself, were not employed by McLeod. (App. p. 323, lines 17-21; p. 340, lines 8-12) Thus, the record establishes that Shatto, like the claimant in *Cooke*, was performing only a very small range of services compared to the overall volume of health-related services offered by McLeod and its employees. Thus, Shatto's performance was not typical of the work performed by McLeod's employees, and she cannot qualify as McLeod's borrowed servant under this prong of the relevant analysis.

**C. Right Of Control.**

McLeod's right to control Shatto, or the lack thereof, is exhaustively analyzed in Section I of this brief and need not be repeated herein. Suffice it say that when considered in its entirety, the record in this case firmly establishes that Shatto was an

independent contractor or, at most, an employee of Staff Care. Accordingly, the decision below should be affirmed.

## III. THE COMMISSION ERRED AS A MATTER OF LAW IN HOLDING SHATTO'S IDIOPATHIC FALL CONSTITUTES A COMPENSABLE INJURY BY ACCIDENT ARISING OUT OF AND IN THE COURSE AND SCOPE OF HER EMPLOYMENT.

While the court of appeals did not reach this issue in light of its finding that Shatto was not McLeod's employee, the idiopathic nature of Shatto's fall also compels reversal of the commission's order awarding benefits. The South Carolina Workers' Compensation Law specifically excludes any injury "which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment." *Crosby v. Wal-Mart Store, Inc.*, 330 S.C. 489, 493, 499 S.E.2d 253, 255 (Ct. App. 1998) (citations omitted).

In *Crosby*, claimant argued that the commission "confused this unexplained fall case with an idiopathic fall case (and argued) that idiopathic fall cases are not generally compensable but that unexplained fall cases are compensable." *Id.* The court of appeals rejected claimant's argument, noting instead that claimant's fall occurred on a level surface and that she failed to establish a causal connection between her employment and the resulting fall. The same result follows here where Shatto cannot establish why she fell and, therefore, that the fall was the proximate cause of her alleged injuries.

On the date of her accident, Shatto was to assist in anesthetizing a patient on his hospital bed who would then be placed on an operating table. (App. p. 407, lines 6-15) She began moving from the head of the patient's bed around to the left hand side when

she fell. (App. p. 407, lines 16-19) Shatto testified that she was going to retrieve some medication when "the next thing (she) knew" was that she had hit the floor. (App. p. 390, line 11 - p. 391, line 15) She does not remember anything else before she realized she was on the ground. (App. p. 407, lines 20-22) Her exact deposition testimony regarding her recollection of the fall is telling:

> Q. Do you remember anything else before you realized you were on the ground?
>
> A. No. I picked up the syringes, turned, and I remember one step. And I thought that -- I hope this is a padded floor because it's linoleum over concrete, and sometimes they have a thin pad under there, other places I've worked had. McLeod does not have any padding between the linoleum and the concrete.
>
> Q. So you remember taking one step, and the next thing you knew, you were on the ground?
>
> A. Thud, thud.
>
> (App. p. 407, line 20 - p. 408, line 6)

Shatto did not hit anything between the time she started falling and when she hit the floor. (App. p. 411, lines 3-7) Her self-serving testimony that "(t)here was something on or near the head of the bed" and that her foot got "caught" is simply unsupported by any other record evidence. (App. p. 411, lines 11-16) While Shatto presented somewhat conflicting testimony at the hearing before the single commissioner, she later was forced to concede that she has "no recollection of tripping" over anything in the operating room that day. (App. p. 302, lines 16-18) According to Shatto's later version of events, she was "in motion, in a regular stepping motion, and the right foot got stuck on something. Beyond that, I can't tell you." (App. p. 304, lines 17-19)

For this reason alone, this Court should affirm the denial of benefits on the alternative bases that Shatto's injuries arose out of her employment.

## CONCLUSION

For all of the reasons stated herein, Respondents McLeod Regional Medical Center and Key Risk Management Services, Inc. respectfully submit that the Order of the South Carolina Court of Appeals should be affirmed in its entirety.

March 11, 2013

Walter H. Barefoot (SC Bar No. 64261)
TURNER PADGET GRAHAM & LANEY P.A.
Post Office Box 5478
Florence, SC 29502
Phone: (843) 662-9008
Fax: (843) 667-0828

Carmelo B. Sammataro (SC Bar No. 69746)
TURNER PADGET GRAHAM & LANEY P.A.
Post Office Box 1473
Columbia, SC 29202
Phone: (803) 254-2200
Fax: (803) 799-3957

ATTORNEYS FOR RESPONDENTS

THE STATE OF SOUTH CAROLINA
In the Supreme Court



---

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

---

Appellate Case No. 2011-201186

---

Mildred H. Shatto, ..... Petitioner,

v.

McLeod Regional Medical Center and
Key Risk Management Services, Inc., ..... Respondents,

and

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

---

PROOF OF SERVICE

---

I certify this 11th day of March 2013 that I have served copies of the BRIEF OF RESPONDENTS by regular U.S. Mail to:

Blake A. Hewitt, Esquire
Margaret Miles Bluestein, Esquire
Bluestein, Nichols, Thompson & Delgado, LLC
P. O. Box 7965
Columbia, SC 29202

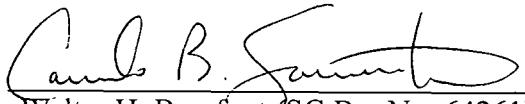
ATTORNEYS FOR PETITIONER

Candace G. Hindersman, Esquire
Willson Jones Carter & Baxley, P.A.
4500 Fort Jackson Blvd.
Columbia, SC 29209

ATTORNEYS FOR DEFENDANTS STAFF CARE, INC. AND TRAVELERS INSURANCE

(Signature page to follow.)

March 11, 2013

By: 

Walter H. Barefoot (SC Bar No. 64261)
TURNER PADGET GRAHAM & LANEY P.A.
Post Office Box 5478
Florence, SC 29502
Phone: (843) 662-9008
Fax: (843) 667-0828

Carmelo B. Sammataro (SC Bar No. 69746)
TURNER PADGET GRAHAM & LANEY P.A.
Post Office Box 1473
Columbia, SC 29202
Phone: (803) 254-2200
Fax: (803) 799-3957

ATTORNEYS FOR RESPONDENTS