THE STATE OF SOUTH CAROLINA
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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 ..... Defendants.

REPLY BRIEF

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The law provides that when you hire people to perform work in the scope of your business, you are liable to provide benefits if those workers suffer workplace injuries. This is why McLeod's obligation is so clear: McLeod is either Ms. Shatto's direct employer or her statutory employer. Both result in McLeod being liable for Ms. Shatto's workers' compensation benefits. Either way, the answer to the question presented is still "yes."

This arrangement was designed to skirt the system. McLeod points to the fact that its only written contract was with Staff Care and it never paid Ms. Shatto anything, but everyone knows that the hospital had the right to tell Ms. Shatto, an individual nurse, how to do her job. McLeod's line of argument overlooks the fact that this is an area where actions matter more than words. The law sets more score by how the working relationship operates than the labels the parties give themselves.

Mildred Shatto was doing the same work McLeod's staff nurses did. She was paid by the hour, she used McLeod's equipment, and she reported to a McLeod employee that had the discretion to terminate her. Parts of this arrangement were unusual, but none undermine the fact that Ms. Shatto was working to further McLeod's business under a supervisor who could tell her how to do her job. The Court should accordingly reinstate the commission's holding that McLeod is liable for Ms. Shatto's workers' compensation benefits.

I. The Comparison to *Wilkinson v. Palmetto State Transportation Company* and the Offered "Right of Control" Analysis Do Not Withstand Legitimate Scrutiny.

McLeod contends that the present case is no different from the circumstances presented in *Wilkinson*. Observing that this Court's decision in *Wilkinson* changed the

manner in which South Carolina courts apply the four-factor employment test, McLeod offers that as in *Wilkinson*, the circumstances of Ms. Shatto's case are an example of an independent contract arrangement in which the parties followed the terms of their written agreements. McLeod says it did not recruit Ms. Shatto, review her credentials, or arrange her lodging, and that it cannot be Ms. Shatto's "employer" because it did not have an oral or written contract with her and did not directly pay her.

In order for the principles applied in *Wilkinson* to have a meaningful impact on the present case, two aspects of the record would have to be different.

First, the commission would need to have found that only one or two prongs of the four-factor employment test tended to show a finding of employment. Though it was once the case that a finding of employment was justified as long as one prong of the test leaned in that direction, *Wilkinson* makes it clear that this is no longer the case. See *Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 300, 676 S.E.2d 700, 702 (2009).

But every commissioner that examined Ms. Shatto's case found that all of the four factors tended to show employment. See (App.pp.151-158; pp.207-214). This is what makes it odd to spend any time focusing on the balancing aspect of the commission's decision. It is obvious that subsequent events have proved the commission's statement on how to weigh the factors was erroneous, but there is no reason to gripe about how to weigh the factors when the commission found that they all pointed in one direction. Unless the commission's analysis on any of the factors was wrong, the balancing test does not matter.

Second, for this to be like *Wilkinson*, Ms. Shatto would need to have agreed to carry her own workers' compensation coverage. In *Wilkinson*, this Court wrote that several

features were important for determining the nature of the parties' relationship. Among those features was Mr. Wilkinson's promise to carry workers' compensation coverage according to South Carolina law. *Id.* at 298, 676 S.E.2d at 701. This Court wrote that it "remains sensitive to the general principle . . . that workers' compensation laws are to be construed liberally in favor of coverage," but also that the policy favoring compensability is diminished when "the independent contractor procures workers' compensation coverage or its functional equivalent." *Id.* at 301, 676 S.E.2d at 703.

Ms. Shatto had no such agreement. The documents she executed with McLeod never reference workers' compensation benefits. See (App.pp.578-587).

True, McLeod did not recruit Ms. Shatto, review her credentials, or arrange her lodging, but none of these are factors of the employment test. The test does not consider how the worker came to work for the business owner. Instead, the test examines features of how the relationship operates in practice and asks whether that operation describes someone that is engaged in his or her own business enterprise (an independent contractor) or someone that is furthering someone else's business (an employee). In *Marchbanks v. Duke Power Co.*, this Court explained it this way: it described the Workers' Compensation Act as being designed to make a business owner liable to "the workman who actually does the [owner's] work." 190 S.C. 336, 362-63, 2 S.E.2d 825, 836 (1939). How Ms. Shatto came to work at McLeod is not as important as who had the right to control her actions once she arrived there, and this leads to the application of the rule of reason: it ought to be obvious that the hospital had the right to tell Ms. Shatto, a nurse, how to do her job. If this was not obvious, the Appendix contains documents in which McLeod does exactly that. See (App.p.581; pp.600-604).

II. When You Hire People to Perform Work in the Scope of Your Business, You Are Liable to Provide Benefits If Those Workers Suffer Workplace Injuries.

South Carolina's workers' compensation laws have always provided that when you hire people to perform work that is in the course of your business, you are liable to provide benefits if those workers suffer workplace injuries. This is true whether your contract is with an individual worker or a firm that provides you with multiple workers. This Court's decision in *Marchbanks v. Duke Power Co.* is an early recognition of this principle. See 190 S.C. at 336, 2 S.E.2d at 825 (painter who was injured while painting a power pole was the statutory employee of the power company). Other examples include the decisions of the Court of Appeals in *Gentry v. Milliken & Co.*, 307 S.C. 235, 414 S.E.2d 180 (Ct. App. 1992) (independent contractor hired to install factory machinery was Milliken's statutory employee) and *Revels v. Hoechst Celanese Corp.*, 301 S.C. 316, 391 S.E.2d 731 (Ct. App. 1990) (truck driver who was injured while helping a chemical distributor's employees load his truck was the distributor's statutory employee). This principle was the driving force in *Cooke v. Palmetto Health Alliance*. *Cooke* held that a medical emergency helicopter pilot was not the hospital's statutory employee because the hospital was in the business of treating patients, not transporting them. See 367 S.C. 167, 174-75, 624 S.E.2d 439, 442 (Ct. App. 2005).

This Court's decision in *Long v. Atlantic Homes*, 311 S.C. 237, 428 S.E.2d 711 (1993) recognizes that the law allows an injured worker to bring a claim for benefits directly against his or her statutory employer. If multiple parties are liable for an injured person's workers' compensation benefits — if the worker has one direct employer and a different statutory employer — the injured person may collect benefits from either of the liable parties,

but not from both. *Id.* at 241, 428 S.E.2d at 713. Statutory law adds some nuances to this situation — see S.C. Code Ann. § 42-1-415 (Supp. 2012) (dealing with representations of coverage) and S.C. Code Ann. § 42-1-440 (1985) (dealing with a principal contractor's right to seek reimbursement) — but none of these nuances inform the present analysis.

This is why McLeod's citation to this Court's decision in *Kilgore Group v. South Carolina Employment Security Commission* is so strange. In *Kilgore*, this Court found that temporary workers were the "employees" of a temporary staffing agency despite the fact that the only work these workers performed was done to further the businesses operated by the agency's clients. 313 S.C. 65, 437 S.E.2d 48 (1993). McLeod reads *Kilgore* to provide that Ms. Shatto was a Staff Care employee.

Regardless of whether Ms. Shatto is Staff Care's employee, she is still McLeod's statutory employee and McLeod is still liable for her workers' compensation benefits. Under this Court's decision in *Long*, Ms. Shatto may seek her benefits directly from McLeod. See 311 S.C. at 241, 428 S.E.2d at 713.

The reality is that this sort of working situation was designed with the goal of avoiding laws like workers' compensation and employee benefits; there cannot have been any other motivation. And though there is nothing necessarily nefarious about this motive, South Carolina has a long history of looking beyond how the parties label themselves and judging how their relationship operates in practice. The workers in *Kilgore* were held to be employees despite the fact that their written contract labeled them independent contractors. See 313 S.C. at 67, 437 S.E.2d at 49. The same was true in *Todd's Ice Cream, Inc. v. South Carolina Employment Security Commission*. See 281 S.C. 254, 315 S.E.2d 373 (Ct. App.

1984). The critical factors are the substance of the relationship and an examination of how the relationship operates. The parties' actions will speak louder than their words.

Because independent contractors are in business for themselves, they generally have the power to hire additional personnel or "sub-out" parts of their contract. See, e.g., *Wilkinson* 382 S.C. at 298, 676 S.E.2d at 701 (Mr. Wilkinson was responsible for hiring and supervising drivers of his tractor); *Marlow v. E. L. Jones & Son, Inc.*, 248 S.C. 568, 571, 151 S.E.2d 747, 748 (1966) (the Marlow brothers were skilled roofers and hired additional personnel at their discretion). Nothing suggests Ms. Shatto had the power to "sub-out" her hospital shifts. She had few (if any) of the powers associated with an independent contractor.

McLeod asks the Court to be guided by the fact it had no oral or written contract with Ms. Shatto, but this argument overlooks that an employment contract can be implied from conduct and can arise "even where the employer does not intend to enter into one." *Alewine v. Tobin Quarries*, 206 S.C. 103, 109, 33 S.E.2d 81, 83 (1945). All the law requires is that the parties recognize each other as employer or employee or that the owner engage in conduct which leads the worker to a good faith belief that he or she is employed. *Id.* at 109, 22 S.E.2d at 83. McLeod gave Ms. Shatto 10 forms that refer to her variously as an "employee," a "temporary employee," and a "staff nurse." In addition to having McLeod employees direct Ms. Shatto's daily activities, these circumstances would be sufficient to cause any reasonable person to believe that he or she was a worker whose job was to work for someone else.

This model could be repeated across a variety of industries, and this arrangement would allow a hypothetical hospital to terminate a significant percentage of its nursing staff, fill those vacancies with temporary staff, and avoid the obligation to insure workers that are

engaged in the hospital's business against the cost of industrial accident. This would subvert the purpose of the Workers' Compensation Act generally and the statutory employee scheme specifically; a scheme that this Court has described as having the purpose of granting "the benefits of compensation to those who are exposed to the risks of the owner's business and [] plac[ing] the burden of paying compensation upon the organizer of the enterprise." *Carver v. Bill Pridemore & Co.*, 278 S.C. 235, 237, 294 S.E.2d 419, 420 (1982).

McLeod was the organizer of this enterprise. It runs the hospital, and the risks to which Ms. Shatto was exposed were the risks of furthering the hospital's business. The commission put the burden of Ms. Shatto's workers' compensation benefits on McLeod because that is where the burden rightly belongs. This decision was the correct decision.

III. The Commission's Decision That Ms. Shatto's Fall Was Compensable Is Not Clearly Erroneous in View of the Evidence in the Record.

The term "idiopathic fall" is used to describe a fall that is either unexplained or caused by someone's personal condition; for example, a medical abnormality. Idiopathic falls are 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), but 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).

The commission determined that Ms. Shatto fell when her foot caught on something as she was moving around a patient's bed, and the commission specifically found that the fall was not idiopathic. (App.p.150, ¶3; p.206, ¶3). Pursuant to the Administrative Procedures

Act, a reviewing court may modify this finding only if it is "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." S.C. Code Ann. § 1-23-380(5)(e) (Supp. 2012); *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981) (APA governs review of the commission's decisions).

The commission's finding is not clearly erroneous. A fair representation of Ms. Shatto's testimony is that as she was stepping around the patient's bed (while holding medication and syringes in both hands), she felt her right foot catch and she remembered thinking "I hope this floor is padded" as she fell to the floor. (App.pp.262, line 22 - p.265, line 16; p.390, line 23 - p.391, line 15; p.407, line 16 - p.408, line 11). Ms. Shatto explained that her foot caught in an area where medical equipment and cords were located, see *id.*, and it is reasonable to view this narrative and these circumstances as circumstantial evidence that Ms. Shatto tripped on this equipment while moving around the patient's bed. There was no evidence that Ms. Shatto had any history of idiopathic falls, and although it is fair to point out that Ms. Shatto's testimony constitutes the only evidence on this issue, it is hard to imagine many other potential sources of corroboration. Absent an eyewitness or a video camera, a trip and fall accident is not an accident that will generally produce a lot of evidence. Ms. Shatto offered a lucid explanation for her fall, the commission found it credible, and this Court should affirm the commission's finding.

CONCLUSION

The day-to-day operation of this relationship looks a lot more like employment than independent contract. McLeod paid for Ms. Shatto's work by the hour, furnished her with all of her equipment, and had the right to immediately end the relationship without future

liability. Though a good bit of McLeod's control over Ms. Shatto was mandated by law, McLeod exercised more control than the law required.

The decision of the Court of Appeals did not faithfully apply the employment test. The court did not list the reasons behind each of the employment factors, and the court also failed to recognize that as the organizer of this enterprise, McLeod is the entity that, in fairness, *should* be responsible for Ms. Shatto's workers' compensation benefits. The commission's decision honors the letter and the spirit of the law. This Court should accordingly reverse the decision of the Court of Appeals and reinstate the commission's holding that McLeod is liable for Ms. Shatto's workers' compensation benefits.

Respectfully submitted,

April 1, 2013

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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 *Reply Brief* by depositing a copy in the United States Mail, postage prepaid to the following address:

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