THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Case No.: 12-ALJ-22-0294-AP

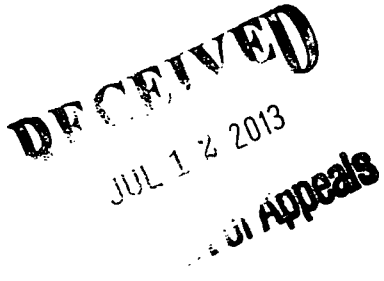
Appellate Case No.: 2013-000985

Cellular Sales of South Carolina, LLC — Appellant,

v.

South Carolina Department of Employment and Workforce, — Respondent.

INITIAL BRIEF OF APPELLANT



Page M. Kalish [SC Bar No. 72611]
ROBINSON, MCFADDEN & MOORE, P.C.
Post Office Box 944
Columbia, SC 29202
(803) 779-8900
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

Appellant, Cellular Sales of South Carolina, LLC, by and through its undersigned counsel, files its Appellant's Brief and would respectfully show the Court of Appeals as follows:

STATEMENT OF ISSUES ON APPEAL

(1) Whether the Administrative Law Court's decision affirming the Appellate Panel's determination is affected by error of law and is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record by holding that Rains, LLC and Nadezda Rains were employees for the purpose of South Carolina law rather than independent contractors?

(2) Whether the Administrative Law Court's decision affirming the Appellate Panel's determination is affected by error of law and is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record by holding that other similarly-situated sales representatives are employees for the purpose of South Carolina law rather than independent contractors?

STATEMENT OF THE CASE

Claimant, Nadezda Rains/Nadezda Rains, LLC, worked for Cellular Sales of South Carolina, LLC ("Cellular Sales") as a sales representative from roughly October 20, 2007 to November 1, 2008. R. at 8. When the relationship with Cellular Sales ended in November 2008, Claimant filed an application for unemployment benefits with the South Carolina Employment Security Commission ("SCESC"), now known as the South Carolina Department of Employment and Workforce ("SCDEW"). Shortly after Claimant's application for benefits, the SCESC Appeal Tribunal issued a formal notification to Cellular Sales and Claimant that SCESC considered Claimant to be eligible for unemployment benefits. R. at 9.

On December 11, 2008, Cellular Sales timely responded to the notification of benefits and advised the SCESC that Claimant, through her entity, Nadezda Rains, LLC, was an independent contractor for Cellular Sales and, as such, was not eligible for unemployment benefits. R. at 11.

Thereafter, on April 8, 2009, the SCESC issued a determination that Claimant was an employee, not an independent contractor. R. at 13-14. Upon receipt of this determination,

Cellular Sales timely requested administrative review of the Commission's determination. R. at 15. Cellular Sales further advised the SCESC at that time that Claimant was never restricted from having a substantial investment in her own business and that, at all times, Claimant had the option of hiring employees through her sales company, Rains, LLC, to supply the services requested by Cellular Sales. *Id.* Further, Cellular Sales confirmed that the frequency and timing of the work performed by Claimant through her sales company were in her discretion and under her control. *Id.* Moreover, because Claimant's company could set the process for products it sold, Claimant, not Cellular Sales, controlled profits and losses.

This matter was then assigned to the South Carolina Department of Employment and Workforce, Lower Authority Appeals. R. at 16. On March 18, 2011, the administrative hearing officer set this case for hearing before the Appeal Tribunal. R. at 16. At the hearing, Julie Dean, the Vice President of Cellular Sales South Carolina, LLC, attended and offered testimony on behalf of Cellular Sales. R. at 21. Claimant attended the hearing as well, along with a representative from the South Carolina Department of Employment and Workforce. R. at 17. No other sales representatives attended this hearing or otherwise offered any evidence at the hearing. *Id.*

Following this evidentiary hearing, on May 4, 2011, the Administrative Hearing Officer of the South Carolina Department of Employment and Workforce issued an Administrative Ruling that Nadezda Rains and similarly-situated sales representatives should be classified as employees and not independent contractors. R. at 119-23.

Cellular Sales filed a timely Application for Leave to Appeal to the Appellate Panel of the South Carolina Department of Employment and Workforce on or about June 3, 2011. R. at 124-25 (Appeal No. Admin-2000-9). In its Appeal, Cellular Sales challenged the Administrative

Hearing Officer's determinations that Claimant was considered an employee under South Carolina law and that other similarly-situated employees should be considered employees as well. *Id.*

On May 9, 2012, the South Carolina Department of Employment and Workforce held a hearing before the Appellate Panel on the issues raised in Cellular Sales's appeal. R. at 1-7. The Appellate Panel subsequently issued its decision on May 25, 2012, affirming the Administrative Hearing Officer's determination with respect to both Rains's status as an employee and the determination that other similarly-situated salespersons were also employees. *Id.*

Cellular Sales timely appealed the Appellate Panel's decision to the Administrative Law Court ("ALC") on June 22, 2012. Cellular Sales appealed the Panel's determination that Nadezda Rains should have been classified as an employee, rather than an independent contractor, and the determination that similarly-situated sales representatives should have been classified as employees as well. On April 11, 2013, the ALC (The Honorable J. Deborah Brooks Durden) issued an Order affirming the Appellate Panel's decision with respect to both issues challenged by Cellular Sales' appeal.

Thereafter, on May 9, 2013, Cellular Sales timely filed its Notice of Appeal to this Court. As set forth below, and as demonstrated by the evidentiary record, the decisions by the Appellate Panel, subsequently affirmed by the ALC, were erroneous and contrary to the substantial evidence, which establishes that Claimant was not an employee under South Carolina law and, even if Claimant could be considered an employee, Claimant's relationship with Cellular Sales was atypical and cannot be used to extrapolate a determination that applies to all other sales representatives within the company.

ARGUMENT

I. Standard of Appellate Review

The Administrative Procedures Act ("APA") provides the standard for judicial review of workers' compensation decisions. *Lark v. Bi–Lo, Inc.,* 276 S.C. 130, 276 S.E.2d 304 (1981). Under the APA, a reviewing court can reverse or modify the decision of the Commission if the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. *Transp. Ins. Co. v. South Carolina Second Injury Fund,* 389 S.C. 422, 427, 699 S.E.2d 687, 689–90 (2010) (citing S.C.Code Ann. § 1–23–380(5)(d), (e) (Supp.2009)); *Paschal v. Price*, 392 S.C. 128, 131, 708 S.E.2d 771, 772-73 (2011), reh'g denied (May 26, 2011).

A decision is supported by substantial evidence when the record as a whole allows reasonable minds to reach the same conclusion as the agency. *Friends of the Earth v. Pub. Serv. Comm'n of S.C.*, 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010). Importantly, however, the decision of the court may not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it. *See Thompson ex re. Harvey v. Cisson Const.*, 377 S.C. 137, 152, 377 S.E.2d 171, 179 (S.C. Ct. App. 2008, *cert. granted*, (June 2009), *vacated as moot*, 385 S.C. 451, S.E.2d 756 (2009)).

In the present case, the ALC's determinations that Claimant and those similarly situated to Claimant are employees, rather than independent contractors, are affected by errors of law and clearly erroneous in view of the substantial evidence to the contrary in the record. Appellant, therefore, respectfully asks this Court to reverse the ALC's decisions.

II. The Administrative Law Court's Determination that Rains, LLC and Nadezda Rains were Employees Rather than Independent Contractors is Clearly Erroneous in View of the Substantial Evidence to the Contrary

The ALC's decision with respect to Claimant and her sales company, Rains, LLC, is affected by error of law and clearly erroneous in light of substantial evidence to the contrary.

In South Carolina, the determination of whether an individual is an employee or independent contractor "focuses on control, specifically whether the purported employer had the right to control the claimant in the performance of his work." *Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 299, 676 S.E.2d 700, 702 (2009). With respect to the right of control, South Carolina courts utilize a four-factor test in viewing the work relationship in its entirety: "(1) direct evidence of the right or exercise of control; (2) furnishing of equipment; (3) method of payment; [and] (4) right to fire." *Id.* (citing *Workers' Comp. Comm'n v. Ray Covington Realtors, Inc.*, 318 S.C. 546, 459 S.E.3d 302 (1995)); *Kilgore Group, Inc. v. S.C. Emp't Sec. Comm'n*, 313 S.C. 65, 68, 437 S.E.2d 48, 49-50 (1993).

The test of whether an employee-employer relationship exists is not whether the actual control was exercised; rather, the test is "whether there exists the right and authority to control and direct the particular work or undertaking." *Kilgore Group, Inc.*, 313 S.C. at 68-69, 437 S.E.2d at 50. When determining an individual's employment status, courts also look to the individual's and employer's written agreement. *Wilkinson*, 382 S.C. at 299, 676 S.E.2d at 702 (quoting *Kilgore Group*, 313 S.C. at 68-69, 437 S.E.2d at 50 (1993) (noting that, although not dispositive, when "'determining the nature of [the parties'] relationship,' the contract 'has considerable weight'")).

Importantly, in applying the *Wilkinson* test, a court must "evaluate[ ] the four factors with equal force in both directions to provide an even-handed and balanced approach." *Pikaart,* 393 S.C. at 318–19, 713 S.E.2d at 270–71; *Paschal v. Price,* 392 S.C. 128, 133–34, 708 S.E.2d 771,

773–74 (2011) (applying *Wilkinson* test). *See also Lewis v. L.B. Dynasty, Inc.*, 400 S.C. 129, 133-34, 732 S.E.2d 662, 664 (S.C. Ct. App. 2012), reh'g denied (Oct. 18, 2012).

The ALC erred in its application of the right of control factors and its decision is clearly erroneous in light of substantial evidence that Cellular Sales did not have a right of control over Claimant.

A. The Record Refutes the ALC's Finding of Direct Evidence of Control over Claimant

In affirming the Appellate Panel's decision, the ALC held, "[i]t is clear from the transcript that Appellant had the right to control and direct Claimant in her work." Op. at 8. The ALC identified the following "evidence," upon which it relied in reaching this conclusion:

- "the activities of sales representatives were monitored by cameras";
- "sales representatives received specific instruction on selling and were counseled when performance numbers were below expectations";
- "Appellant providing pricing guidelines";
- "the final schedule was posted by Appellant";
- "Rains, LLC was formed for the sole purpose of satisfying Appellant's employment requirement."

Id.

As set forth herein, however, the evidence refutes every one of these bases for the ALC's determination that Cellular Sales had a right of control.

i. Sales Representatives Were Not Monitored by Cameras

The evidence established the in-store cameras were for **security purposes**—not to monitor Claimant. (R. at 89-90). Although Claimant erroneously believed the in-store security cameras were for monitoring purposes, she never refuted the company's undeniably legitimate explanation for the cameras. Claimant's erroneous belief that the security cameras were also

being used to monitor sales representatives is precisely the type of "surmise, conjecture, or speculation," the South Carolina Supreme Court has warned against. *See Thompson ex re. Harvey v. Cisson Const.*, 377 S.C. at 152. Tellingly, Claimant offered no evidence that Cellular Sales took action against any sales representative based on its alleged monitoring. Moreover, Claimant's conjecture is illogical and is just as easily explained as security as opposed to Claimant's unsupported belief she was being monitored.

Claimant failed to show the company was using cameras or any other means to monitor sales representatives. As even the ALC acknowledged (Op. at 8), Cellular Sales did not have in-store managers overseeing Claimant's work on a daily basis. R. at 59 (acknowledging that the Company's regional manager was actually located in Wilmington, North Carolina). *See also* R. at 38, ll. 14-20; 42, l. 14. As the company explained, the regional manager visited each South Carolina store only one time per 1-2 week period. R. at 39, ll. 1-8. This evidence was undisputed. In fact, the person Claimant believed was a manager (Smith) was actually another sales representative (R. at 89-90).[1]

The finding that "sales representatives were monitored by cameras" is not credible evidence nor is it supported by the record. The actual record evidence, which Claimant did not dispute, resoundingly refutes this determination.

ii. Sales Representatives Did Not Receive "Instruction on Selling" From the Company, Nor Were They Counseled About Performance

The ALC next found that "sales representatives received specific instruction on selling" and counseling on performance. The record contradicts this finding.

---

[1] Notably, this is the same person Claimant accuses of "instructing" her in sales techniques in the store. R. at 68, l. 13 – 69, l. 11.

Although Claimant testified that she received product training, her testimony on this point is inaccurate and unreliable. There is no dispute Claimant, through her sales company, received *device* training *from Verizon* at *Verizon's* facility. R. at 33, ll. 11-18. Likewise, to the extent Claimant claims she was instructed about promotional items (R. at 80, l. 8), the company explained that *Verizon* provides promotional materials and instruction. R. at 34, l. 17-20; 38, l. 10-13. Claimant never contradicted this testimony. Importantly, although Claimant contends she was told what to say and how to say it, she never answered the Hearing Officer's question, "**who conducted that training?**" R. at 65, ll. 13-20. Tellingly, the person Claimant believes gave her sales entity sales instruction was another *sales representative*. R. at 89-90. Claimant never refuted this testimony, and it is a telling indication that, although Claimant may have believed she was receiving formal instruction or being counseled by Cellular Sales, she was actually getting help from fellow sales representatives on ways to improve her performance, which would then improve the overall profitability her sales company.[2]

There is simply no evidence in the record to substantiate the conclusion that *Cellular Sales*, as opposed to Verizon or other sales companies, provided any training to Claimant. Like the exotic dancers in *Lewis v. L.B. Dynasty, Inc.*, Cellular Sales did not tell the sales representatives "how to dance." 400 S.C. 129, 135, 732 S.E.2d 662, 665 (S.C. Ct. App. 2012), reh'g denied (Oct. 18, 2012). Indeed, the record proves that the manner in which a sales representative "performs her [sale] to satisfy the club's customers...is not subject to any limitation or control by the club." *Id.* Similarly, sales representatives were expected to have a

---

[2] Claimant admits that, unlike a traditional employee, at no time during her year-long engagement with Cellular Sales did she receive a formal evaluation, review, or performance write-up. R. at 85, ll. 7-12.

pre-existing sales background (R. at 42, l. 3-9), and the record establishes that Cellular Sales did not provide sales training. R. at 33, ll. 7-18.

iii. Sales Representatives Undisputedly Set Their Own Prices at "Whatever You Decide"

The ALC next determined that, although Claimant was undeniably given "latitude" with pricing (Op. at 8), she was nonetheless subject to control because "Appellant provided pricing guidelines." The ALC's determination is one-sided and contradicted by the record evidence.

In the Claimant's testimony, she admitted her sales entity had total discretion to set her own prices on equipment, service, and re-stocking fees. R. at 69, ll. 15-17; 70, ll. 3-7; and 70, l. 11-18; 71, ll. 1-3. To use Claimant's own words, when determining prices, Cellular Sales's instructions were, "**whatever you decide**." *Id. See also* R. at 69, ll. 15-17 ("you can charge under that minimum; that minimum or higher than that")). The company likewise confirmed the sales companies had discretion to set prices "well below" cost, if they chose. R. at 34. Like all sales representatives, Claimant's sales company could have incurred losses in its performance on behalf of Cellular Sales. R. at 45, l. 9-14.

In support of its determination, the ALC wrongly assumed Cellular Sales issued "pricing guidelines." There are no such pricing guidelines in the record and no evidence to prove these "guidelines" are anything other than MSRPs from vendors.[3] Even if the company recommended pricing to sales representatives, the fact the sales representatives were free to establish—and did establish—their own prices disproves the right of control. *See, e.g., Lewis v. L.B. Dynasty, Inc.*,

[3] Notably, the record does not contain any such internal pricing guideline implemented by Cellular Sales as opposed to standard MSRP rates recommended by Samsung, Apple, HTC, and countless other providers. Regardless, Claimant admits she, through her sales entity, had complete discretion to set prices on all products and services she provided.

400 S.C. at 135, 732 S.E.2d at 665 (holding that dancers were independent contractors even though the club set the floor rate for VIP dances).

iv. The Final Schedules were the *Effect* of Sales Representatives' Scheduling Discretion

The ALC next determined the right to control exists because, "while workers could sign up for scheduled times, the final schedule was posted by Appellant." (Op. at 8). The ALC's determination in this regard is counter-intuitive. The final schedule is merely the *effect* of the undisputed discretion exercised by sales representatives to schedule themselves to work in the storefronts.

As even the ALC acknowledged, the record is clear: the company did not schedule workers, rather, "workers could sign up for scheduled times." *Id.* It is also undisputed that, not only did Claimant, through her sales entity, have the ability to sign up for shifts in the physical storefronts (R. at 4 ("sales representatives had the ability to sign up for shift times")), but she admits she had complete discretion to work outside the stores, meet clients for appointments, trade shifts, work out of her home, etc. R. at 35; 46; 65, l. 1-4. The fact Claimant, through her sales entity, *chose* not to do so is not direct evidence of either the right to control or the actual exercise of control. In fact, by its very definition, any sales made outside the physical storefronts would be completely independent from Cellular Sales's purported supervision and control.

The ALC's determination places undue influence on the fact these sales representatives were "scheduled" to work while overlooking the evidence it was the sales representatives themselves who sought out and requested in-store shifts. As the Court recognized in *Wilkinson*, requesting to be scheduled for shifts does not create a right of control over the manner of performance. 382 S.C. at 301-02, 676 S.E.2d at 703 ("[t]he fact that Palmetto contacted Wilkinson for potential assignments and provided the pickup location does not change the result.

Wilkinson retained the right to refuse any assignment. If Wilkinson agreed to an assignment and made the pickup, he exercised complete control over the delivery and chose his travel routes without direction from Palmetto.").

v. Contrary to South Carolina Supreme Court Precedent, the ALC did not Accord *Any* Weight to the Independent Contractor Agreement

In determining Cellular Sales maintained a right of control over Claimant, the ALC further concluded that "Rains [LLC] was formed for the sole purpose of satisfying Appellant's employment requirement." (Op. at 8).

As an initial matter, this conclusion does not demonstrate a right of control or even relate to the right of control factor. Logically, what Claimant did *before* her sales company began working for Cellular Sales cannot demonstrate control over the manner in which the sales company performed its work.

Second, the undisputed record disproves this conclusion as well. Cellular Sales specifically told Claimant in advance that it was engaging her sales company as an independent contractor and not employing her in an individual capacity. R. at 97-98. Prior to contracting with her sales company, Cellular Sales specifically informed Claimant—*and Claimant fully acknowledged*—"Cellular Sales . . . contracts with legal entities to market and sell cellular telephones . . . **Cellular Sales does not employ or hire individuals to serve as sales representatives.**" R. at 97 (emphasis added). As the company testified, Cellular Sales explains this to potential contractors before entering an independent contractor relationship, "so that they're fully aware this is not an employment position." R. at 40, ll. 11-16. Contrary to the ALC's conclusion, Claimant admits she was advised up front the company was not hiring her individually. *See* R. at 60, ll. 14-20.

As stated in the agreement itself, Claimant's sales company, Nadezda Rains, LLC, contracted with Cellular Sales, not Claimant individually. R. at 104, 108-110. As such, Claimant, in her individual capacity, was not even required to work for Cellular Sales, but could have employed another person(s) to furnish services on behalf of Rains, LLC. R. at 15 (noting that the Claimant "was not required to perform services personally and could have supplied services through another employee of her company, but chose not to"). In fact, pursuant to the independent contractor agreement, Claimant's sales company was not even prohibited from **competing against** Cellular Sales, even during its association with the company. R. at 35, l. 7-11; Ex. 7. As the company explained, Claimant's sales company could even work shifts at a nearby AT&T store if it chose. *Id.*

The ALC's determination conflicts with South Carolina Supreme Court precedence in that, despite these clear provisions of the contractor agreement, the ALC does not assign any weight at all to the existence of an independent contractor agreement. *See Wilkinson*, 382 S.C. at 300, 676 S.E.2d at 702 ("we are guided initially by the parties' independent contractor agreement."). "The contract entered into by the parties must be considered in determining the nature of their relationship and **has considerable weight**." *Kilgore Group, Inc. v. S. Carolina Employment Sec. Com'n*, 313 S.C. 65, 68, 437 S.E.2d 48, 50 (1993) (emphasis added). Notwithstanding this express instruction, the ALC makes only a single, passing reference to the independent contractor agreement. (Op. at 2).

Contrary to the ALC's determination, the record proves Cellular Sales did not have a "right of control." Claimant's sales company had discretion to employ sales representatives in addition to Claimant, (R. at 15), set its own shifts (R. at 35, ll. 14-20; 44, ll. 11-14), work for competitors (R. at 35, ll. 7-11), set its own prices on all products, services, and fees (R. at 69, ll.

15-17; 70, ll. 3-7; and 70, l. 11-18; 71, ll. 1-3), make sales outside the storefronts (R. at 42, l. 13; 46, ll. 3-7), and promote the sales company (R. at 44, l. 18 – 45, l. 6). Although Claimant *believed* she was subject to control, the record proves Claimant was not subject to daily supervision (R. 38, ll. 14-20), nor was Cellular Sales monitoring her or her sales company's activities by security camera (R. at 89-90). Similarly, if she, through her sales company, received instruction and "counseling," it was from either Verizon (R. at 33, ll. 11-8) or from another sales representative (i.e., Smith). The substantial evidentiary record proves Claimant's sales company had the right to control the manner of its services, and this factor, along with the contractor agreement itself, weighs in favor of a contractor relationship.

B. The Record Does Not Support the ALC's Finding that the Furnishing of Equipment Evidences Control

With respect to the furnishing of equipment, the ALC determined that this factor weighs in favor of a contractor relationship because Cellular Sales made storefronts available to sales representatives, which included the built-in terminals, supplies, and inventory. (Op. at 8). The ALC distinguished *South Carolina Workers' Compensation Commission v. Ray Covington Realtors, Inc.*, 318 S.C. 546, 459 S.E.2d 302 (1995), and held that, unlike the broker in *Covington*, Cellular Sales "provided sales representatives with all the materials to complete their job." (Op. at 9). This characterization of the record contravenes the even-handed analysis required by the South Carolina Supreme Court. The record actually proves this factor weighs in favor of Cellular Sales:

<u>What the Company Made Available to Sales Representatives:</u>

- Physical storefronts, if they chose to use them;
- Supplies (pens, pencils, paper);
- Inventory (for in-store sales); and

- Sales terminals.

What the Sales Companies were Required to Furnish:

- Marketing and advertising materials (R. at 44, l. 18 – 45, l. 6);
- Necessary business permits (R. at 98, ¶¶ 4, 7D; R. at 34, ll. 13-17);
- Corporate documentation (*id*);
- Computers (R. at 37, ll. 2-11);
- Cellular phones (*id*);
- Cash bags (R. at 43, ll. 1-3);
- Sales experience (R. at 42, ll. 3-9);
- Inventory (for all non-store sales) (R. at 65, ll. 5-12);
- Sales training. (R. at 33, l. 7-18); and
- Transportation (R. at 86, l. 1 – 87, l. 3).

Although the ALC places significant emphasis on the fact the company made inventory available to the sales representatives, to make sales outside the storefront, sales companies purchased the inventory themselves for re-sale (R. at 65, ll. 5-12). Additionally, Cellular Sales did not furnish any personal vehicles or otherwise reimburse for mileage or gas. R. at 86, l. 1 – 87, l. 3. Although the ALC also points to "promotional materials," the record proves the promotional materials were placed there by vendors, not Cellular Sales. (R. at 38, ll. 10-13).

The record simply does not support ALC's determination that the company "provided sales representatives with all the materials to complete their job." The ALC's attempt to distinguish *Covington* fails, and the *Covington* opinion is indeed applicable to the instant circumstance because it demonstrates that even where the employer furnishes certain equipment, including office space, supplies, a desk, and business forms, *Covington Realtors, Inc.*, 318 S.C. at 547-48, this factor still weighs in favor of a contractor relationship. *Id.* at 549. *See also Lewis*

v. L.B. Dynasty, Inc., 400 S.C. 129, 135, 732 S.E.2d 662, 665 (S.C. Ct. App. 2012), reh'g denied (Oct. 18, 2012) (holding that providing exotic dancers a premises, stage, pole, chairs, couches, and glasses was not "furnishing equipment").

C. The ALC did not Correctly Analyze the Method of Payment Factor and the Record Disproves the Panel's Finding that the Method of Payment Evidences an Employment Relationship

The ALC's analysis of the method of payment factor is no analysis at all. Simply put, the method of payment is straightforward and undisputed: sales representatives like Claimant were paid commission for sales via 1099s, and they were responsible for their own expenses. Yet, to avoid simply admitting this factor weighs in favor of a contractor relationship, the ALC accepts the Appellate Panel's tortured reasoning that because "Claimant seemingly had little understanding of [the contract's] purpose," the method of payment shows control.

First, the evidence regarding Claimant's method of payment is uncontroverted. Claimant admits Cellular Sales paid her sales company—not her—solely on a commission basis and reported the company's income on Form 1099s. Further, there is no dispute Claimant's sales company was responsible for its own taxes and benefits, and Claimant's sales company admittedly paid its own expenses. R. at 86, l. 1 – 87, l. 3; 113, ¶ 9(b-d).[4] Importantly as well, it is undisputed that sales companies could incur losses in the performance of their services. R. at 45, ll. 9-14. Moreover, Claimant and her sales company could have worked multiple jobs, **including working for competitors**, during the duration of its agreement with Cellular Sales. R. at 35, ll. 7-11. This method of payment is entirely consistent with Claimant's sales company's status as an

[4] The ALC's conclusion that such expenses would likely be minimal is irrelevant and contradicted by the record. Claimant was undisputedly required to pay its own expenses and, for example, with respect to its monthly phone bill, actually did so. R. at 86, l. 1 – 87, l. 3; R. at 88, l. 18 – 89, l. 11.

independent contractor and bears no indicia of an employment relationship. *Wilkinson*, 382 S.C. at 303, 676 S.E.2d at 704.

In *S. Carolina Workers' Comp. Comm'n v. Ray Covington Realtors, Inc.*, 318 S.C. 546, 548, 459 S.E.2d 302, 303 (1995), the South Carolina Supreme Court considered an analogous relationship involving a real estate salesperson. In *Covington*, the salesperson "was not paid unless he earned a commission, and nothing was withheld from his check. At the end of the year, [he] received a form 1099 rather than a W-2 from appellant." *Id.* The Court determined the salesperson was an independent contractor and that this method of payment was consistent with his characterization as a contractor, rather than an employee. *Id.* at 548-49. This case is directly on point, yet ignored in the ALC's analysis.

At bottom, the ALC's analysis is fundamentally flawed because it does not examine the "method of payment" factor as a separate, independent factor from "direct evidence of control." Rather, the ALC has improperly conflated the method of payment and the evidence of control factors: Because it believes Cellular Sales *exercised control* over Claimant (requiring Claimant to establish an LLC), it disregarded the undisputed *method of payment* (which is entirely consistent with a contractor relationship) and weighed this factor in favor of an employment relationship. The method of payment, however, is an independent factor, and the ALC erred by failing to treat it as such.

D. The Right to Fire Neither Proves Nor Disproves the Contractor Relationship

It is hard to see how this factor weighs in favor of either party. The evidence shows Claimant's sales entity could have terminated its contract at any time without any advance notice requirement to the Company. R. at 85, l. 13-19. Similarly, Cellular Sales reserved the right to terminate contracts for unethical actions by a contractor. R. at 39, l. 18 – 40, l. 2. As the ALC

pointed out, the contractor agreement "did not address the termination of the parties' relationship." (Op. at 10).

Yet, despite the record evidence, which clearly gave either party the right at any time to end the relationship, the ALC determined that this factor weighs in favor of an employee relationship because "[a] review of the record reveals that Appellant controlled the method and manner in which the sales representatives' jobs were carried out." (Op. at 10). As before in connection with the ALC's method of payment analysis, this reasoning simply re-states the ALC's determination on the *first* factor. If the *Wilkinson* Court wanted the first factor to control all four factors, it would not have bothered identifying three other factors.

Notwithstanding the ALC's misapplication of the *Wilkinson* factors, the mere fact that Cellular Sales, like Claimant, had the ability to end the relationship does not mean this factor weighs in favor of an employee relationship. *Wilkinson,* 382 S.C. at 304, 676 S.E.2d at 704 (stating "a right of termination, in some form, exists in an independent contractor arrangement") As this Court explained in *Lewis*, "[a]ny business has a right to impose conditions on those to whom it pays money for work, regardless of whether the worker is an independent contractor or an employee. The business's right to terminate the relationship for a violation of its conditions does not make the worker an employee." 400 S.C. at 136, 732 S.E.2d at 665. *See, e.g., Covington*, 318 S.C. at 548-49.

In light of the evidence, this factor does not weigh in favor of either party, and the ALC's erroneous attempt to super-impose the first factor onto the remaining factors is inconsistent with Supreme Court precedent and analogous caselaw.

III. The ALC's Decision that Similarly-Situated Sales Representatives are Employees Rather than Independent Contractors is Affected by Error of Law and is Clearly Erroneous in View of the Substantial Evidence to the Contrary

The ALC affirmed the SCDEW's and Appellate Panel's decisions that similarly-situated sales representatives are employees. As discussed herein, this determination is an impermissible advisory opinion. Moreover, even examining the record as it relates to other sales representatives, the record proves other sales representatives had a different employment relationship than Claimant's.

In support of its determination that similarly-situated sales representatives are employees, the ALC held first that the SCDEW's conclusion is not an advisory opinion. The ALC reasoned, "the rendering of that decision has practical effect, which prevents it from being classified as an advisory opinion." (Op. at 11). The ALC is correct. With respect to Rains individually, the decision has a practical effect and is not an advisory opinion. With respect to the hundreds of other sales companies that were not part of these proceedings, however, the SCDEW's determination is an impermissible advisory ruling.

As the ALC acknowledges (*id.*), the determination of an independent contractor/employee status is fact-specific. *Young v. Warr,* 252 S.C. 179, 165 S.E.2d 797 (1969). It was, therefore, error of law for the SCDEW to attempt to make such a determination for hundreds of sales representatives throughout the state based on a single Claimant's purported relationship with the company.

The ALC next cites *Kilgore Group v. South Carolina Employment Securities Commission*, 313 S.C. at 69, 437 S.E.2d at 50 (1993) and *Ellison, Inc. v. Board of Review*, 749 P.2d 1280 (Utah C. App.) *cert. denied*, 765 P.2d 1278 (Utah 1988) for the proposition that "the employer shoulders the burden of producing evidence that its other similarly-situated employees operated under a different relationship." (Op. at 11). In the instant case, however, after pointing out that neither SCDEW nor Claimant offered any testimony relating to *other* contractors, the

company identified its **unrefuted** evidence *that shows other contractors had a different relationship with the company than Claimant.*

As the vice president of the company explained, **other contractors**:

- did not request or receive any assistance to form business entities (R. at 32, ll. 7-10);
- hired employees to provide services for their sales c (R. at 15);
- derived a significant portion of their commissions from outside sales (R. at 46, ll. 3-7);
- engaged in their own marketing and advertising at their own expense (R. at 44, l. 18 – 45, l. 6);
- obtained the proper business licenses (R. at 50, ll. 13-17);
- priced equipment and services at its own discretion (R. at 34, ll. 7-16); and
- derived income from other sources while also working for Cellular Sales (R. at 35, ll. 7-11).

Indeed, the finding by the Georgia Department of Labor that similar sales representatives in Georgia are independent contractors and not employees provides further evidence that other sales contractors did not necessarily have the same relationship as Claimant with the company. R. at 116-18.

Even if Claimant is properly considered an employee under South Carolina law, the **only** evidence put forward relating to other contractors came from the company and establishes that other contractors had significantly different relationships with Cellular Sales. Appellant thus asks this Court to limit or reverse the ALC's decision to the extent it purports to extend beyond the scope of Claimant's individual relationship with the company.

CONCLUSION

As discussed herein, the ALC's decision that Claimant is an employee rather than an independent contractor is affected by error of law and is clearly erroneous in view of the reliable,

probative, and substantial evidence on the whole record. Likewise, the ALC's decision that other sales representatives within the company are employees of Cellular Sales rather than employees of an independent contractor an independent contractor is affected by error of law and is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Appellant, therefore, respectfully asks this Court to reverse the ALC's decision or, alternatively, July 10, 2013 to modify this decision to remove the global determination as to all sales representatives.

Page M. Kalish [SC Bar No. 72611]
ROBINSON, MCFADDEN & MOORE, P.C.
Post Office Box 944
Columbia, SC 29202
(803) 779-8900
Attorney for Appellant

July 10, 2013