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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Rest Assured, LLC,)
)
Appellant,)
)
vs.)
)
South Carolina Department of Employment)
and Workforce)
)
Respondent.)
_____)

Docket No. 12-ALJ-22-0209-AP

ORDER

STATEMENT OF THE CASE

On March 2, 2006, the South Carolina Employment Security Commission (ESC) (currently known as the South Carolina Department of Employment and Workforce (DEW)), issued a determination that Appellant Rest Assured, LLC (Rest Assured) had an employer-employee relationship with certain in-home personal care aides that had been designated as independent contractors.¹ On April 3, 2006, Rest Assured appealed this determination for administrative review to the ESC. A hearing was held on September 12, 2006, and on February 16, 2007, the Administrative Hearing Officer, Chauntel Bland, issued his opinion and upheld the determination.

On March 16, 2007, Appellant filed an application to appeal the Administrative Ruling to the full Employment Security Commission. Four years later, on March 28, 2011, Appellant was informed by the now DEW that the appeal had been scheduled for review. After hearing oral arguments from the parties, the Appellate Panel issued an Appellate Panel Decision and Order, Appellate Decision No. 2011-P-10, on May 31, 2011. On June 30, 2011, Rest Assured filed a Petition and Notice of Intent to Appeal in Richland County Court of Common Pleas.

On July 11, 2011, DEW filed a Notice of Special Appearance and a Motion to Dismiss the action based on improper jurisdiction of the Richland County Court of Common Pleas to hear the appeal, arguing that the appeal should have been filed in the Administrative Law Court (ALC

¹ Respondent DEW concurred with the Statement of the Case set forth by Appellant Rest Assured in its brief. Therefore, the Statement of the Case set forth above is taken largely from Rest Assured's Statement of the Case. Also, "independent contractor" and "subcontractor" will be used interchangeably throughout.

or Court). In response to the Motion to Dismiss, Rest Assured filed a Motion to transfer the appeal to the ALC pursuant to Rule 204, SCACR and South Carolina law.

On March 27, 2012, the circuit court issued an order denying the Motion to Dismiss and transferring the case to the ALC pursuant to Rule 204, SCACR and South Carolina case law.² DEW appealed this decision to the South Carolina Court of Appeals, but the appeal was dismissed.

This Court accepted the case and issued an Order Governing Procedure on October 19, 2012. On November 8, 2012, DEW filed a Motion to Dismiss the appeal before the ALC based on lack of jurisdiction. This Court issued an order on December 19, 2012, denying the Motion to Dismiss. The Record on Appeal was filed January 8, 2013. The appeal is now before this Court on the merits and is considered without oral arguments.

FACTUAL BACKGROUND

Rest Assured is a company that places personal care assistants (PCAs) who provide in-home care services to elderly and disabled individuals. The PCAs provide “custodial care” to the clients, consisting of duties such as assisting with changing clothes, bathing, combing hair, meal preparation, and light housekeeping. Rest Assured maintains a registry in of approximately 250-280 PCAs, all of whom must provide their qualifications and times of availability, and must pass all background checks before they can be registered. Most of the PCAs have other employment outside of Rest Assured, many with competing companies. All of the PCAs have entered into independent contractor agreements with Rest Assured, which became required after Rest Assured’s director, Reatha Johnson (Johnson) decided to treat the PCAs as subcontractors, rather than employees.

Rest Assured obtains clients from several sources, including Medicaid, the U.S. Department of Veteran Affairs, the South Carolina Department of Disabilities and Special Needs, and private pay individuals. When it has a client in need, one of these entities submits to Rest Assured a “dispatch request,” which includes a list of services the client requires and the times for which a PCA is needed. Rest Assured then matches at least two potential PCAs that meet the skill and availability requirements and arranges an interview with the client. The client then chooses which PCA he or she wants to provide the services. The PCA can accept or deny

² Specifically, the circuit court relied on In re November 4, 2008 Bluffton Town Council Election, 385 S.C. 632, 686 S.E.2d 683 (2009).

the position, and it is up to the PCA to determine her own hours. The PCA is required to submit documentation weekly for services provided.

Rest Assured negotiates with the client as to how much the client must pay for services, and Rest Assured and the PCA negotiate the PCA's hourly rate. Thus, the client does not directly pay the PCA. When a government agency refers a client, Rest Assured sends the bill directly to the agency, which, in turn, pays Rest Assured. Rest Assured pays the PCA based on the PCA's weekly report of hours worked. Even if the client fails to pay, Rest Assured still pays the PCA for the hours worked. The PCAs have no investment in Rest Assured.

Johnson offers and encourages training for those on her registry, but she does not require it. The extent of Johnson's supervision of the PCAs is that Johnson contacts the clients every four months or so for "quality control." She testified that "[t]his is not supervision unless [she] hear[s] back from [her] clients." Rest Assured does not provide any tools or supplies to the PCAs; such supplies must be provided either by the client or the PCA. The PCAs also work with the client in determining how to perform the services requested, and the PCAs are free to work out their schedule, including their holiday schedule, directly with the client. Rest Assured does not withhold taxes from the PCAs and provides them each with an IRS Form 1099 at the end of the year. Also, other in-home care providers treat their PCA's as independent contractors, including the South Carolina Department of Disability and Special Needs, South Carolina Department of Health and Human Services, and Medicaid. However, Rest Assured provides workers' compensation insurance and liability insurance for the PCAs. Additionally, though the PCAs do not wear uniforms, Rest Assured provides each PCA a name badge bearing Rest Assured's logo to wear.

The client also has the choice of maintaining a particular PCA. If a client "fires" a PCA, Rest Assured would generally place the PCA back into the registry for use on other jobs. Rest Assured has never dismissed a PCA from a job for any reason other than client dissatisfaction. Rest Assured has the right to terminate a PCA if the PCA engages in conduct that "is harmful, detrimental, improper, or fraudulent to or for the business."

On its 2005 fourth-quarter unemployment tax return, Rest Assured reclassified the majority of its workers from employees to "subcontractors." Subsequently, a former worker for Rest Assured filed an unemployment claim. As a result, a Field Deputy for the ESC, Cheryl J. Clay, investigated Rest Assured regarding its tax liability status and furnished a report. On

March 2, 2006, the ESC issued a determination finding that Rest Assured's workers should be classified as employees with their wages subject to unemployment tax. DEW's Appellate Panel (Appellate Panel) affirmed this determination. It is from this decision by the Appellate Panel that Rest Assured appeals.

ISSUE ON APPEAL

Did the DEW Appellate Panel err in affirming DEW's determination that Rest Assured's personal care aides are employees for unemployment tax purposes?

STANDARD OF REVIEW

DEW is an "agency" under the Administrative Procedures Act (APA). See Gibson v. Florence Country Club, 282 S.C. 384, 386, 318 S.E.2d 365, 367 (1984) (finding that the Employment Security Commission, a predecessor of DEW, was an agency within the meaning of the APA). Accordingly, the APA's standard of review governs appeals from decisions of DEW. See S.C. Code Ann. §§ 1-23-380, -600(E) (Supp. 2012); Gibson, 282 S.C. at 386, 318 S.E.2d at 367; McEachern v. S.C. Employment Sec. Comm'n, 370 S.C. 553, 557, 635 S.E.2d 644, 646-47 (Ct. App. 2006). The standard used by appellate bodies to review agency decisions is provided by Section 1-23-380(5) of the South Carolina Code (Supp. 2012). That section states:

The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

§ 1-23-380(5); see also § 1-23-600(E) (directing administrative law judges to conduct appellate review in the same manner prescribed in § 1-23-380).

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). “The findings of the agency are presumed correct and will be set aside only if unsupported by substantial evidence.” Kearse v. State Health & Human Servs. Fin. Comm'n, 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995). The fact that the record presents the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency’s findings from being supported by substantial evidence. Waters v. S.C. Land Res. Conservation Comm'n, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996). In applying the substantial evidence rule, “a reviewing court will not overturn a finding of fact by an administrative agency ‘unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based.’” Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res., 345 S.C. 594, 603-04, 550 S.E.2d 287, 292 (2001) (quoting Lark v. Bi-Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981)). Appellant bears the burden “to prove convincingly that the agency’s decision is unsupported by the evidence.” Waters, 321 S.C. at 226, 467 S.E.2d at 917.

DISCUSSION

Pursuant to the South Carolina Labor and Employment Act, common law rules, as well as other specific provisions not applicable to this case, determine whether an employer-employee relationship exists as opposed to an independent contractor relationship. S.C. Code Ann. § 41-27-230(1)(b) (1986). Accordingly, “the determination of whether a [worker] is an employee or independent contractor focuses on the issue of control, specifically whether the purported employer had the right to control the claimant in the performance of [her] work.” Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 299, 676 S.E.2d 700, 702 (2009). In making this determination, this Court must “examine[] four factors which serve as a means of analyzing the work relationship as a whole: (1) direct evidence of the right or exercise of control; (2) furnishing of equipment; (3) method of payment; [and] (4) right to fire.” Id. Wilkinson requires a court to “evaluate[] the four factors with equal force in both directions to provide an even-handed and balanced approach.” Pikaart v. A & A Taxi, Inc., 393 S.C. 312, 318–19, 713 S.E.2d 267, 270–71 (2011) (quoted in Lewis v. L.B. Dynasty, Inc., 400 S.C. 129, 133-34, 732 S.E.2d 662, 664 (Ct. App. 2012).

Based on the following, this Court concludes that there was substantial evidence to justify the Appellate Panel’s finding that Rest Assured possessed the right to control its PCAs in the

performance of their work and that its PCAs were therefore employees for unemployment tax purposes.³

Compliance with the Contract

This Court is “guided initially by the parties' independent contractor agreement. But more importantly, [it is] guided by the parties' conduct . . .” Wilkinson, 382 S.C. at 300, 676 S.E.2d at 702. Hence, “in determining the nature of [the parties’] relationship,” the contract “has considerable weight,” but the “language in the contract merely declaring the relationship is that of an employer/independent contractor is not dispositive.” Id.

In this case, the PCAs ultimately entered into independent-contractor agreements with Rest Assured. DEW nevertheless argues that because Rest Assured allowed the PCAs to work for other companies, its conduct failed to comply with the contract, specifically with the clause entitled “Agreement Not To Compete With The Company.” However, this prohibition against working for competing businesses is limited in the contract to serving “a patient served by [Rest Assured],” and to “solicit[ing] or accepting business from, provid[ing] for consulting services of any kind to, or perform[ing] any of the services offered by [Rest Assured] for, any of [Rest Assured’s] customers or prospects with whom the [PCA] had business dealings in the year next preceding the termination of its contract.” Indeed, Rest Assured even acknowledges in the contract that it “is aware that subcontractors work for a variety of agencies and/or clients.”⁴

DEW also argues that the parties’ conduct did not reflect the written terms of the contract because although the contract indicated that Rest Assured had the right to terminate, the evidence from the hearing showed that the right to terminate a PCA from a job rested with the client. However, the client could only terminate the PCA’s work with that client, but could not

³ In its Reply Brief, Rest Assured asserts that Pikaart sets forth that in determining this matter the Court may take its own view of the preponderance of the facts. In Pikaart and Wilkinson, the Court held that because the question of whether a claimant is an employee or an independent contractor is a jurisdictional issue, it may take its own view of the preponderance of the facts. However, both Pikaart and Wilkinson are workers’ compensation cases. Notably, in reviewing whether a claimant for unemployment benefits before the ESC is an employee or an independent contractor, the Supreme Court found that “we must affirm the factual findings . . . if they are supported by substantial evidence” and that “limited standard of review applies to facts establishing jurisdiction.” Kilgore Group, Inc. v. S.C. Employment Sec. Comm’n, 313 S.C. 65, 68, 437 S.E.2d 48, 50 (1993). Though the Kilgore court did not clarify its reasons for such a distinction, it nonetheless limited itself to review under the substantial evidence standard.

⁴ The non-competition clause is ultimately immaterial to the analysis of whether the PCAs are employees or independent contractors because the Appellate Panel did not include non-adherence to the non-competition clause as a reason for its decision.

terminate the agreement between the PCA and Rest Assured. Indeed, the evidence shows that if a client was dissatisfied with a PCA and requested a new one, the PCA would go back into the registry for reassignment. The independent contractor agreement only covered termination of the contractual relationship between the PCA and Rest Assured. Thus, the ability of a client to end a relationship with a PCA was not contrary to the terms of the independent contractor agreement between the PCA and Rest Assured.

In this case, because the parties complied with the terms of the contract, the contract is given considerable weight. Therefore, the necessary inquiry focuses on the terms of the contract, i.e. whether the terms of the contract, and thus the parties' compliance therewith, reflect an independent-contractor relationship. Nevertheless, as stated above, "language in the contract merely declaring the relationship is that of an employer/independent contractor is not dispositive." Wilkinson, 382 S.C. at 300, 676 S.E.2d at 702. Therefore, the Court must still ultimately look at the conduct of the parties in carrying out the terms of the contract in assessing the four factors in this case.

Direct Evidence of the Right or Exercise of Control

The Appellate Panel found that Rest Assured exercises control over the PCAs by offering them training, supervising work, controlling the manner in which the work is performed, and providing the PCAs name tags identifying the PCAs with Rest Assured.⁵ I find that there was substantial evidence to support the Appellate Panel's conclusion that Rest Assured had the right to, and indeed sufficiently exercised, control over its PCAs such that the PCAs should be treated as employees.

Rest Assured argues that it is the client who directs the actions of the PCA, that the client discusses the performance of services directly with the PCA, that Rest Assured exercises no control over the actual methods of service, and that the PCAs are therefore outside the scope of employees. Rest Assured also draws a distinction between this case and cases such as Chavis v. Watkins, 256 S.C. 30, 180 S.E.2d 648 (1971), where the agent lacks autonomy to deal directly

⁵ The Appellate Panel also based its conclusion that Rest Assured exercised control over the PCAs on its finding that the PCAs were "an integral part of the business and essential to the operation and success of the business." However true this statement may be, it has no bearing on Rest Assured's control over the PCAs, particularly in light of the fact that pursuant to the "Right to Terminate" clause in the agreement, the PCAs can terminate the agreement "at any time prior to completion [of their assigned duties]."

with the client and the client instead communicates its wishes directly to the employer, who then instructs the worker.

I agree with Rest Assured that the PCAs in this case communicate directly with the clients about when they will perform the agreed services and the methods of services to be performed. However, in addition to exercising control over “extraneous aspects of the PCAs’ work, such as the dates and times when work is offered and collection of compensation,” Rest Assured has discussions with clients from the outset about the kinds of services required, which is how Rest Assured is able to match the client with a PCA that has the appropriate skills. Moreover, even though the client ultimately chooses the PCA, the slate of candidates from which the client chooses rests entirely upon the discretion and control of Rest Assured. The evidence did not reflect that Rest Assured ever relinquishes that control. For instance, although the client can choose to discontinue receiving the services from a particular PCA, it is to Rest Assured that the client communicates their dissatisfaction, upon which Rest Assured takes the appropriate action.⁶

The facts of this case are quite similar to those in Kilgore Group, Inc. v. S.C. Employment Sec. Comm’n, 313 S.C. 65, 437 S.E.2d 48 (1993). In Kilgore, the employer was contacted by clients with their specific employment needs. The employer negotiated a fee for providing a temporary worker(s) and contracted with the worker(s) to fill the position. The contract between the employer and a worker could be based on an hourly wage or on a fixed amount. The contract expressly stated that the relationship between the employer and worker was that of an independent contractor. The employer had nothing to do with the day-to-day activities of the workers; rather, the clients controlled the workers’ daily activities. If a client had a problem with a worker, the client went through the employer and did not deal directly with the worker. Finally, if a client was dissatisfied with a worker, the client was free to tell the employer not to send the worker back.

Based on these facts, the Court in Kilgore found that there was substantial evidence to support the ESC’s finding that the employer’s workers were employees and not independent contractors. The Court recognized that the workers’ work and the manner in which it was

⁶ The Court will not discuss the “Agreement Not To Compete With The Company” clause as a factor in the question of Rest Assured’s control over its PCAs’ work because though the Appellate Panel mentions this clause, it was not given as a reason for its decision. It is noteworthy, however, that a covenant not to compete could reasonably be construed to reflect control over the workers’ job rather than a reflection of independence.

performed were controlled by the clients. Nevertheless, the Court emphasized that the clients had no contracts with the workers and that their ability to control the work of the workers derived solely from their contracts with the employer and from the employer's contract with the workers. The Court thus "inferred that [the employer] possessed the right to control the workers' performance and manner in which it was done and delegated that authority to its clients." 313 S.C. at 69, 437 S.E.2d at 50. The Court also noted that the workers were paid by the hour, that the equipment was supplied by the client, and that the clients believed that based upon their dissatisfaction with the workers' performance, the workers could be terminated at any time.

In the present case, as in Kilgore, clients contact Rest Assured with specific needs. Rest Assured does not determine the method of performing the services of the PCAs; rather, the clients discuss directly with the PCAs how the PCA is to perform the services.⁷ However, Rest Assured negotiates with the clients the fee for providing PCAs. The contract between Rest Assured and the PCAs is based on an hourly wage, which, though not conclusive, is indicative of an employer-employee relationship. Also, though the employment contract expressly states that the relationship between Rest Assured and the PCAs is that of an independent contractor, as in Kilgore, the clients in the present case do not contract with the PCAs but with Rest Assured. It is the clients who discuss how the PCAs will perform services and the hours that the PCAs will work; but the clients are only able to do so because of their agreement with Rest Assured (either directly or through a provider such as Medicaid) and because of Rest Assured's agreement with the PCAs. Indeed, a PCA "is required to work according . . . to the schedule that the client gives to [Rest Assured's client care] liaison," and "[the PCA is] there for custodial reasons and they get in there and they **do basically what the client wants to [sic] them to do in their scope of practice.**" (Emphasis added). If a client has a problem with a PCA, they go directly to Rest Assured, not the PCA. Finally, upon a client's dissatisfaction with a PCA's performance, the PCA's job with that client could end. It can thus be inferred that Rest Assured delegates most of its authority to its clients. It is noteworthy, however, that Rest Assured still maintains some

⁷ In its Reply Brief, Rest Assured asserts that "[a]fter a PCA is chosen it is totally up to the PCA to determine the means and methods to provide the specified services to the client/patient," that "the nature of the relationship between the PCA and the client/patient is controlled by the PCA," and that "the client/patient does not control the PCAs." However, in its Initial Brief, Rest Assured asserted that "[w]ith regard to the Rest Assured PCAs, it is the client who directs the actions of the PCAs." Thus, either Rest Assured is improperly adopting contrary positions between its two briefs, or Rest Assured carries out the means and methods of a service but only within the direction of the client.

direct control over its PCAs through the care plan and its periodic supervision of its PCAs work, thus reflecting more direct control than that exercised by the employer in Kilgore. Rest Assured asserts that the Supreme Court's holding in Wilkinson, *supra* supports its contention that it did not exercise control. Wilkinson involved a determination of whether a worker was an employee or independent contractor for workers' compensation purposes. In Wilkinson, the worker began as an employee for a trucking company. He and the employer then agreed to change the relationship to that of an independent contractor, which was reflected in their new contract. Accordingly, the worker purchased his own tractor. The worker was "solely responsible for all expenses associated with acquiring, financing, maintaining and insuring the tractor." *Id.* at 298, 676 S.E.2d at 701. The worker was also responsible for withholding and employment taxes. He also carried his own workers' compensation coverage in the form of an occupational accident policy. The contract also provided that the worker "shall determine the means and methods of the performance of all transportation services." Finally, either party could terminate the contract under the terms of the contract.

The Court considered each of the four factors and also noted that "policy considerations favoring a finding of compensability are further diminished where, as here, the independent contractor procures workers' compensation coverage or its functional equivalent," i.e., a worker is less likely to be an employee if he or she has to purchase his or her own workers' compensation coverage (or its functional equivalent). The Court found that the worker possessed the right of control and indeed exercised it. He purchased his own tractor, could refuse any assignment, and exercised complete control over the delivery and travel routes for assignments that he accepted. Also, the worker was not under the employer's supervision.⁸ The fact that the employer contacted the worker about possible assignments and gave him pickup locations was immaterial. As to the furnishing of equipment, the Court found that an independent contractor relationship was indicated by the fact "[the worker] owned his own tractor and paid for all of the costs associated with the tractor." Wilkinson, 382 S.C. at 303, 676 S.E.2d at 704. As to method of payment, the Court found that this factor also indicated an independent-contractor status because the worker received "1099" forms, filed tax returns as a sole proprietor, and included

⁸ The Court noted that the employer's use of global positioning satellite (GPS) system in each tractor was not an exercise of control by the employer, but rather so customers could track the shipment of goods. The Court also noted that the worker's compliance with government regulations regarding the transportation of goods in interstate commerce was not evidence of control by the putative employer.

forms for business expenses and self-employment taxes on his tax returns. Id. Finally, the Court also found that the right to fire factor reflected an independent-contractor status because either party could terminate the agreement. Id. at 304, 676 S.E.2d at 704.

As to the first factor of direct evidence of the right or exercise of control, Wilkinson is distinguishable from the instant case.⁹

First, although PCAs could choose to accept or reject an assignment from Rest Assured, the PCAs did not have complete control over their hours and methods of performing services. A major difference between Wilkinson and this case (and Kilgore) is that the worker in Wilkinson did not have clients telling him how to deliver and which travel routes to take. In this case, the contract states that “[t]he [PCA] will determine the method, details and means of performing the Services upon receiving the care plan for the patient.” In actuality, however, as in Kilgore, the clients dictate the care to be given and the hours to be worked; and the care given is to be based upon the needs discussed between the clients and Rest Assured when the client makes a request, prior to assignment of PCAs from the registry. Therefore, the clients’ control over the services provided by PCAs are derived from the agreement between the clients and Rest Assured and the agreement between the PCAs and Rest Assured. Moreover, unlike in Wilkinson, Rest Assured has the authority to supervise, and does indeed periodically supervise, the quality of work that a PCA performs to ensure that the proper services are being rendered per the clients’ request and that clients are satisfied.

Here, it is true that the PCAs deal directly with the clients. However, it is also true that the client, prior to choosing a PCA, communicates his or her wishes to Rest Assured, who then selects at least two PCAs that it believes has the skills necessary to provide the services to meet the needs as expressed to it by the client. Rest Assured seems to suggest that it has nothing to do with the actual services provided, and indeed the agreement even states that “[t]he [PCA] will determine the method, details and means of performing the Services”¹⁰ However, that same clause further states that the PCA’s determination about implementing the services is based upon

⁹ In Wilkinson, the court addressed each of the four factors in determining whether the claimant was an employee or independent contractor.

¹⁰ The Appellate Panel erred in finding, at least by doing so in general terms, that “[Rest Assured] has control over the manner in which the work is performed.” But Rest Assured does have control over the nature of the work to be performed based on the individual needs of each client; and though the PCAs control the manner of the work performed, the manner of work is performed under the direction of the client, a power delegated to the client by Rest Assured..

the “care plan for the patient.” Thus, Rest Assured establishes the basic needs of the clients and institutes a care plan for each client before the services begin. Therefore, Rest Assured ultimately exercises control over the basic care of the client through the care plans. As Rest Assured is the one who also decides which PCAs can provide the appropriate services, it is not surprising that Rest Assured does not have to supervise often; it should reasonably expect that the PCAs, whom it has already determined have the appropriate skills to provide the services needed, will exercise those skills accordingly. And the fact that Rest Assured has chosen not to supervise more often, which it could easily do if it wished, simply indicates that it has been successful in matching the needs of its clients with the skills of its PCAs. Indeed, Ms. Johnson herself testified that after checking on the client and caregiver every four months or so, “[u]nless [she] hear[s] back from the client or that caregiver then [she] . . . assume[s] everything is going fine.” More importantly, Rest Assured need not exercise control to maintain the right to control. Clearly, in Wilkerson, as in Kilgore, the Court emphasized that the determination of whether a person is an employee or independent contractor focuses on whether the purported employer had the **right** to control the claimant in the performance of his work.” Wilkinson, 382 S.C. at 299, 676 S.E.2d at 702.

Rest Assured nevertheless argues that “[t]he existence of the power to supervise an individual does not necessarily establish an employment relationship.” It also asserts that “all of the evidence in the record supports the fact that Rest Assured does not supervise the PCAs or control their method of work.” As to the Rest Assured’s first assertion, I quite agree that the power to supervise does not necessarily establish an employment relationship. However, it is certainly a consideration upon which DEW could reasonably find the existence of an employer-employee relationship. As to Rest Assured’s second assertion, there is indeed evidence that Rest Assured supervises its PCAs; it simply chooses to do so less frequently, checking in on the client about every four months to ensure the quality of the services and the satisfaction of the client. Rest Assured seems to suggest that someone would have to be physically present to supervise a PCA. However, to review a PCA’s work, having the authority, based on that review, to terminate not only the relationship between the PCA and client but also the contract between the PCA and Rest Assured, reasonably constitutes supervision for purposes of the employee-status analysis.

Rest Assured then shifts its argument by stating that “[c]alls every four months by Rest Assured are required to ensure the PCAs are complying with state and federal health codes,” and by quoting Wilkinson thusly: “requiring a worker to comply with the law is not evidence of control by the putative employer.” 382 S.C. at 295, 676 S.E.2d at 703. However, even if these calls verify compliance with state and federal health codes, that mandate does not preclude DEW determination that the evidence reflects the right to control. In fact, as Rest Assured argued in the immediately preceding paragraph in its brief, those calls also “make sure the quality of services are up to standard and that the client is satisfied.” Thus, these calls reflect an exercise of control by Rest Assured in supervising the work of its PCAs, which is suggestive of an employment relationship. And again, the infrequency of this supervision (an **exercise** of control) is irrelevant as to the **possession of the right to control**, which is the consideration in the employee-status analysis. See Jamison v. Morris, 385 S.C. 215, 221, 684 S.E.2d 168, 171 (2009) (“The decisive test in determining whether the relation of master and servant exists is whether the purported master has the right or power to direct and control the servant in the performance of his work and in the manner in which the work is to be done.”).

Rest Assured further argues that although it encourages the PCAs to obtain training (and even occasionally offers optional training at its offices) and to stay current on all of the procedures the PCAs were required to perform, this training was not mandatory and does not indicate control over the PCAs. I agree with Rest Assured that Rest Assured’s offering of optional training is not indicative of control over its PCAs.¹¹ The Appellate Panel erred its finding to the contrary. However, I find this error harmless in light of the other indications of control discussed herein. See State v. White, 371 S.C. 439, 447, 639 S.E.2d 160, 164 (Ct. App. 2006) (“Error is harmless where it could not reasonably have affected the results of the [hearing].”).

Finally, Rest Assured argues that the Appellate Panel erred in finding that Rest Assured’s provision of name tags to its PCAs was an exercise of control to negate an independent contractor relationship. Rest Assured asserts that “the employer-employee relationship does not arise simply because someone displays a company’s emblem and sells the company’s product.” I agree with Rest Assured that merely wearing a name tag with the company’s logo does not conclusively establish an employer-employee relationship; but, as with the power to supervise,

¹¹ DEW does not address this point in its brief.

the fact that PCAs wear nametags with Rest Assured's logo thereon is suggestive of Rest Assured's right to control its PCAs and thus of an employee-employer relationship. See, e.g., Universal Am-Can, Ltd. v. Workers' Comp. Appeal Bd., 563 Pa. 480, 489 762 A.2d 328, 332) (noting that although an a carrier's insignia on the outside of a rig "does not command a conclusion of employee status," it is "one of many factors to be considered when determining employee/independent contractor status.").¹² Though the Court in Wilkinson, citing Universal Am-Can, rejected consideration of the insignia on a carrier as a factor in that case, that holding was based upon the reasoning that insignia and identification numbers are required by federal regulations. In this case, however, the issuance and use of name tags bearing Rest Assured's logo was not done for compliance with governmental regulation. Therefore, it was properly considered by the Appellate Panel as part of many factors in reaching its decision.¹³

I therefore conclude that as to direct evidence of the right or exercise of control, there was substantial evidence favoring the Appellate Panel's finding of an employer-employee relationship.

Furnishing of Equipment

The Appellate Panel acknowledges that Rest Assured does not furnish its PCAs with equipment. Such equipment can range from supplies, forms, instruction manuals (S.C. Indus. Comm'n v. Progressive Life Ins. Co., 242 S.C. 547, 131 S.E.2d 694 (1963)) to a vehicle used on the job (Wilkinson, supra). However, whereas in Wilkinson the furnishing of the equipment

¹² The Court recognizes DEW's argument that references to other state and federal cases and laws is inappropriate in this analysis, which is statutorily required to be determined by state common law. However, the S.C. Supreme Court, in Wilkinson, cited Universal Am-Can, a Pennsylvania case, in support of its analysis as to the direct evidence of the right or exercise of control factor.

¹³ Rest Assured argues in its Initial Brief that "[t]he court in Wilkinson refuted the argument that a company name tag reflected an employment relationship, where a name tag was required by accreditation guidelines and/or applicable provisions of state or federal law." The Court in Wilkinson did state that "requiring a worker to comply with the law is not evidence ~~is not evidence~~ of control by the putative employer." However, that Court did not refute an argument that a company name tag reflected an employment relationship, as there was no name tag involved in that case. Had a name tag been required by accreditation guidelines and/or applicable provisions of state or federal law, the Court may have found that it did not evince an employment relationship. At any rate, this is merely speculative and irrelevant, as the name tags in the present case were not issued to comply accreditation guidelines and/or applicable provisions of state or federal law. Rest Assured, in its Reply Brief, argues that "draft regulations by the Department of Health and Environmental Control require the PCAs to wear identification badges." However, the regulation that Rest Assured cites, DHEC Reg. 61-121-501(J), is just a draft and does not have the effect of state law. Our Supreme Court has said emphatically that the ALC is not to rely on unenacted pieces of legislation. Cf. CFRE, LLC v. Greenville County Assessor, 395 S.C. 67, 716 S.E.2d 877 (2011). Furthermore, the evidence in this case shows that the name tags were issued on a company initiative because it "came from experience that you have to identify yourself when you're in a persons [sic] home."

went to the essence of the job, in this case, there was hardly any equipment to furnish. The only things that a PCA typically brings to a client's home are "hand wash, and gloves, and cups, and that sort of thing." Though even these meager supplies would be sufficient to constitute self-provided equipment, the Appellate Panel found otherwise. What makes this a closer question is that "[any equipment is] . . . all provided by the client or the contractor" Thus, the client may also provide the supplies or equipment. In Kilgore, the employer did not supply equipment to the worker; rather, the client supplied the equipment to the worker. The Supreme Court found that this weighed in favor of the worker being an employee, and not an independent contractor. 313 S.C. at 69, 437 S.E.2d at 50. Having found the relationship among Rest Assured, its clients and PCAs analogous to the relationship among the employer, its clients and workers in Kilgore, I find that there was substantial evidence such that a reasonable mind could conclude, as the Appellate Panel did, that the factor of furnishing equipment leaned in favor of an employer-employee relationship. The finder of fact could have found that the clients provide nearly all of the equipment to the PCAs and that what the PCAs supply is negligible.

I therefore conclude that as to furnishing of equipment, there was substantial evidence favoring the Appellate Panel's finding of an employer-employee relationship.

Method of Payment

The Appellate Panel found that the method of payment to the PCAs was indicative of an employer-employee relationship because "[Rest Assured] controls the method and manner in which payment is made to the workers and . . . collects all of the monies," and because Rest Assured ensures payment to the PCAs even if the clients default.

Rest Assured, quoting 20 S.C. Jur. Master and Servant § 2 (2013), first argues that "actual payment of compensation is not dispositive of the existence of an employer and employee relationship since the relationship may exist even though the servant neither expects nor is entitled to compensation." This is indeed correct, but as there is actual payment in this case, the method thereof is a factor for consideration.

Rest Assured next argues that it acts in a broker capacity, and that it simply takes a cut of the PCA rate that is essentially a finders/matching fee. Rest Assured also argues that it does not participate in the relationship between the PCA and client, "but simply matches their skills, requirements, and schedule." Again, however, the Appellate Panel found otherwise and there is substantial evidence to support that determination. First, the evidence did not establish that Rest

Assured was charging a finders/matching fee, because the amounts of its “cut” were not uniform. Rest Assured may not have participated directly in the relationship between the PCA and client, but Rest Assured participated directly with the clients in negotiating the fee. Indeed, Rest Assured is paid the fee, either by the client directly or by an agency referring the client, at a rate agreed upon between Rest Assured and the client. From the money that Rest Assured is paid, it pays its PCA. Importantly, the PCA’s earnings are based on the PCA’s hourly rates and the number of hours that the PCA works according to a worksheet that the PCA submits to Rest Assured. The hourly rate is negotiated with the PCA based on the PCA’s experience, and that rate is set forth in the agreement between the PCA and Rest Assured.

Rest Assured asserts that the PCAs negotiate their rates with Rest Assured based on the specific clients; but this is not undisputedly established by the evidence.¹⁴ To the contrary, according to the passage cited by Rest Assured, and on “R. pp. 46:1-5,” negotiations between Rest Assured and PCAs as to the hourly rate of pay are based on the PCA’s experience. The negotiations between Rest Assured and the clients are based on “the type of work, the amount of work, the hours of work that needs to be done.”¹⁵ Indeed, it is Rest Assured’s negotiations with the client that determines the amount of the fee that Rest Assured will receive, from which it will pay the PCA. The PCA’s negotiation with Rest Assured determines only how much the PCA’s hourly wage rate will be before he or she is put in the registry.

In sum, the PCA does not negotiate with Rest Assured to be paid an agreed-upon sum to perform a particular job; the PCA does not get paid at a higher or lower rate depending on the client to whom they’ve been matched; the PCA’s rate is fixed upon negotiation, and they may or may not thereafter get matched to a client; and after the PCA is matched to a client, assuming the client then chooses that PCA, the PCA’s number of hours will depend on the client’s decisions. The mere fact that a PCA can negotiate for an hourly rate higher than that of another PCA based on more experience is no different than any employer-employee relationship in which one worker paid by the hour is paid at a higher hourly rate than another based on the former’s possession of greater skill and experience.

¹⁴ Rest Assured cites “R. pp. 45:9-20” for support of its assertion.

¹⁵ R. pp. 45:6-9.

Though there is evidence in the record that favors finding Rest Assured an independent contractor based on the method of payment,¹⁶ Rest Assured included its PCAs under its liability insurance coverage and provides its PCAs with workers' compensation insurance coverage, considering them statutory employees for South Carolina workers compensation purposes. Although the factor of method of payment presents another close call in a case of close calls, I nevertheless find that there was substantial evidence to support the Appellate Panel's finding that Rest Assured's method of payment favored an employer-employee relationship.¹⁷ The fact that two inconsistent conclusions could be drawn from the evidence does not mean that the Appellate Panel's conclusion findings is unsupported by substantial evidence. See Jeffrey v. Sunshine Recycling, 386 S.C. 174, 178, 687 S.E.2d 332, 335 (Ct. App. 2009) ("The possibility of drawing two inconsistent conclusions from the evidence does prevent an administrative agency's findings is supported by substantial evidence.").

Right to Fire

The Appellate Panel found that Rest Assured had a right to fire its PCAs, which indicated an employer-employee relationship based upon its determination that Rest Assured "may terminate workers if they violate their contract or [Rest Assured's] **expectations**." (Emphasis added). Rest Assured, citing Wilkinson, argues that because Rest Assured retains only the right to terminate the agreement, and the PCAs possess the same right, Rest Assured does not have the right to fire its PCAs, thus indicating an independent contractor relationship.

In Wilkinson, the Court recognized that a right of termination exists in both employment and independent contractor agreements. The Court thus found that in determining whether an employment relationship exists, the critical inquiry is the term "fire." The contract in that case provided that either party could terminate the contract upon thirty days' notice. The agreement further provided that "[i]n the event either party commits a material breach of any term of this

¹⁶ Rest Assured does not withhold any of the PCAs' taxes, and it provides an IRS Form 1099 to each PCA at the end of the year. The S.C. Supreme Court found, in Wilkinson, that when a worker has the obligation for withholding and paying employment taxes, it is indicative of an independent contractor relationship. 382 S.C. at 303, 676 S.E.2d at 704.

¹⁷ I agree with Rest Assured that the Appellate Panel erred in supporting its conclusion with the fact that the PCAs "do not stand to lose if the clients do not pay for services." At least in the construction context, a subcontractor has a right to payment from the party with whom it contracts, and that payment is not dependent on whether a client pays the general contractor. See S.C. Code Ann. § 29-6-230 (2007). This rule would reasonably seem to apply in this case. At any rate, it has nothing to do with employee status analysis. Nevertheless, I find this error harmless in light of its other grounds.

Agreement; ... the other party shall have the right to terminate this Agreement immediately and hold the party committing the breach liable for damages.” Wilkinson 382 S.C. at 304, 676 S.E.2d at 704. Based upon those terms, the Court found that the agreement did not grant a “right to fire” but rather “[t]he termination of the party’s’ relationship was controlled by their agreement.”

Here, however, the agreement grants Rest Assured much greater latitude in terminating the relationship than was addressed in Wilkinson. Pursuant to its agreement, Rest Assured retains the ability to terminate its relationship with the PCA if the PCA “engages in conduct that is harmful, detrimental, improper, or fraudulent to or for the business of [Rest Assured],” or “is unable to perform their assigned duties or for any reason fails to provide services for a period of more than seven consecutive days.” Thus, Rest Assureds’ autonomy to terminate the contract is much greater than the contract in Wilkinson.

Rest Assured also has complete authority to end a PCA employment by simply ending their services with the assigned client(s) and returning them to the registry for **possible** reassignment. Nevertheless, once returned to the registry, Rest Assured possesses the sole authority to assign a PCA to another client. Thus, under the agreement, Rest Assured possess the right to end a PCA’s services based upon the client’s or Rest Assured “expectations.” That right is closely analogous to the right to fire in an at-will employee-employer relationship.¹⁸ In view of the context of the agreement as a whole, I find the termination provision supports a finding of an employer-employee relationship.

CONCLUSION

Although the facts in this case make the question of the PCAs status as employees or independent contractors a close call, I find, based on a careful weighing of all four of the factors articulated in Wilkinson, that the record contains substantial evidence supporting the Appellate

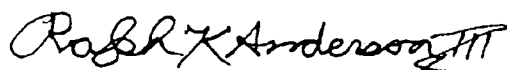
¹⁸ Rest Assured points out that either Rest Assured or the PCA has the right to terminate the contract, just as the parties did in Wilkinson. However, both parties in an at-will employee-employer relationship also have the right to terminate the relationship at any time. Also, in the event of a termination by either party in this case, the terminating party is not liable for damages for material breach of contract like the breaching party was in Wilkinson. The fact that either party in this case could terminate the agreement without being liable for damages is more indicative of an at-will employer-employee relationship.

Panel's finding that the PCAs were employees of Rest Assured for unemployment tax purposes.¹⁹

ORDER

IT IS THEREFORE ORDERED that the Appellate Panel's decision is **AFFIRMED AS MODIFIED.**

AND IT IS SO ORDERED.



Ralph K. Anderson, III
Chief Administrative Law Judge

March 14, 2013
Columbia, South Carolina

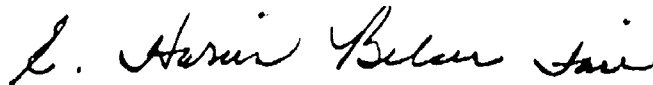
¹⁹ Rest Assured analogized this case with a Pennsylvania bankruptcy case, In re Serino, 190 B.R. 778 (Bkrtcy. M.D.Pa. 1995). However, I find that there is sufficient South Carolina common law with which to decide the present case, and therefore decline to consider In re Serino.

As to Rest Assured's reference to the "industry standard" of treating PCAs as independent contractors, I agree that it appears that the South Carolina Department of Disability and Special Needs (DDSN) and the South Carolina Department of Health and Human Services (HHS) treat their PCAs as "self-employed," or independent contractors. However, one of DDSN's "conduit[s] or 'funnels'" through which state funds are used to compensate caregivers, Babcock Center, Inc., states in its independent contractor agreement that the caregiver is not an employee because: (1) Babcock Center, Inc. is not involved in the caregiver's selection; (2) does not direct or control the caregiver in the delivery of caregiver services; (3) does not monitor the caregiver in the delivery of caregiver services; (4) does not fix the caregiver's compensation; and (5) does not have authority to cause the cessation of the caregiver's services to the client. In light of the foregoing discussion, and based on this definition of independent contractor, if Rest Assured was a provider for DDSN, then Rest Assured would be an employee of DDSN.

Finally, as to Rest Assured's policy argument in favor of treating the home healthcare industry as independent contractors, the Court acknowledges that in-home care providers can be independent contractors. See S.C. Code Ann. § 44-70-20 (Supp. 2012). But, under the same statute, in-home care providers can also be employees or agents. Id.

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).



E. Harvin Belser Fair
Judicial Law Clerk

March 14, 2013
Columbia, South Carolina