

**STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT**

Rest Assured, LLC,	)	Docket No. 12-ALJ-22-0209-AP
	)	
Appellant,	)	
	)	
vs.	)	<b>ORDER DENYING MOTION TO SUPPLEMENT RECORD</b>
	)	
South Carolina Department of Employment and Workforce	)	
	)	
Respondent.	)	
_____	)	

This matter is before the Administrative Law Court (Court or ALC) on a Motion to Supplement the Record (Motion) filed by the Appellant, Rest Assured, LLC (Rest Assured), on March 7, 2013.

**BACKGROUND**

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 Rest Assured had an employer-employee relationship with certain in-home personal care aides that had been designated as independent contractors. 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 issued an opinion upholding the determination.

On March 16, 2007, Appellant filed an application to appeal the Administrative Ruling to the full ESC. Four years later, on March 28, 2011, Appellant was informed by the now DEW that the appeal had been scheduled for review. The South Carolina Department of Employment and Workforce (DEW) issued an Appellate Panel Decision and Order on May 31, 2011. On June 30, 2011, Rest Assured filed a Petition and Notice of Intent to Appeal in the 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

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. 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. Rest Assured filed its brief on January 28, 2013, and Respondent filed its brief on February 19, 2013. Rest Assured then filed a Reply brief on March 1, 2013.

On March 7, 2013, Rest Assured filed a Motion to Supplement the Record on Appeal under Rule 212(b), SCACR.

### **DISCUSSION**

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 (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).

S.C. Code Ann. § 1-23-380 (3) provides:

If a timely application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court...

(Supp. 2012).

In its Motion, Rest Assured did not present any reason for its failure to present the additional evidence at the proceeding before the agency or for its failure to request that the document be included in the Record on Appeal. In addition, this matter has been on appeal since

July of 2011. The parties have filed their briefs with the Court, and the Court is in the process of deciding the matter. Rest Assured knew, or certainly should have known, of documents in its possession that it wanted the Court to consider. Therefore, I do not find that there were good reasons for failure to present the additional evidence in the proceeding before the agency.

Additionally, § 1-23-380 (4) provides:

The review must be conducted by the court and must be confined to the record. In cases of alleged irregularities in procedure before the agency, not shown in the record, and established by proof satisfactory to the court, the case may be remanded to the agency for action as the court considers appropriate.

(Supp. 2012). Rest Assured has not alleged any irregularities that justify the Court remanding the case to the agency.

Though I do not find it necessary to consider the South Carolina Appellate Court Rules,<sup>1</sup> Rule 212(b), SCACR provides that if the attorneys of record do not consent to a party supplementing the Record on Appeal, “[w]ithout such consent or after argument commences, a party desiring to supplement the Record on Appeal must move the appellate court for leave to do so.” As explained above, I do not find good cause to supplement the record at this late stage in the process.

Based upon the facts of this case,

**IT IS THEREFORE ORDERED** that the Motion to Supplement the Record is **DENIED,**

**AND IT IS SO ORDERED.**



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Ralph K. Anderson, III  
Chief Administrative Law Judge

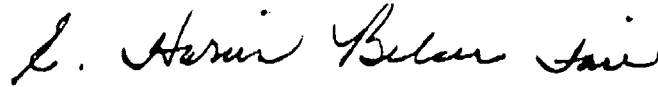
March 14, 2013  
Columbia, South Carolina

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<sup>1</sup> ALC Rule 68 provides that an Administrative Law Judge may apply South Carolina Appellate Court Rules to resolve questions not addressed by the ALC’s rules.

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).



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E. Harvin Belser Fair  
Judicial Law Clerk

March 14, 2013  
Columbia, South Carolina

**STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT**

Rest Assured, LLC,	)	Docket No. 12-ALJ-22-0209-CC
	)	
Appellant,	)	
	)	<b>ORDER DENYING MOTION</b>
v.	)	<b>FOR RECONSIDERATION</b>
	)	
South Carolina Department of Employment	)	
and Workforce,	)	
	)	
Respondent.	)	
_____	)	

This matter is before the Administrative Law Court (Court or ALC) on a Motion for Reconsideration (Motion) filed by Rest Assured, LLC (Rest Assured) on March 23, 2013. Rest Assured has asked the Court to reconsider its Order denying the Motion to Supplement Record.

**BACKGROUND**

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 Rest Assured had an employer-employee relationship with certain in-home personal care aides that Rest Assured had designated as independent contractors. 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 issued an opinion upholding the determination.

On March 16, 2007, Appellant filed an application to appeal the Administrative Ruling to the full ESC. Four years later, on March 28, 2011, Appellant was informed by the now DEW that the appeal had been scheduled for review. The South Carolina Department of Employment and Workforce (DEW) issued an Appellate Panel Decision and Order on May 31, 2011. On June 30, 2011, Rest Assured filed a Petition and Notice of Intent to Appeal in the Richland County Court of Common Pleas (Circuit Court).

On July 11, 2011, DEW filed a Notice of Special Appearance and a Motion to Dismiss the action based on improper jurisdiction of the Circuit Court to hear the appeal, arguing that the appeal should have been filed in the ALC. 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. DEW appealed this decision to the South Carolina Court of Appeals, which dismissed the appeal.

This Court 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. Rest Assured filed its brief on January 28, 2013, and Respondent filed its brief on February 19, 2013. Rest Assured then filed a Reply brief on March 1, 2013.

On March 7, 2013, Rest Assured filed a Motion to Supplement the Record on Appeal under Rule 212(b), SCACR. The Court denied this Motion and issued its Final Order on March 14, 2013. On March 26, 2013, Rest Assured filed this Motion for Reconsideration of the Order Denying the Motion to Supplement the Record on Appeal.<sup>1</sup>

### DISCUSSION

Rest Assured seeks to supplement the Record on Appeal with a letter dated May 8, 2008. South Carolina Code Ann. § 1-23-380(3) provides that:

If a timely application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court.

(Supp. 2012).

Before a court can allow new evidence under § 1-23-380(3), a party must timely apply to the court to submit that evidence, and the court must consider two factors: (1) the materiality of the additional evidence and (2) the existence of a good reason for the failure to introduce such evidence at the original hearing. Brown v. Peoplelease Corp., 5082, 2013 WL 1223380 (S.C..Ct. App. Mar. 27, 2013); see also Byers v. S.C. Alcoholic Beverage Control Comm'n., 305 S.C. 243, 245, 407 S.E.2d 653, 654–55 (1991) (finding the decision to hear additional evidence under

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<sup>1</sup> In a footnote to the Motion to Reconsider, Rest Assured further asks that should the Court grant the Motion to Reconsider, the Court reconsider the final decision in this matter.

section 1–23–380(e), prior to the statute's amendment, was “a matter within the sound decision of the trial judge” and the appellate court's proper standard for review was “whether the circuit judge committed an error of law in remanding the case to the Commission to hear additional evidence”); *id.* (stating that “[i]n ruling on an application under subsection (e), the [c]ircuit [c]ourt should have considered two factors: the materiality of the additional evidence and the existence of a good reason for the failure to introduce such evidence at the original hearing.”).

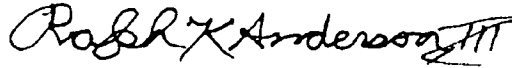
As to whether the evidence is material, Rest Assured failed to explain or even allege that the evidence it seeks to add to the record is material. In its Motion, Rest Assured asserts that the evidence is simply to support its position. That assertion does not establish materiality.

Furthermore, Rest Assured failed to show good reason for its failure to introduce the evidence prior to the ESC issuing its decision in 2011. Rest Assured only states inadvertent oversight for failure to submit the evidence. The ESC did not issue a ruling in this case until May 2011. The ALC received the Record on Appeal on January 8, 2013. Rest Assured filed its brief on January 28, 2013, and Respondent filed its brief on February 19, 2013. Rest Assured then filed a Reply brief on March 1, 2013. Not until March 7, 2013 did Rest Assured attempt to make the evidence part of the record. This Court simply does not find good cause for Rest Assured’s failing to submit this evidence prior to the ESC issuing its decision in 2011, much less for its failure to do so before March 2013.

In addition, Rest Assured did not timely file the Motion to Supplement the Record. Although S.C. Code Ann. § 1-23-380(3) (Supp. 2012) provides that the Court may allow additional evidence, that discretionary grant is conditioned upon a timely request for that evidence - “[i]f a **timely application** is made to the court. . . .” (emphasis added). A delay of nearly five years (the date of the letter to the date the Motion to Supplement the Record was filed) is simply not a timely request.

Because the Court finds that Rest Assured has failed to show (1) that the Motion to Supplement was timely filed, (2) that the evidence was material, and (3) that there was good cause shown for failure to introduce the evidence earlier, the Motion to Reconsider should be denied.

**IT IS THEREFORE ORDERED** that the Motion to Reconsider is denied.<sup>2</sup>  
**AND IT IS SO ORDERED.**



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Ralph K. Anderson, III  
Chief Administrative Law Judge

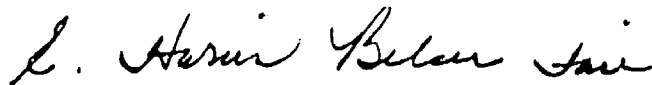
April 15, 2013  
Columbia, South Carolina

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<sup>2</sup> In denying the Motion to Reconsider, the Court declines to reconsider the Final Order upholding the decision of the Appellate Panel.

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).



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E. Harvin Belser Fair  
Judicial Law Clerk

April 15, 2013  
Columbia, South Carolina